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MEMORANDUM

SUBJECT: Supplemental Amendment to the January 11, 2018 memorandum, *Amendments to EPA's Civil Penalty Policies to Account for Inflation (effective January 15, 2018) and Transmittal of the 2018 Civil Monetary Penalty Inflation Adjustment Rule*, to account for inflation for the September 8, 2016 penalty guidance, *Supplemental Guidance to the 1995 Interim Clean Water Act Settlement Policy for Violations of the Industrial Stormwater Requirements*

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TO: Regional Counsels
Regional Enforcement Directors
NPDES Water Enforcement Managers

The purpose of this memorandum is to supplement the January 11, 2018 memorandum, *Amendments to the EPA's Civil Penalty Policies to Account for Inflation (effective January 15, 2018) and Transmittal of the 2018 Civil Monetary Penalty Inflation Adjustment Rule* ("2018 Penalty Inflation Adjustment Memorandum") by providing a revised multiplier that case teams should apply to the gravity-based portion of the penalty in industrial stormwater cases to account for inflation. The 2018 Penalty Inflation Adjustment Memorandum did not include an inflation adjustment for the September 8, 2016 *Supplemental Guidance to the 1995 Interim Clean Water Act Settlement Policy for Violations of the Industrial Stormwater Requirements* ("2016 Industrial Stormwater Penalty Guidance"). In addition, this memorandum also supplements the 2016 Industrial Stormwater Penalty Guidance because it contains additional instruction for calculating inflation into the gravity-based portion of the penalty. This supplemental amendment is effective immediately.

To calculate the gravity-based portion of the penalty for industrial stormwater cases with violations occurring solely in or before September 2016, use the 2016 Industrial Stormwater

Penalty Guidance.[1] If all violations occurred after September 2016, use the 2016 Industrial Stormwater Penalty Guidance to calculate the gravity-based portion of the penalty and then multiply the initial gravity amount by the inflation multiplier of 1.02168.[2]

For cases with violations occurring both before and after September 2016, follow these steps:

1. To adjust the A factor for inflation: Calculate the total A factor for those months with violations occurring after September 2016. Multiply that amount by the inflation multiplier of 1.02168. Add that amount to the total A factor for the months with violations occurring in or before September 2016.

2. To adjust the B and D factors for inflation:

   a. Determine the Inflation Adjustment Multipliers: Use the following equation to calculate an inflation adjustment multiplier for the B factor and for each D factor violation category:

   Inflation Adjustment Multiplier = [PRE/TOTAL] + [(1.02168 x POST)/TOTAL]

   Where, for the B factor, PRE = number of months with violations and at least one discharge event occurring in or before September 2016; POST = number of months with violations and at least one discharge event occurring after September 2016; and TOTAL = total number of months with violations and at least one discharge event (i.e., PRE + POST).

   And, where, for each D factor category, PRE = number of months with violations occurring in or before September 2016; POST = number of months with violations occurring after September 2016; and TOTAL = total number of months with violations (i.e., PRE + POST).

   b. B Factor: Use the 2016 Industrial Stormwater Penalty Guidance to determine an appropriate B factor and multiply that amount by the B factor inflation multiplier from Step 2a above.

   Example: The case team determined there were 10 months during the period of noncompliance where at least one discharge event occurred. Of those 10 months, 6 were

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[1] For violations that occurred in or before September 2016, the 2016 Industrial Stormwater Penalty Guidance contains numbers that were current from an inflation standpoint as of September 2016, the month the Guidance was issued. The conservative approach of applying an inflation factor of 1.00 (or no inflation) for violations that occurred throughout the month of September 2016 rather than prorating the month for violations that occurred on or before September 8, 2016 and those that occurred after September 8, 2016 reflects the fact that the 2016 Industrial Stormwater Penalty Guidance calculates penalties for violations on a monthly basis.

[2] The multiplier was calculated using the increase established by the Consumer Price Index for all Urban Consumers (CPI-U) from September 2016, the date of the 2016 Industrial Stormwater Penalty Guidance, to October 2017, the end date used in the 2018 Penalty Inflation Adjustment Memorandum. The September 2016 CPI-U was 241.428 and the October 2017 CPI-U was 246.663, yielding an increase of 1.02168.

in or before September 2016 and 4 were after September 2016. From the B factor table, a B factor of $8,000 was selected.

- The inflation-adjustment multiplier would be: $(6/10) + [(1.02168 \times 4)/10] = 1.008672$.
- The Penalty-adjusted B factor would be: $8,000 \times 1.008672 = \$8,069.38$.

c. D Factor:

   i.   Use the 2016 Industrial Stormwater Penalty Guidance to calculate a preliminary D factor amount for each violation category and adjust each for duration.

   ii.   After adjusting for duration, multiply each violation category by the appropriate penalty adjustment multiplier from step 2a above.

Example: The duration of noncompliance for BMP deficiencies is 12 months; two of those months occurred in or before September 2016, and 10 months were after September 2016. The case team selected a D.b value of "3" and the duration multiplier is "7". Therefore, the duration-adjusted value for D.b is 21.

- Inflation adjustment multiplier would be: $(2/12) + [(1.02168 \times 10)/12] = 1.01807$.
- Inflation-adjusted D.b would be: $21 \times 1.01807 = 21.3798$ or $21,379.80.

   iii.   Add together the inflation adjusted D factors for each violation category, and proceed with size-sophistication and discharge-without-a-permit adjustments as instructed in the 2016 Industrial Stormwater Penalty Guidance.

Note that if all violations span the same length of time, the D factor calculation is even easier: calculate the D factor as instructed in the 2016 Industrial Stormwater Penalty Guidance. Then, determine a single inflation adjustment multiplier that applies to all the D factor categories, and multiply the D factors by the inflation multiplier.

3. Finally, add the new total A, B, and D factors together, and round the calculated gravity-based portion of the penalty amount to the nearest dollar.[3]

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[3] We are instructing case teams to round to the nearest dollar because this was the approach taken in the Federal Civil Penalties Inflation Adjustment Act Improvement Act of 2015 and in EPA's 2018 Penalty Inflation Adjustment Memorandum.

Once the total gravity-based penalty has been calculated, incorporate economic benefit[4] and any other factors (e.g., ability to pay, litigation considerations, etc.) that apply as instructed by the 2016 Industrial Stormwater Penalty Guidance to arrive at the total penalty.[5]

For more information about how the inflation multiplier was derived, or other questions relating to penalty inflation, please see the 2018 Penalty Inflation Adjustment Memorandum. For additional questions on how to calculate the gravity using the inflation adjusted factor, please contact Kristin Buterbaugh at Buterbaugh.Kristin@epa.gov or (202) 564-4479.

This memorandum only supplements, and does not supersede, the 2018 Penalty Inflation Adjustment Memorandum and the 2016 Industrial Stormwater Penalty Guidance.

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[4] We are not modifying the long-standing approach of calculating economic benefit separately from the gravity-based amount, because economic benefit calculations already take inflation into account. The inflation adjustments in this supplemental amendment only apply to the gravity-based portion of the penalty.

[5] If the total penalty amount is greater than the statutory maximum amount, then the statutory maximum amount would apply. Similarly, the entire penalty sought (including economic benefit) in an administrative enforcement action cannot exceed any applicable administrative penalty caps. Note that penalty amounts greater than those calculated using EPA penalty policies and this supplemental amendment may be appropriate in limited circumstances. For example, in a formal administrative enforcement context, EPA may seek, and presiding officers or the Environmental Appeals Board may assess, higher penalties provided such amounts do not exceed the statutory maximum, are in accordance with statutory civil penalty factors, and consider applicable civil penalty guidelines, and provided that any deviations from applicable penalty policies are persuasively and convincingly explained. *See,* *e.g.,* 40 C.F.R. § 22.27(b) and *In Re Morton L. Friedman & Schmitt Construction Company,* 11 E.A.D. 302 (EAB 2004).