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**EPA INCREASES MAXIMUM PENALTIES**

On December 11, 2008, EPA increased daily and total maximum environmental penalty amounts in its Civil Monetary Penalty Inflation Adjustment Rule (the “Rule”). The Rule requires agency enforcement staff to calculate and apply an *inflation adjustment factor* when setting civil monetary penalties for violations of EPA-administered statutes and implementing regulations. The newly adjusted penalties became effective after the Rule’s effective date of January 12, 2009. The next set of adjustments is projected to occur in 2012 and again every four years thereafter.

**Calculating the Adjusted Penalty**

A four-step process is applied to determine the adjusted penalty:

1. The inflation adjustment factor must be calculated based on the increase in the annual Consumer Price Index for urban consumers (“CPI-u”);
2. The inflation adjustment factor must then be multiplied by the existing penalty;
3. The raw inflation increase is rounded according to the size of the proposed penalty;
4. Once rounded appropriately, the rounded inflation increase is then added to the penalty amount, yielding the newly adjusted civil monetary penalty.

In most cases, the Rule caps the inflation increase at 10% of the original penalty amount.

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The chart below provides a few examples of the daily and maximum penalties after the January 17, 2009 adjustment.

REGULATION	PENALTIES AS ENACTED	JAN. 30, 1997 - MAR. 15, 2004	MAR. 16, 2004 - JAN. 12, 2009	POST JAN. 12, 2009
<b>Clean Air Act - § 113(d)</b>	\$25,000/\$200,000	\$27,500/\$220,000	\$32,500/\$270,000	\$37,500/\$295,000
<b>Clean Water Act - § 309(g)(2)(B) § 311(b)(6)(B)(ii)</b>	\$10,000/\$125,000 \$10,000/\$125,000	\$11,000/\$137,500 \$11,000/\$137,500	\$11,000/\$157,000 \$11,000/\$157,000	\$16,000/\$177,000 \$16,000/\$177,000
<b>CERCLA - § 109(b) § 109(c)</b>	\$25,000/\$75,000 \$25,000/\$75,000	\$27,500/\$82,500 \$27,500/\$82,500	\$32,500/\$97,500 \$32,500/\$97,500	\$37,500/\$107,500 \$37,500/\$107,500
<b>TSCA - § 16(a)(1) § 207(a) § 207(g)</b>	\$25,000 \$5,000 \$5,000	\$27,500 \$5,500 \$5,000	\$32,500 \$6,500 \$5,500	\$37,500 \$7,500 \$7,500

The final Civil Monetary Penalty Inflation Adjustment Rule is available on page 75,340 of the Federal Register, Vol. 73, No. 239 (available [here](#)). A correction to the final Rule that inserts omitted penalties under the Safe Water Drinking Act is available on page 626 of the Federal Register, Vol. 74, No. 4.

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## ***EPA EXTENDS SPCC DEADLINES AGAIN***

As a result of the Obama administration's freeze on pending regulations, EPA has extended by 60 days the effective date of the December 5, 2008 Oil Spill Prevention, Control and Countermeasure (SPCC) final rule. The amendments to the rule will now become effective on April 4, 2009.

On December 5, 2008, EPA had published a final rule seeking to clarify the SPCC regulations by tailoring requirements to particular industry sectors and streamlining certain requirements for facility owners or

operators subject to the rule. In addition to extending the effective date, EPA also provided a 30-day public comment period for the December 5, 2008 SPCC final rule.

EPA also said that it is reviewing the dates by which owners or operators of facilities must prepare or amend their SPCC plans, and implement the plans. It will address those compliance deadlines in a separate notice.

As a reminder, owners or operators of facilities must prepare or maintain and implement SPCC plans if:

- The facility is non-transportation related;
- The facility has an aggregate aboveground oil storage capacity greater than 1,320 gallons or a completely buried oil storage capacity greater than 42,000 gallons; and
- There is a reasonable expectation of a discharge into or upon navigable waters of the United States or adjoining shorelines.

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## ***STIMULUS BILL MAY EXPEDITE NEPA REVIEW, BUT WAIVER UNLIKELY***

The proposed economic stimulus package allocates tens of billions of dollars to the development of renewable energies, energy transmission lines and energy efficiency programs. However, immediate use of those funds for environmental projects is uncertain because the National Environmental Policy Act (“NEPA”) imposes extensive review and permitting obligations on the government. Faced with this dilemma, some, like Senator John Barasso (D-WY), have argued that for environmental development to serve as a catalyst for economic revival, green development may require waiving NEPA obligations so that projects can have an immediate economic impact. However, on February 5, 2009, the Senate rejected that position and approved an amendment sponsored by Senator Barbara Boxer (D-CA) that would expedite NEPA review instead of waiving it.

Under NEPA, governmental agencies are required to perform Environmental Assessments and Environmental Impact Statements detailing how a proposed government action would affect the environment. As a result, government spending on development of solar fields, wind farms, energy transmission lines and other green projects would likely be subject to these review requirements. While some projects, like most transportation projects under supervision of the Department of Transportation, would be subject to programmatic exemptions from NEPA, other projects could theoretically be subject to years of review.

The Barasso proposal was designed to facilitate groundbreaking on shovel-ready projects by eliminating NEPA red tape:

- The Barasso proposal would have imposed a 270-day requirement upon NEPA review. If NEPA review was not performed within that time frame, a finding of “no significant impact” was imposed upon the project and it could continue unabated.
- The proposal also consolidated administrative appeals into one review. Following that, judicial review would occur at the U.S. District Court of Appeals for the District of Columbia to avoid the problem of “judge shopping.”

Senator Boxer argued that the Barasso proposal would have stripped the stimulus package of any real NEPA obligations and would function as a *de facto* waiver of NEPA review. Instead, and after consultation with Sen. Barasso, Sen. Boxer proposed an amendment that would expedite, rather than waive, NEPA obligations.

- The Boxer amendment requires that the stimulus allocate adequate resources to ensure that NEPA reviews “are completed on an expeditious basis and that the shortest existing applicable process” under NEPA is used.
- The amendment also requires that, until September 30, 2011, the President report to the Senate Environment and Public Works Committee and the House Natural Resources Committee every 90 days and update them on the status of NEPA review for projects funded by the stimulus package.

A copy of the Boxer amendment can be found [here](#). For more information, please contact Raphael Ramos at 414-277-5539 / [rmos@quarles.com](mailto:rmos@quarles.com) or your Quarles & Brady LLP attorney.