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Via Facsimile (206-553-1809) and
First Class U.S. Mail

Mr. L. John Iani, Administrator
U.S. Environmental Protection Agency, Region 10
1200 6th Avenue
Seattle, WA 98101

RE: Comments on EPA Region 10's Proposed Consent Agreements and Final Orders Pursuant to Clean Water Act Section 309(g)(2)(B) with Unocal Corporation for Clean Water Act Violations in Cook Inlet, Alaska for the Period 1998-2002: Docket Nos. CWA-10-2003-0070 through CWA-10-2003-0080

Dear Mr. Iani:

These comments on U.S. EPA Region 10's proposed Consent Agreements and Final Orders ("CAFOs") pursuant to Clean Water Act Section 309(g)(2)(B) with Unocal Corporation ("Unocal") for Clean Water Act violations in Cook Inlet, Alaska for the period 1998-2002, Docket Nos. CWA-10-2003-0070 through CWA-10-2003-0080, are submitted on behalf of Cook Inlet Keeper, Alaska Community Action on Toxics, the Coastal Coalition, Environmental Defense, Alaska Center for the Environment, and Kachemak Bay Conservation Society (collectively "Commenters"). Commentors are nonprofit organizations and/or alliances of nonprofit organizations concerned about enforcement of the Clean Water Act and toxic discharges to the rich and productive fisheries of Cook Inlet, Alaska. Together, these organizations represent over a hundred thousands citizens in Alaska and throughout the United States who are concerned about toxic discharges from oil and gas facilities to our Nation's waterways, especially coastal waters.

I. INTRODUCTION

Cook Inlet is the only location in the United States where oil platforms may lawfully discharge produced water and other toxic drilling wastes directly into coastal waters. See 61 Fed. Reg. 66086, 66101 (Dec. 16, 1996). This discharge is allowed by National Pollution Discharge Elimination System ("NPDES") General Permit, No. AKG2580000 ("Permit"), issued by EPA. The Permit requires monitoring of outfalls and reporting on those results to EPA via Discharge Monitoring Reports ("DMRs"). If the effluent limits are exceeded or the discharger fails to report or monitor, the discharger is liable for both civil and criminal violations under the Clean Water Act ("CWA"). 33 U.S.C. § 1319(b-d).

Unocal regularly violates the Permit at all of its Cook Inlet facilities, and is responsible for 98.7% of the produced water discharged into Cook Inlet. Water Quality Benefits Analysis of Final Effluent Limitations Guidelines and Standards for the Coastal Subcategory of the Oil and Gas Extraction Point Source Category (“Water Quality Benefits Analysis”), EPA Document #EPA-821-R-96-024 (October 1996), Section 2.2.1.2 and Exhibit 2-2, pp. 2-6 – 2-7. For at least a decade, Unocal has been aware of its lack of compliance with CWA and permit requirements. In 1994, several environmental groups filed suit against, and eventually settled with, Unocal and other Cook Inlet operators, for over 4,200 permit violations. In light of Unocal’s recalcitrant history of noncompliance, EPA’s failure to enforce the Permit has been alarming. For example, EPA has not performed a single NPDES compliance inspection since 1995 for the platforms, and not since 1999 for the onshore facilities. Furthermore, it has conducted no water quality compliance sampling since before 1986. Given the complete lack of oversight by the primary regulatory agency, it is not surprising that Unocal has continued to violate its permit with regularity, amassing at least 960 violations between 1998 and 2002, according to the Commenters’ analysis.

In addition to its lack of enforcement, EPA has also failed to maintain adequate records of Unocal’s noncompliance. In April 2003, Cook Inlet Keeper (“Keeper”) staff traveled to Seattle to examine the DMRs for the Unocal Cook Inlet facilities after making a Freedom of Information Act (“FOIA”) request and consulting with EPA Region 10 staff. Significantly, the requested DMRs were missing from EPA files, and EPA staff has been unable to locate them. Keeper made another FOIA request for the DMRs and other settlement documents in May, and EPA finally produced some DMRs in mid-July. Keeper informed EPA of the missing documents, and it claimed to have found the documents and produced them at the end of July. However, EPA provided the same DMRs Keeper had already received. Thus, EPA has still failed to produce many documents that are necessary to review whether the proposed CAFOs are arbitrary and capricious decisionmaking. And despite EPA’s lack of information regarding the Unocal violations, it has negotiated the proposed CAFOs for each of the Unocal facilities.

The violations to be settled in the CAFOs are violations of both effluent limits and monitoring and reporting requirements under the Permit. These violations are serious and ongoing, and are indicative of a pattern of noncompliance, which reflects a refusal to commit the necessary resources to remedy and prevent violations over the last decade. Because of the flagrant nature of these violations, Unocal’s history of violations, procedural irregularities at EPA, and recalcitrance of Unocal, the Commenters believe that the proposed penalty amounts are too low, and criminal penalties are appropriate for some categories of violations.

A penalty of \$9,900 per violation, as calculated by EPA for the King Salmon Platform, would result in a reasonable total penalty of \$9,504,000 (for the number of violations found by the Commenters), which would provide an appropriate incentive for Unocal to cease deferring its responsibility to the public and to fully comply with the terms of the Permit in an environmentally sound and reasonable manner. After all, this is Unocal’s second penalty assessment in 10 years. However, the penalty assessed for the violations determined by EPA is a mere \$667 per violation, and \$370,000 total, which is no more than the cost of doing business to Unocal and will not deter it from continuing its pattern of irresponsible and illegal behavior.

Based on the Commenters' analysis, EPA staff failed to penalize Unocal for over 400 violations, which results in over 400 violations that will not be penalized because future enforcement on those violations will be precluded. It is unknown how many additional violations will be discovered once all of the missing DMRs are disclosed.

Besides the lack of incentive posed by the low penalty amount, other factors demand that the penalty amount be increased. These factors militate against any settlement until an accurate and complete analysis can be performed. First, the penalties in the proposed CAFOs are internally inconsistent in that the per-violation penalties between the Unocal platforms vary widely for no apparent reason. In addition, EPA's policy mandates that penalties be similar for different operators in all areas of the country, but this penalty is well below the average amount for similar violations in other areas.

EPA's policy lists several factors relating to the calculation of appropriate settlement amounts for NPDES permit violations. The factors include economic benefit and gravity of the violations, both of which were interpreted incorrectly by EPA staff and should be reconsidered to increase the penalty amount. Unocal has received the economic benefits of noncompliance for almost a decade, thereby receiving a substantial benefit over its competitors. The gravity component was underestimated as well; the length and extreme nature of the violations, when combined with the lack of knowledge of the impacts of the pollution on local subsistence resources and populations, and the fact that failures to monitor undermine the entire enforcement scheme established under the NPDES program, require that the penalty amount be higher than the current proposal.

The penalty amount based on economic benefit and gravity may be altered based on other factors, including recalcitrance and quick settlement. The failure of Unocal to mitigate the harmful effects of the pollution or to prevent recurrences over more than a decade after a citizen enforcement lawsuit constitutes recalcitrance under EPA guidelines, and the penalty amount must be increased accordingly. EPA also wrongly awarded a quick settlement discount to Unocal. It is remarkable that Unocal receive a quick settlement offset for violations that occurred five years ago, especially given that EPA will issue a new permit in 2004, and Unocal's compliance will be scrutinized. In this scenario, the CAFOs are likely to influence the terms of the new permit not to reflect Unocal's recalcitrance to comply with CWA and permit requirements.

Finally, Unocal has refused to accommodate local Alaskan Native villages by performing a Supplemental Environmental Project ("SEP") that would help determine the impacts of pollution on subsistence resources in Cook Inlet. While a SEP is not required, refusal to perform one reflects poorly on Unocal's corporate responsibility and values at a time when the company is already under scrutiny for human rights violations in Myanmar. This inhumane conduct evidences a pattern of disdain by Unocal for the people most affected by its illegal business practices and reinforces the Commenters' contention that the penalty amount should be increased.

As a preliminary matter, the Commenters applaud EPA in undertaking enforcement against Unocal. However, the Commenters are seriously concerned the enforcement occurred at the request of Unocal, and resulted in a significantly lower penalty than would be the case if EPA diligently prosecuted a civil or criminal case against Unocal. In addition, because of the circumstances surrounding Unocal's disclosures, audits and corrected reports, Commenters believe that EPA should refer this matter for criminal prosecution.

Further, the limited information gleaned from the Keeper's FOIA efforts and the procedural irregularities outlined above both paint an alarming picture of virtually no federal or state oversight. Since 1986, for example, the State of Alaska performed one compliance sampling inspection in 1990 at the Granite Point Production Facility. More significantly, EPA has not performed water quality compliance sampling at any Unocal facility, and no NPDES compliance inspections have been performed on the platforms since the middle of 1995. As EPA well knows, the entire system of self-reporting and self-policing falls apart without timely and adequate agency oversight. It is therefore crucial that EPA perform compliance inspections to verify discharger information. This is illustrated by a comparison of heavy metal sampling at the Unocal facilities between 2001 and 2002. The average copper, silver, and arsenic concentrations in 2002 are one order of magnitude or more higher than in 2001. See Table 1: Annual Average Concentrations of EPA-Permitted Contaminants as Reported in 2001 and 2002 Discharge Monitoring Reports, attached as Exhibit A. At the very least, these elevated exceedances should have alerted EPA to problems, and should have triggered a review by EPA for potential discrepancies in data collection or reporting.

The Commenters also point out that there are other platforms in Cook Inlet that are operated by other companies that may also have significant violations. Those dischargers should also be investigated.

II. STATEMENT OF FACTS

A. Unocal's Cook Inlet Operations

Unocal currently operates 10 offshore drilling platforms in Cook Inlet. Four of these platforms discharge produced water directly to Cook Inlet following oil-water separation: Anna, Bruce, Baker, and Dillon. In November 2002, Unocal announced that Platforms Baker and Dillon, on the east side of Cook Inlet, are to be shut in. The Platforms may discharge drilling wastes directly into Cook Inlet pursuant to the Permit issued by EPA Region 10.

In addition, Unocal operates two onshore facilities that discharge produced water directly to Cook Inlet following oil-water separation, Granite Point Tank Farm (also known as Granite Point Production Facility) and Trading Bay Production Facility. Granite Point Tank Farm receives a crude oil-water mixture from the Granite Point offshore platform. Trading Bay Production Facility receives crude oil-water mixtures from the Monopod, King Salmon, Grayling, Steelhead, and Dolly Varden offshore platforms. Following produced water removal, Unocal ships the remaining crude oil from Granite Point Tank Farm and Trading Bay Production

Facility via the Cook Inlet Pipeline Company pipeline to the Drift River Terminal for tanker transport across Cook Inlet to the Tesoro Refinery in Nikiski, Alaska.

B. Citizen Enforcement

In 1994, Greenpeace, Trustees for Alaska, and Alaska Center for the Environment filed suit against Unocal and other operators for violations of the NPDES permit that was in effect at that time. The environmental groups documented over 4200 violations of the Clean Water Act, and a settlement was reached in 1995. Significantly, EPA's last recorded platform inspection occurred in 1995, only after citizens had alerted EPA to the various permit violations.

C. EPA Enforcement

Under the Permit, Unocal must submit monthly and quarterly DMRs, which summarize monitoring results. Permit No. AKG285000, Section IV.A. In addition, non-compliance with the Permit must be reported in some cases within 24 hours, otherwise in the DMRs, and always in writing. Permit No. AKG285000, Section IV.G & H.

From what the Commenters can discern from the documents that they received, Unocal provided written notices of non-compliance on various violations over the period of the Permit. In July, August, and September 2002, Unocal provided written notification to EPA of errors in DMRs submitted between 1998 and 2002. While Unocal requested that the Audit Policy be applied in this case, which would further reduce any penalty, EPA rightly refused to apply the Audit Policy because Unocal was required to submit correct DMRs as a requirement of the Permit.

Pursuant to Section 309(g) of the Clean Water Act, EPA has authority to assess administrative penalties for violations of NPDES permits. 33 U.S.C. § 1319(g)(1). EPA's "diligent prosecution" of administrative penalties precludes civil penalty actions in district court by EPA or citizens. 33 U.S.C. § 1319(g)(6)(A).

In November 2002, Unocal approached EPA to discuss potential settlement of the violations disclosed in 2002 as well as all other violations disclosed in Unocal's DMRs during the period 1998 through 2002. Proposed CAFOs, p. 2, ¶ 2.4. The Proposed CAFOs contain the following violations:

| FACILITY | VIOLATIONS | PENALTY AMOUNT |
|-----------------------------------|-------------------|-----------------------|
| Granite Point Production Facility | 190 | \$124,795 |
| Trading Bay Production Facility | 110 | \$93,975 |
| Platform Anna | 2 | \$4,940 |
| Platform Baker | 60 | \$27,900 |
| Platform Bruce | 32 | \$18,000 |
| Platform Dillon | 32 | \$13,860 |
| Platform King Salmon | 1 | \$9,900 |
| Platform Dolly Varden | 33 | \$27,930 |
| Granite Point Platform | 30 | \$9,000 |
| Platform Monopod | 32 | \$24,400 |
| Platform Steelhead | 33 | \$15,300 |
| Platform Grayling | 0 | \$0 |
| TOTAL | 555 | \$370,000 |

III. THE PROPOSED PENALTY IS INADEQUATE.

A. EPA Did Not Accurately Calculate the Number of Violations, the Penalty Amounts are Not Consistent, and the Penalty Per Violation is Too Low.

The Commenters analyzed the Unocal correspondence to EPA that reported violations between 1998 and 2002 as well as the 2002 correspondence from Unocal detailing corrections to DMRs. Commenters' review yielded 73% more violations than detailed in the CAFOs. Further, the penalty amount for similar numbers of violations in the CAFOs is grossly inconsistent, and the resulting penalty amount per violation is inadequate. The following chart details the differences between the CAFOs and the Commenters' review:

| FACILITY | EPA VIOLATIONS | EPA PENALTY | PENALTY/VIOLATION | COMMENTERS VIOLATIONS | PENALTY/VIOLATION |
|-----------------------------------|-----------------------|--------------------|--------------------------|------------------------------|--------------------------|
| Granite Point Production Facility | 190 | \$124,795 | \$657 | 328 | \$380 |
| Trading Bay Treatment Facility | 110 | \$93,975 | \$854 | 132 | \$712 |
| Platform Anna | 2 | \$4,940 | \$2,470 | 13 | \$380 |
| Platform Baker | 60 | \$27,900 | \$465 | 70 | \$399 |
| Platform Bruce | 32 | \$18,000 | \$562.50 | 95 | \$189 |
| Platform Dillon | 32 | \$13,860 | \$433 | 47 | \$295 |
| Platform King Salmon | 1 | \$9,900 | \$9,900 | 2 | \$4,950 |
| Platform Dolly Varden | 33 | \$27,930 | \$846 | 97 | \$288 |
| Granite Point Platform | 30 | \$9,000 | \$300 | 30 | \$300 |
| Platform Monopod | 32 | \$24,400 | \$762.50 | 38 | \$642 |
| Platform Steelhead | 33 | \$15,300 | \$464 | 73 | \$210 |
| Platform Grayling | 0 | \$0 | \$0 | 35 | \$0 |
| TOTAL | 555 | \$370,000 | | 960 | |
| AVERAGE PENALTY/VIOLATION | | | \$667 | | \$385 |

The increased number of penalties determined by the Commenters are as follows:

| FACILITY | INCREASED PENALTY NUMBER | VIOLATIONS |
|--------------------------------------|---------------------------------|---|
| Granite Point Production Facility | 138 | 6/8-14/98 – No pH sample collected = 1 10/20-25/98 – No O&G sample collected = 1 10/20-25/98 – No pH sample collected = 1 11/99 – pH exceeded daily = 1 1/00 – misreported WET = 1 4/00 – O&G exceeded monthly = 30 4/00 – O&G exceeded daily = 1 12/00 – O&G exceeded monthly = 30 12/00 – O&G exceeded daily = 1 4th Qtr 00 – WET spp. exceeded monthly = 30 4th Qtr 00 – WET spp. exceeded monthly = 30 4th Qtr 00 – WET spp. exceeded daily = 1 4/01 – incorrect Pb concentration = 1 4/01 – misreporting = 1 10/01 – failed to sample O&G, Cu, Pb, Hg, TAH = 5 10/01 – misreporting = 1 4th Qtr 01 – failed to sample 2 WET spp. = 2 |
| Trading Bay Treatment Facility | 21 | Miscounted violations = 1 4/99 – misreported Pb concentration = 1 7/99 – misreported produced water volume = 1 8/99 – misreported Cu concentration = 1 8/99 – misreported TAqH concentration = 1 11/99 – failed to sample 2 WET spp. = 2 4/00 – misreported Pb concentration = 1 5/00 – misreported Pb concentration = 1 6/00 – misreported Pb conc. (daily & monthly) = 2 8/00 – misreported Pb concentration = 1 10/00 – misreported data = 1 5/01 – misreported data = 1 7/01 – misreported data = 1 2/02 – failed to sample 2 WET spp. = 2 3/02 – failed to sample 2 WET spp. = 2 4/02 – failed to sample 2 WET spp. = 2 |

| | | |
|------------------------|----|---|
| Platform Anna | 11 | 5/98 – misreported O&G = 1 8/98 – misreported O&G = 1 10/98 – misreported O&G = 1 10/00 – misreported TAH & TAqH = 2 11/00 – misreported O&G = 1 3/01 – misreported deck drainage = 1 4/01 – misreported deck drainage = 1 9/01 – misreported Hg concentration = 1 10/01 – misreported TAH & TAqH = 2 |
| Platform Baker | 10 | 6/99 – WET not reported for 1 spp. = 1 1/00 – misreported data = 1 6/00 – misreported data = 1 7/00 – misreported data = 1 8/00 – misreported data = 1 9/00 – misreported data = 1 10/00 – misreported data = 1 11/00 – misreported data = 1 7/01 – misreported O&G = 1 9/01 – misreported O&G = 1 |
| Platform Bruce | 63 | Miscounted violations = 1 4/99 – monthly O&G = 30 4/99 – misreported Cd = 1 4/01 – misreported TAH = 1 12/01 – monthly O&G = 30 |
| Platform Dillon | 15 | 4/01 – misreported produced water flow = 1 6/01-6/02 – misreported produced water flows = 13 7/01 – misreported pH = 1 |
| Platform King Salmon | 1 | 9/01 – sheen observed = 1 |
| Platform Dolly Varden | 64 | 11/98 – misreported deck drainage = 1 4/99 – misreported deck drainage = 1 10/99 – TSS exceeded monthly = 30 10/99 – BOD exceeded monthly = 30 10/99 – misreported deck drainage = 1 5/00 – misreported deck drainage = 1 |
| Granite Point Platform | 0 | |
| Platform Monopod | 6 | 4/99 – misreported deck drainage = 1 11/99 – misreported deck drainage = 1 12/99 – misreported deck drainage = 1 1/00 – misreported domestic flow = 1 1/00 – misreported deck drainage = 1 12/01 – sheen observed = 1 |

| | | |
|--------------------|------------|---|
| Platform Steelhead | 40 | 4/99 – misreported domestic water flow = 1 5/99 – misreported domestic water flow = 1 6/99 – misreported domestic water flow = 1 7/00 – no daily reported for BOD or TSS = 2 8/00 – no daily reported for BOD or TSS = 2 10/00 – no daily reported for BOD or TSS = 2 11/00 – sanitary wastewater monthly BOD = 30 10/01 – misreported san. wastewater discharge = 1 |
| Platform Grayling | 35 | 6/98 – diesel present = 1 7/98 – O&G exceeded monthly = 30 7/98 – O&G exceeded daily = 1 8/99 – misreported deck drainage = 1 10/99 – misreported deck drainage = 1 7/01 – misreported domestic water flow = 1 |
| TOTAL | 405 | |

In a July 8, 2003 conversation with EPA staff, Commenters were informed that when a monthly average limit was exceeded (which, according to EPA’s Penalty Policy, is 30 individual violations), the penalty was only weighted as one violation in the gravity calculation. This directly contravenes the Interim Clean Water Act Settlement Penalty Policy (“Penalty Policy”). See Interim Clean Water Act Settlement Penalty Policy (“Penalty Policy”) (March 1, 1995), Attachment 1; *Atlantic States Legal Foundation v. Tyson Foods*, 897 F.2d 1128, 1139 (11th Cir. 1990) See also, *Atlantic States Legal Foundation v. Universal Tool & Stamping Co., Inc.*, 786 F.Supp. 743, 746-747 (N.D. Ind. 1992) (53 out of 413 violations were monthly average limitations violations, which were deemed a violation for each of the days of the month, and the defendant violated its permit 1,977 times for a statutory maximum of up to \$25,830,000). Based on EPA’s incorrect weighting of violations, EPA believes that each violation resulted in a penalty of several thousand dollars. However, that is not correct, nor is it how anyone will perceive the penalty.

Something approaching an appropriate penalty was established at Platform King Salmon, which was assessed a \$9,900 penalty for its single waterflood sheen violation. This amount is appropriate in light of the fact that this is the second penalty assessment against Unocal in 10 years. After establishing this baseline amount for a single violation, EPA failed to diligently seek similar per-violation penalties at the other Unocal facilities, thereby giving Unocal a “volume discount” instead escalating the penalty amounts for repeated violations as would be more appropriate. For example, Platform Bruce, Platform Dillon, Platform Dolly Varden, Granite Point Platform, Platform Monopod, and Platform Steelhead have between 30 and 33 violations, yet the penalty amounts range from \$9,000 to \$27,930. This 3-fold gap in penalty amounts has no evidentiary support. Further, Platform Baker has 60 violations and has a penalty amount of \$27,900, which is less than Platform Dolly Varden, which had 33 violations. Using the Platform King Salmon assessment of \$9,900 per violation as a benchmark for an appropriate settlement amount per violation for all of the facilities would result in a more uniform and appropriate penalty figure.

In fact, there is no evidentiary basis for the lack of uniformity between the penalty assessments both between the CAFOs and on a national level. The platforms all share similar types of violations, so it is impossible to explain the differences through factual distinctions.

EPA's basis for the penalty amounts is unsupported, and cannot go unchallenged. Judicial proceedings require that some meaningful reasoning be the basis for Agency decisions, including penalty assessments. *Pleasant Hills Authority*, No. CWA-III-210, 1999 WL 1120327 (E.P.A. Nov. 19, 1999). This situation is similar to *Idaho Sporting Congress v. Thomas*, where the court refused to accept unsubstantiated expert testimony in the context of NEPA; the data was required before the court would give deference to the expert testimony. *Idaho Sporting Congress v. Thomas*, 137 F.3d 1146, 1150 (9th Cir. 1998); see also, 40 CFR 1502.24 (agency must identify methodology and data sources). While these authorities are in the NEPA context, the same reasoning will apply to determine whether EPA's penalty is arbitrary and capricious.

Further, the Penalty Policy was instituted to make penalty assessments consistent nationwide. "CWA penalties should be generally consistent across the country. This is desirable as it not only prevents the creation of 'pollution havens' in different parts of the nation, but also provides fair and equitable treatment to the regulated community wherever they may operate." Penalty Policy, p. 3. Moreover, the Penalty Policy applies to settlements of both civil judicial and administrative actions. *Id.* at p. 2.

These CAFOs are not consistent with other recent settlements. Some examples are drawn from the Compliance and Enforcement page of EPA's website: (1) on June 23, 2003, a settlement was reached with the Washington, D.C. Water and Sewer Authority that requires facility upgrades to reduce illegal discharges amounting to \$150 million, \$250,000 in penalties, and \$2 million in storm water pollution prevention; (2) on March, 13, 2003, a settlement was reached with the Puerto Rico Aqueduct and Sewer Authority over sewage and pollutant discharges from 471 pump stations, which requires construction and remedial action at 185 pump stations amounting to \$8 million, a comprehensive plan for operations, including spill response, \$1 million in penalties for past violations, and a \$1 million SEP for low-income communities to improve drinking water quality; (3) on June 28, 2002, a settlement was reached with the City of Toledo, Ohio that resulted in improvements to the sewer system, \$500,000 in penalties, and \$1 million for two improvement projects; (4) on April 26, 2002, a settlement was reached with the City of Baltimore, Maryland for untreated sewer overflows resulting in \$940 million for construction upgrades, \$600,000 in penalties, and a requirement to design a biological nutrient reduction facility estimated to cost \$2.7 million; and (5) on March 5, 2002, a settlement was reached with Youngstown, Ohio for raw sewage discharges that required \$12 million for improvements over the next 6 years, and \$100 million in improvements over 2 decades, including a sewage discharge control plan.

Pursuant to 40 CFR § 19.4, EPA may assess administrative penalties under Clean Water Act Section 309(g)(2)(B) in an amount not to exceed \$11,000 per day for each day a violation continues up to a maximum \$137,500. The maximum penalty could, and should, have been assessed for all of the facilities except Platforms Anna and King Salmon because of the low

number of violations at those platforms. That penalty would have been \$1,270,500. The Commenters fail to see what mitigating factors could have made EPA determine that a penalty reduction of 70% was warranted, especially when injunctive relief and a SEP are not part of the settlement.

Moreover, a \$667/violation penalty (based on the number of violations calculated by EPA - \$385/violation based on the Commenters' analysis) for a multi-billion dollar, trans-national corporation is offensive. Even a \$2,289/violation penalty at the statutory maximum is questionable, especially given that a citizen enforcement lawsuit against Unocal that was settled in 1995 resulted in Unocal paying over \$1 million in penalties and SEPs. Obviously, a court would not be so lenient with a corporation that repeatedly violated permit requirements over the term of the permit, and that can afford substantial injunctive relief to prevent violations from recurring in the future.¹ Thus, from a purely practical and mathematical standpoint, the proposed penalty is inadequate.

B. The Statutory Criteria for Penalty Assessment Dictate a Much Higher Penalty.

The statutory criteria for assessing penalties in the administrative and civil contexts are largely the same. EPA or the court must "take into account the nature, circumstances, extent and gravity of the violation, or violations, and, with respect to the violator, ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation, and such other matters as justice may require." 33 U.S.C. §§ 1319(d) and (g)(3); *see also, Hawaii's Thousand Friends, supra*, 821 F.Supp. at 1394-1395; *Community Ass'n for Restoration of the Env't v. Henry Bosma Dairy*, 2001 WL 1704240, *7-17 (E.D. Wash. 2001). "The penalty amount pled in the administrative complaint also must be high enough to permit the Agency to obtain an appropriate penalty under statutory assessment criteria if the case must be litigated." Guidance on the Distinctions Among Pleading, Negotiating, and Litigating Civil Penalties for Enforcement Cases under the Clean Water Act (January 19, 1989) p. 3. "In this context, EPA will best preserve its negotiation and litigation position by pleading for a civil penalty based on the statutory penalty factors and resolving all discretion in favor of the highest defensible penalty amounts." *Id.* at p. 4. Thus, the criteria dictate a much higher penalty.

¹ *See e.g., Natural Resources Defense Council v. Southwest Marine, Inc.*, 236 F.3d 985, 1002 (9th Cir. 2000) (approving penalty award of \$799,000 for 799 violations; average award was \$1000 for each violation); *United States v. Mun. Auth. of Union Township*, 929 F. Supp. 800, 809 (M.D. Pa. 1996) (penalty award of \$4,031,000 for 2,360 violations of permit; average of \$1,708 per violation); *Hawaii's Thousand Friends v. City and County of Honolulu*, 821 F.Supp. 1368, 1396-97 (D. Haw. 1993) (\$312,000 for 52 permit violations; average of \$5,887 per violation; and \$156,000 for 52 bypass violations; average of \$3,000 per violation); *PIRG v. Powell Duffryn Terminal, Inc.*, 720 F.Supp. 1158, 1166 (D. N.J. 1989) (penalty of \$4,205,000 imposed for 386 violations, mitigated to \$3,205,000; average of \$8,303 per violation), *aff'd in part, rev'd in part*, 913 F.2d 64, 81 (3d Cir. 1990) (district court order remanded as to amount of penalty for recalculation because "reduction of the penalty cannot be even impliedly based on the 'as justice may require factor'").

1. *Economic Benefit*

The purpose of “the economic benefit analysis is to prevent a violator from profiting from its wrongdoing.” *Mun. Auth. of Union Township, supra*, 150 F.3d at 263. In order to determine the economic benefit enjoyed by the violator, the court must consider “the after-tax present value of avoided or delayed expenditures on necessary pollution control measures.” *Id.* at 264; *See also, Community Ass’n for Restoration of the Env’t, supra*, 2001 WL at *7-17 (“after-tax present value” of avoided or delayed expenditures used to calculate economic benefit and financial statements used to figure out the economic impact on the violator). In other words, the economic benefit analysis is “the amount of money a company has gained over its competitors by failing to comply with the law.” *U.S. v. Smithfield Foods*, 972 F.Supp. 338, 348 (E.D. Va. 1997). Under the Penalty Policy, “every effort should be made to calculate and recover the economic benefit of noncompliance. The objective of the economic benefit calculation is to place violators in the same financial position as they would have been if they had complied on time.” Penalty Policy, p. 4. Thus, EPA is required to evaluate Unocal’s financial position, especially as it relates to the economic benefit it gained from failing to comply with the law.

In a July 8, 2003 conversation with EPA staff, the Commenters were informed that the economic benefit analysis was “modest” because Unocal quickly corrected errors and reported them right away. This assertion is incorrect. All of the violations found by the Commenters were reported and corrected at the end of 2002, which was 1-4 years after the violation occurred. Thus, Unocal achieved an economic benefit from the violations over a period of time, and that must be reflected in the penalty calculation. And it should be noted that Unocal clearly possesses the economic wherewithal to not only pay a higher penalty, but also to invest in compliance management systems designed to prevent toxic discharges and/or future violations in Cook Inlet. For example, Unocal realized profits of \$331 million, \$615 million and \$760 million for fiscal years 2002, 2001 and 2000, respectively.² Importantly, instead of bolstering its efforts to comply with the Clean Water Act and other environmental statutes, Unocal in 2002 took an entirely different direction, closing its Kenai (Alaska) office, and firing or relocating 18% of its Alaskan work force, in an effort specifically designed to increase profits.³

In fact, Unocal profited significantly by failing to comply with permit effluent limits, and received benefits, including avoided and delayed costs for installing adequate effluent control technology to prevent or reduce pollutant discharges over many years, and competitive advantage as a result of its lower production costs. EPA must evaluate Unocal’s economic benefit for each type of violation. To fully determine the economic benefit, it is necessary to determine what actions a company should have taken to comply with its permit and avoid its violations. *Public Interest Research Group of New Jersey, Inc. v. Magnesium Elektron, Inc.*, 1995 WL 461252, *12 (D.N.J. 1995). In addition, the economic benefit must be calculated based on persistent and ongoing violations, which have occurred since the installation of the Cook Inlet facilities. The lack of compliance over this extended period shows that pollution

² See <http://www.unocal.com/annualreport/02-report.pdf>

³ See <http://www.unocal.com/uclnews/2002news/111202.htm>

control technology has not been implemented. As a result, both the capital costs of required equipment, and operating and maintenance costs for each year must be factored into the economic analysis.

In 1996, the EPA commissioned Avanti Corporation to perform a study entitled Compliance Costs and Pollutant Removals for Produced Water Generated at Oil and Gas Production Platforms Located in Cook Inlet, Alaska ("Produced Water Study"). That study detailed both the capital costs and operating and maintenance costs of each option for compliance with permit limits for oil and grease; the study determined that improved gas flotation systems would result in compliance at minimum cost and calculated values for these costs that far exceed the CAFO penalties or the statutory maximum penalty for settlements (\$9,232,461 capital costs, \$1,168,826/year operating and maintenance costs). Produced Water Study at p. 5, Table 3 (1996). Though improved gas flotation filtration may have been installed subsequent to the study, Unocal continues to violate its permit. Further, the high costs avoided for not installing control technology to prevent repeated oil and grease discharge violations indicates that similarly large economic benefits result from avoided implementation of other technologies to control for other effluent limitations.

Mere reporting of violations without action to prevent future violations does not represent full compliance, and is insufficient to reduce Unocal's economic benefit. The evidence in this case supports the assumption that insufficient, if any, compliance efforts were made. The violations are ongoing and have continued for many years. At the very least, Unocal failed to comply with its permit for the duration of the violations at issue in this case, and therefore received an economic benefit by competitive advantage and delayed costs during that period.

Further, even if EPA determined that Unocal's actions after the violations resulted in full compliance, the cost of those actions is the appropriate economic benefit and the delayed costs of operating and maintaining the effluent controls should be assessed as a penalty. Unocal should have known that the effluent controls in place prior to the violations were not sufficient and therefore installed the equipment, trained its employees appropriately, or performed other compliance measures prior to the violations. As a result, EPA must assess a significant penalty for the economic benefit Unocal received for its long-term, ongoing violations of the Permit.

2. *Gravity/Seriousness of Violations*

The gravity component of the penalty analysis is as important as the economic benefit component of the penalty calculation. "The removal of economic benefit of noncompliance only places the violator in the same position as he would have been if compliance had been achieved on time. Both deterrence and fundamental fairness require that the penalty include an additional amount to ensure that the violator is economically worse off than if [he] had obeyed the law." *Id.* at p. 6.

The lack of scientific information about the impact of Unocal's and other oil facilities' discharges in Cook Inlet weighs in favor of Unocal's violations having greater gravity calculations. See, Water Quality Benefits Analysis of Final Effluent Limitations Guidelines and

Standards for the Coastal Subcategory of the Oil and Gas Extraction Point Source Category (“Water Quality Benefits Analysis”), EPA Document #EPA-821-R-96-024 (October 1996), Section 7.3.1.2, p. 7-28 (“There is no study of produced water impacts in Cook Inlet comparable to the Trinity bay study. Therefore, no assessment of ecological impacts is developed for Cook Inlet produced water discharges.”); Section 7.4.1.2, p. 7-31 (“As no ecological impact assessment is conducted for Cook Inlet discharges of produced water, no projection of monetized benefits is performed for these discharges.”); Section 8.1, p. 8-1 (“There is little tissue data available with which to assess the risks from consumption of fish and shellfish from Cook Inlet.”); and Section 6.1.1.2, p. 6-3 (“Because of the minimal concentration of radium detected in produced water discharges in Cook Inlet, and the uncertainty over the level of fishing near oil and gas structures and proportion of dietary intake that such catch might represent, no radium risk assessment is conducted for Cook Inlet dischargers in this WQBA.”). This is alarming when “the total Cook Inlet current technology pollutant loading (46 pollutants) for produced water is 1,056,542,206 lbs. This total loading includes: 1,781,074 lbs. of conventionals,⁴ 120,587 lbs. of priority organics, 51,089 lbs. of priority metals, and 1,054,589,456 lbs. of non-conventionals.” *Id.* at Section 2.5.1.2, pp. 2-25 – 2-27. Unocal outfalls are responsible for a full 98.7% of the produced water discharged into Cook Inlet each day. See *Id.*, at Section 2.2.1.2 and Exhibit 2-2, pp. 2-6 – 2-7.

Unocal’s discharges contain toxic heavy metals, as well as polycyclic aromatic hydrocarbons (“PAH”) and alkylphenols, which have been shown to harm salmon and other fish.⁵ Significantly, many of the same pollutants historically found in Unocal’s discharges have also been identified in various Cook Inlet subsistence resources by EPA itself.⁶ Accordingly, environmental harm must be considered in the gravity calculation. Potential degradation of human use is an applicable environmental harm, and gravity penalties may be assessed without known health effects. See, *Smithfield Foods*, 972 F. Supp. at 346; Penalty Policy at 8-9 (beach closings, other use factors listed for gravity assessment).

In addition, the weight of particular violations has been set forth in case law. Violations that exceed effluent limits by over 100% are considered “severe” violations. See, e.g. *Smithfield Foods*, 972 F. Supp. at 344 (63% over the limit is severe but that 35% is not); *Pleasant Hills Authority*, *supra* (excursions less than 100% higher than the limit were minor, and those over 500% were extreme violations). Further, oil sheens automatically harm the environment.

⁴ Defined by 40 CFR § 401.16 as Biochemical Oxygen Demand (“BOD”), Total Suspended Solids (“TSS”), fecal coliform bacteria, oil and grease, and pH.

⁵ See, e.g., Heintz, R.A., S.D. Rice, A.C. Wertheimer, R.F. Bradshaw, F.P. Thrower, J.E. Joyce, and J.W. Short. 2000. *Delayed effects on growth and marine survival of pink salmon *Oncorhynchus gorbuscha* after exposure to crude oil during embryonic development*. Mar. Ecol. Prog. Ser. 208: 205-216; Heintz, R. A., J. W. Short, and S. D. Rice. 1998. Sensitivity of Fish Embryos to Weathered Crude Oil: Part II. Increased Mortality of Pink Salmon (*Oncorhynchus gorbuscha*) Embryos Incubating Downstream from Weathered *Exxon Valdez* Oil Spill. Environmental Toxicol. And Chem. 18(3):494-503; Meier, S., Anderson, T.E., Hasselberg, L., Kjesbu, O.S., Klungsoyr, J., and Svardal, A., *Hormonal effects of C4-C7 alkylphenols on cod (*Gadus morhua*)*. 2001. Norway Institute of Marine Research.

⁶ EPA, Office of Water. 2001. *Human Exposure Evaluation of Chemical Contaminants in Seafoods Collected in the Vicinity of Tyonek, Port Graham and Nanwalek in Cook Inlet, Alaska*. (EPA-910-R-01-003).

Chevron USA, Inc. v. Yost, 919 F.2d 27, 28-29 (5th Cir. 1990) (under 40 C.F.R. Part 110, discharges of oil in quantities large enough to create a sheen on the water ‘may be harmful to the public health or welfare’ and are therefore violations of the Clean Water Act). In *Magnesium Elektron*, the court made findings on oil and grease toxicity, which included two main effects on human health: tainting edible aquatic species, and bioaccumulation of carcinogenic PAHs. *Magnesium Elektron*, 1995 WL at *10. Harm does not have to be quantified for penalties to be assessed. See, *United States v. Krilich*, 948 F. Supp. 719, 727 (N.D. Ill. 1996); *Hawaii’s Thousand Friends v. City and County of Honolulu*, 821 F. Supp. 1368, 1396-97 (D. Haw. 1993).

Moreover, failures to monitor must be considered severe violations. In *Magnesium Elektron*, the court held that “failure to monitor as required and to report monitoring results accurately undermines the self-reporting system on which the entire NPDES system is based.” 1995 WL 461252, at *12. See also, *Sierra Club v. Simpkins Indus.*, 847 F.2d 1109, 1115 (4th Cir. 1988) (reporting and records retention requirements vital to effective administration and enforcement of NPDES permits; without reporting, officials may not be able to determine whether discharge violations have occurred). EPA’s own policies also dictate that these violations be considered serious; the 1984 general EPA Penalty Policy (on which the Clean Water Act Penalty Policy is based) states that, “the violation of any recordkeeping or reporting is a very serious matter. But if the involved requirement is the only source of information, the violation is far more serious.” 1984 Penalty Policy, at 14-15. Failures to monitor or submittal of false DMRs may also camouflage more severe violations, so EPA should assume that a serious violation has occurred to eliminate the perverse incentive that a minor penalty would provide. See, *Smithfield Foods*, 972 F. Supp. at 348.

In fact, failures to monitor are the basis for criminal enforcement. Section 307 of the Clean Water Act mandates that operators make reports as required by permit; any violation of this requirement is punishable criminally. 33 U.S.C. 1319(c)(2)(A) (any person who “knowingly violates section...307...of this Act [33 U.S.C. 1318], or any permit condition or limitation implementing any of such sections in a permit issued under section 402 of this Act [33 USCS § 1342] by the Administrator or by a State, ...shall be punished by a fine of not less than \$ 5,000 nor more than \$ 50,000 per day of violation, or by imprisonment for not more than 3 years, or by both.”); see also, *Proffitt v. Lower Bucks County Joint Municipal Authority*, 1987 U.S. Dist. LEXIS 8085 (E.D. Pa. 1987) (exceedences of NPDES limits reported on DMRs constitute strict liability violations of the Clean Water Act); *United States v. Confederate Acres Sanitary Sewer and Drainage System, Inc.*, 1988 U.S. Dist. LEXIS 16968, at *8 (W.D. Ky. 1988) (“[I]t is well settled that even unintentional, negligent, and accidental violations of the Act’s provisions result in strict liability”).

3. *Mitigating Factors Actually Mandate a Substantial Increase in Penalty Amount.*

Under the Penalty Policy, the gravity of violations may be adjusted by three factors: (1) history of recalcitrance (to increase); (2) flow reduction factor (to reduce); and (3) quick settlement factor (to reduce). Penalty Policy, p. 12. Of these factors, only history of recalcitrance applies, so the penalty should be increased accordingly.

Unocal's history of recalcitrance and noncompliance is clear. Under the Penalty Policy, Unocal has unjustifiably delayed "in preventing, mitigating, or remedying the violation." Penalty Policy, p. 12. Unocal has met each of these tests for recalcitrance; its enforcement history vividly illustrates this fact. Unocal's violations were litigated by environmental groups and settled in 1995, and Unocal is aware that the Keeper and other environmental groups review its compliance. Given that history and its continuing failure to prevent recurrence of similar violations, Unocal now seeks to avoid harsh sanctions and any citizen enforcement action by appealing to EPA for settlement of any violations right before the issuance of a new permit. Unocal could have prevented the pollution by installation of pollution control devices at any time since 1995, it unjustifiably delayed by failing to do so until last winter. When this action is viewed in the appropriate context, it cannot act as good faith to offset the recalcitrance penalty. EPA, in its settlement, has not required any injunctive relief for the ongoing violations that would provide a remedy for preventing future violations or mitigating the effects of the past violations on the local population.

Not only has Unocal unjustifiably delayed in preventing violations, but it has also failed to undertake any action to mitigate the effects of its violations or to remedy those effects. It is the Commenters' understanding that Unocal has so far refused to perform a SEP that could help address local impacts from its violations – a position that directly contradicts Unocal's own code of conduct and a good faith position aimed at mitigating its pollution violations.⁷ Agreement by Unocal that a SEP would be beneficial would show good faith and might be a reason to minimize the recalcitrance factor. Its current position, however, is self-serving and seeks to use EPA enforcement as a shield without providing for impacts on surrounding communities who depend on Cook Inlet for their survival. This behavior cannot be rewarded, but rather merits an increase in the penalty calculation.

While meeting the recalcitrance settlement adjustment factor, Unocal does not qualify for any mitigating factors under the Penalty Policy. Unocal is not a small discharger that qualifies for a flow reduction factor. While the individual facilities may have flows that would provide for a flow reduction, Unocal, the parent corporation employs far more than 100 individuals, not to mention that EPA issued Proposed CAFOs for 9 of the 10 Unocal Cook Inlet facilities, and the flow rates are significant. Thus, the flow reduction factor cannot be applied.

In addition, while the particular timeframes for quick settlement in the Penalty Policy may be met, the quick settlement reduction factor cannot be applied in this case because Unocal's motivation for a quick settlement is either to avoid another citizen enforcement action, or to "clear the slate" of past violations for the upcoming re-issuance of the Cook Inlet NPDES General Permit. Had Unocal truly wanted to prevent future violations after the 1995 enforcement action, it would have made the corporate decisions and investments to do so.

Further, it is the Commenters' understanding that EPA did not apply the Audit Policy because Unocal was required to submit the correct DMRs in the first place, which voids the

⁷ See, Unocal Code of Conduct, available at http://www.unocal.com/ucl_code_of_conduct/index.htm (last visited 7/21/03).

Audit Policy. The Commenters applaud EPA for refusing to apply the Audit Policy, as it would provide the wrong incentive to dischargers: violate and self-report without serious penalties. Thus, the quick settlement reduction factor does not apply.

4. *Litigation Considerations*

These considerations are also used to reduce the penalty amount. Penalty Policy, p. 13. The settlement is so far below the statutory maximum that EPA cannot factor in litigation considerations. “The greater the disparity between the maximum statutory penalty and the preliminary penalty amount, the less litigation considerations should affect the Agency's settlement position.” Penalty Policy, p.14. EPA has a strong judicial enforcement case against Unocal since the DMRs are admissions of liability, and therefore EPA is likely to obtain a much higher penalty in a judicial proceeding. Further, Unocal has previously paid a much higher amount in prior proceedings for similar violations. See Penalty Policy, p.15, §4(f). As a result, there is no basis to reduce the penalty amount when analyzing the litigation considerations in this case.

5. *Ability to Pay*

EPA “typically does not request settlement penalties, which combined with the cost of the necessary injunctive relief, that are clearly beyond the financial capability of the violator” (i.e., the violator should be able to pay the penalty without a measurable effect on solvency). Penalty Policy, p. 21. Thus, this factor is also used to reduce the penalty calculation.

Unocal is a multi-billion dollar, trans-national corporation that can afford significant penalties, and in fact, must be assessed large penalties in order to deter future violations. In fact, Unocal's past penalties were much higher and failed to deter Unocal from continuing its harmful and noncompliant behavior, which indicates that the prior penalty amounts were too low. As such, Unocal's ability to pay is not a factor that justifies reducing the penalty amount.

6. *Unocal's Refusal to Undertake a SEP Justifies a Significantly Larger Penalty.*

“Evidence of a violator's commitment and ability to perform a SEP is also a relevant factor for EPA to consider in establishing an appropriate settlement penalty.” EPA Supplemental Environmental Projects Policy (“SEP Policy”) (May 1, 1998) p. 2. The Commenters are informed that Unocal refused to perform a SEP as part of the proposed CAFOs. See, e.g., July 8, 2003 Letter from Unocal to the Port Graham Village Council, attached as Exhibit B (stating that “there are many groups who might want to enter into negotiations regarding SEPs. Singling out an individual village or project could potentially damage our relationships with other groups. Additionally, Unocal does not have the capacity to neither (sic) administer nor (sic) evaluate these proposed projects.”) As a result, no penalty reduction is justified, but an increase is justified.

Further, Unocal's Cook Inlet operations impact several Alaska Native Villages, which raises environmental justice concerns. “Emphasizing SEPs in communities where environmental

justice concerns are present helps ensure that persons who spend significant portions of their time in areas, or depend on food and water sources located near, (sic) where the violations occur would be protected. . . . [and] EPA encourages SEPs in communities where environmental justice may be an issue.” *Id.* at p. 4. Various Alaska Native Villages and Tribes around Cook Inlet (e.g., Tyonek, Seldovia, Chickaloon, Salamatof, Kenaitze, Port Graham, Nanwalek) rely on the Inlet for subsistence foods, which support their traditional way of life. Water Quality Benefits Analysis, Section 5.2.2, pp. 5-6 – 5-7. Thus, EPA cannot reduce Unocal’s penalty amount, and should increase the penalty because Unocal has done nothing to protect neighboring subsistence communities using the same resources, and is another example of Unocal’s disregard for human rights. This is particularly damning when viewed against Unocal’s corporate code of conduct, which states, “Unocal’s management is committed to ensuring the well-being of our workers and the environment, as well as people living and working in communities near our facilities. Human, physical and financial resources will be provided to meet this commitment.” Unocal Code of Conduct, at 19.⁸ Unocal’s words and actions in this case provide a vivid contrast; in light of Unocal’s failure to meet its own standards, EPA should decline to reduce the penalty, and should in fact increase the penalty, since Unocal has failed to take affirmative and meaningful action to mitigate the effects of its pollution and protect the local community.

EPA has proposed these penalties just as Unocal’s operations in Myanmar and elsewhere are receiving considerable (negative) attention regarding human and civil rights abuses. For EPA to simply ignore these issues in the context of NPDES compliance enforcement will only perpetuate the discrimination and environmental justice concerns that have occurred in Cook Inlet for the past 30+ years. See, “Unocal May Be Tried on Abuses, State Court Rules,” Los Angeles Times, March 29, 2003; and “Unocal on trial for Burma ‘abuses,’” BBC News, August 1, 2003, attached as Exhibit C.

IV. BASED ON THE FACTS, THIS CASE WARRANTS A CRIMINAL REFERRAL.

The CWA requires company officials to sign all DMRs submitted to EPA, to attest to their veracity. 40 CFR § 122.22(b). Congress rightly recognized that industry must have a strong incentive to report their permit compliance status correctly, so citizens, businesses and agencies have accurate information on the types and volumes of pollution entering public waterways. As a result, Congress provided criminal sanctions for violation of these requirements, and for good reason: without timely and accurate information on the compliance status of a permittee’s discharges, the entire self-policing mechanism of the CWA falls apart.

Unocal approached EPA in 2003 with four years’ of corrected DMRs for years 1998-2002. Many of the corrections involved changes to monitoring results that had originally been submitted to EPA on the original DMRs. This chain of events begs a critical question: how could Unocal report its 1998-2002 violations in 2003 if it did not have the data showing such violations when it originally submitted the DMRs to EPA between 1998 and 2002? One scenario suggests Unocal simply “made a mistake” - several dozen times – for violations between 1998-2002; another holds that Unocal knew it could conduct an audit at a later time,

⁸ Available at http://www.unocal.com/ucl_code_of_conduct/index.htm (last visited, 7/21/03).

and failed to diligently scrutinize its 1998-2002 monitoring reports prior to submitting them to EPA.

Regardless what occurred, a Unocal official signed the 1998-2002 DMRs in question under criminal penalties of perjury, and those DMRs turned out to be false statements. These false statements led at least one entity – the Cook Inlet Regional Citizens Advisory Council (“CIRCAC”) – to conclude there were no significant permit compliance issues at Unocal facilities in Cook Inlet between 1998 and 2002.⁹ Because the CIRCAC Board of Directors includes a broad range of representatives from municipal, Native, fishing, environmental and other interest groups, none of these interests knew – or more importantly, could know – of Unocal’s long history of noncompliance.¹⁰ As a result, no one – not EPA, not CIRCAC, and not the public – knew about the Unocal violations. This is precisely the type of situation Congress meant to prevent by providing criminal sanctions for false statements on DMRs submitted to EPA. Accordingly, this matter warrants a referral to discern whether Unocal engaged in any criminal acts when submitting false DMRs to EPA between 1998 and 2002.

V. CONCLUSION

The penalties assessed against Unocal in the Proposed CAFOs are grossly inadequate, and are merely a slap on the wrist. The proposed penalty amount reflects only a small “cost of doing business” for Unocal, which means that Unocal will absorb the cost and continue its practices without changing its operations to prevent similar violations in the future. As a result, this proposed penalty allows Unocal to pay to pollute without any meaningful injunctive relief, and raises the oil and gas industry above other legally protected uses, such as recreational, subsistence, and commercial fishing.

Based purely on numbers, many violations were not included in the CAFOs, which allows Unocal to evade significant violations over the period covered by the CAFOs. In addition, there is no basis to reduce the assessed penalties, and every reason to increase the penalties against Unocal based on recalcitrance and avoidance of significant financial burdens for penalties, as well as injunctive relief and SEPs to avoid impacts on subsistence communities and other surrounding communities. As a result, the proposed CAFOs must be modified to assess the maximum possible penalty for Unocal’s egregious behavior. A penalty of \$9,900 per violation, as assessed for Platform King Salmon, is more appropriate for these violations and would likely be large enough to provide an incentive for Unocal to prospectively prevent future violations.

⁹ Comments of Susan Saupe, Staff Scientist, Cook Inlet Regional Citizens Advisory Council, *at* CIRCAC Board Meeting, Homer, Alaska, May 16, 2003.

¹⁰ At no time did CIRCAC reveal to its Board or to the public Unocal’s pattern of violations at its Cook Inlet facilities between 1998-2002, presumably because the DMR’s filed by Unocal did not reveal violations.

Based on this discussion, and relying on EPA's own Penalty Policy, the Commenters anticipate modified CAFOs – and a criminal referral - that provide sufficient deterrence to minimize Unocal's impacts on the Cook Inlet watershed now and in the future.

Very truly yours,

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