



Billing Code 3720-58

DEPARTMENT OF DEFENSE

Department of the Army, Corps of Engineers

33 CFR Part 326

RIN 0710-AA66

Civil Monetary Penalty Inflation Adjustment

AGENCY: U.S. Army Corps of Engineers, DoD

ACTION: Direct final rule.

SUMMARY: The U.S. Army Corps of Engineers (Corps) is amending its regulations to adjust its Class I civil penalties under the Clean Water Act and the National Fishing Enhancement Act to account for inflation. The adjustment of civil penalties to account for inflation is required by the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended. Since we have not made any adjustments to our Class I penalties to account for inflation since 2004, we are making a second round of penalty adjustments to account for inflation. Using the adjustment criteria provided in the statute, the Class I civil penalty under the Clean Water Act remains at \$11,000 per violation, but the maximum civil penalty increases to \$32,500. Under the National Fishing Enhancement Act, the Class I civil penalty remains at \$11,000 per violation. Increasing the maximum amount of the Class I civil penalty under the Clean Water Act to account for inflation will maintain the deterrent effects of the penalty.

DATES: This rule is effective [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER] without further notice, unless the Corps receives adverse comment by [INSERT DATE 30 DAYS FROM DATE OF

PUBLICATION IN FEDERAL REGISTER]. If we receive such adverse comment, we will publish a timely withdrawal in the Federal Register informing the public that this rule will not take effect.

ADDRESSES: You may submit comments, identified by docket number COE-2011-0024, by any of the following methods:

Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.

E-mail: [david.b.olson@usace.army.mil](mailto:david.b.olson@usace.army.mil). Include the docket number, COE-2011-0024, in the subject line of the message.

Mail: U.S. Army Corps of Engineers, ATTN: CECW-CO (David Olson), 441 G Street, NW, Washington, D.C. 20314-1000.

Hand Delivery/Courier: Due to security requirements, we cannot receive comments by hand delivery or courier.

Instructions: Direct your comments to docket number COE-2011-0024. All comments received will be included in the public docket without change and may be made available on-line at <http://www.regulations.gov>, including any personal information provided, unless the commenter indicates that the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI, or otherwise protected, through [regulations.gov](http://www.regulations.gov) or e-mail. The [regulations.gov](http://www.regulations.gov) web site is an anonymous access system, which means we will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail directly to the Corps without going through [regulations.gov](http://www.regulations.gov), your e-mail address

will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, we recommend that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If we cannot read your comment because of technical difficulties and cannot contact you for clarification, we may not be able to consider your comment. Electronic comments should avoid the use of any special characters, any form of encryption, and be free of any defects or viruses.

Docket: For access to the docket to read background documents or comments received, go to [www.regulations.gov](http://www.regulations.gov). All documents in the docket are listed. Although listed in the index, some information is not publicly available, such as CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form.

FOR FURTHER INFORMATION CONTACT: Mr. David Olson at 202-761-4922 or by e-mail at [david.b.olson@usace.army.mil](mailto:david.b.olson@usace.army.mil) or access the access the U.S. Army Corps of Engineers Regulatory Home Page at <http://www.usace.army.mil/Missions/CivilWorks/RegulatoryProgramandPermits.aspx>.

SUPPLEMENTARY INFORMATION:

Executive Summary

This rule is an inflation adjustment for civil penalties administered by the U.S. Army Corps of Engineers. It is necessary to comply with the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended (28 U.S.C. 2461 note) (FCPIAA). The FCPIAA requires Federal agencies to periodically increase their civil penalties to account

for inflation to maintain the deterrent effects of those penalties. On August 3, 2011, the Deputy Secretary of Defense delegated to the Secretary of the Army the authority and responsibility to adjust penalties administered by the U.S. Army Corps of Engineers. On August 29, 2011, the Secretary of the Army delegated that authority and responsibility to the Assistant Secretary of the Army for Civil Works.

The maximum Class I civil penalty for violations under Section 309(g) of the Clean Water Act would increase from \$27,500 to \$32,500. Because of the rounding rules of the FCPIAA, the minimum penalty would remain unchanged at \$11,000 per violation. The Class I civil penalty for violations of Section 205(e) of the National Fishing Enhancement Act would also remain at \$11,000 per violation.

This rule would not result in any additional costs to implement the Corps Regulatory Program, because the Class I civil penalties have been in effect since 1990. This rule merely adjusts those Class I civil penalties to account for inflation, as required by the FCPIAA. This rule will result in additional costs to members of the regulated public who do not comply with their Clean Water Act section 404 permits and receive a final Class I civil administrative penalty order from a District Engineer, because it would increase the maximum penalty amount from \$27,500 to \$32,500. The benefit of this rule would be to increase the maximum Class I civil penalty amount to account for inflation and maintain the deterrent provided by that Class I civil penalty.

#### Background

Pursuant to Section 4 of the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. 2461 note, as amended, each Federal agency is required to issue regulations adjusting for inflation the civil monetary penalties that can be imposed

pursuant to such agency's statutory authorities. The Corps initial adjustment to each civil monetary penalty under Section 309(g) of the Clean Water Act and Section 205(e) of the National Fishing Enhancement Act was published in the June 25, 2004, issue of the Federal Register (69 FR 35515) and became effective on July 26, 2004. The initial adjustment was based on the 10 percent increase provided by Section 6 of the Federal Civil Penalties Inflation Adjustment Act.

The FCPIAA requires subsequent adjustments to be made at least once every four years following the previous adjustment. The FCPIAA requires that the adjustment reflect the percentage increase in the Consumer Price Index (CPI) between June of the calendar year preceding the adjustment and June of the calendar year in which the amount was last set or adjusted. As the initial adjustment was made and published on June 25, 2004, the inflation adjustment was calculated by comparing the CPI for June 2004 (189.700) with the CPI for June 2012 (229.478), resulting in an inflation adjustment of 21.0 percent.

The amount of each civil monetary penalty was multiplied by 21.0 percent (the inflation adjustment) and the resulting increase amounts were rounded in accordance with the rounding requirements of the FCPIAA. As a result of the rounding rules in the FCPIAA, the Class I civil penalty for violations under Section 309(g) of the Clean Water Act would remain at \$11,000 per violation. The maximum penalty would increase to \$32,500. The Class I civil penalty for violations under Section 205(e) of the National Fishing Enhancement Act would remain at \$11,000 per violation, because of the rounding rules in the statute.

#### Administrative Requirements

### Plain Language

In compliance with the principles in the President's Memorandum of June 1, 1998, regarding plain language, this preamble is written using plain language. The use of "we" in this notice refers to the Corps and the use of "you" refers to the reader. We have also used the active voice, short sentences, and common everyday terms except for necessary technical terms.

### Paperwork Reduction Act

This action does not impose any new information collection burden under the provisions of the Paperwork Production Act, 44 U.S.C. 3501 et seq. This rule adjusts our civil penalty amounts to comply with the requirements of the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended. Therefore, this action is not subject to the Paperwork Reduction Act.

Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. For

the Corps regulatory program under Section 10 of the Rivers and Harbors Act of 1899, Section 404 of the Clean Water Act, and Section 103 of the Marine Protection, Research and Sanctuaries Act of 1972, the current OMB approval number for information requirements is maintained by the Corps of Engineers (OMB approval number 0710-0003).

Executive Order 12866 and Executive Order 13563, “Improving Regulation and Regulatory Review”

Under Executive Order 12866 (58 FR 51735, October 4, 1993), the Corps must determine whether the regulatory action is “significant” and therefore subject to review by the Office of Management and Budget (OMB) and the requirements of the Executive Order. The Executive Order defines “significant regulatory action” as one that is likely to result in a rule that may:

(1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or Tribal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in these Executive Orders.

Pursuant to the terms of Executive Order 12866, we have determined that this rule is not a “significant regulatory action” because it does not meet any of these four criteria. This rule adjusts the maximum Class I civil penalty amount for violations of permit conditions and limitations for activities that involve discharges of dredged or fill material into waters of the United States.

#### Executive Order 13132

Executive Order 13132, entitled “Federalism” (64 FR 43255, August 10, 1999), requires the Corps to develop an accountable process to ensure “meaningful and timely input by State and local officials in the development of regulatory policies that have Federalism implications.” The phrase “policies that have Federalism implications” is defined in the Executive Order to include regulations that have “substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.”

This rule does not have Federalism implications. We do not believe that adjusting our Class I civil penalties to account for inflation will have substantial direct effects on the States, on the relationship between the Federal government and the States, or on the distribution of power and responsibilities among the various levels of government. This rule does not impose new substantive requirements. In addition, this rule will not impose any additional substantive obligations on State or local governments since it is applicable only to permittees who violate the conditions and limitations of certain Corps permits. Therefore, Executive Order 13132 does not apply to this rule.

Regulatory Flexibility Act (RFA), as Amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), 5 U.S.C. 601 et seq.

The RFA generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice-and-comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations and small governmental jurisdictions.

For purposes of assessing the impacts of this rule on small entities, a small entity is defined as : (1) a small business based on Small Business Administration size standards; (2) a small governmental jurisdiction that is a government of a city, county, town, school district, or special district with a population of less than 50,000; or (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impacts of this rule on small entities, we believe that this action will not have a significant economic impact on a substantial number of small entities. The rule is consistent with current agency practice, does not impose new substantive requirements, and therefore would not have a significant economic impact on a substantial number of small entities.

#### Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104-4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and Tribal governments and the private sector. Under Section 202 of the UMRA, the agencies generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with “Federal mandates”

that may result in expenditures to State, local, and Tribal governments, in the aggregate, or to the private sector, of \$100 million or more in any one year. Before promulgating a rule for which a written statement is needed, section 205 of the UMRA generally requires the agencies to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows the Corps to adopt an alternative other than the least costly, most cost-effective, or least burdensome alternative if the agency publishes with the final rule an explanation why that alternative was not adopted. Before the Corps establishes any regulatory requirements that may significantly or uniquely affect small governments, including Tribal governments, they must have developed under Section 203 of the UMRA a small government agency plan. The plan must provide for notifying potentially affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of regulatory proposals with significant Federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

We have determined that this rule does not contain a Federal mandate that may result in expenditures of \$100 million or more for State, local, and Tribal governments, in the aggregate, or the private sector in any one year. This rule adjusts civil penalties in accordance with the requirements of the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended. This rule is consistent with current agency practice, does not impose new substantive requirements and therefore does not contain a Federal mandate

that may result in expenditures of \$100 million or more for State, local, and Tribal governments, in the aggregate, or the private sector in any one year. Therefore, this rule is not subject to the requirements of Sections 202 and 205 of the UMRA. For the same reasons, we have determined that this rule contains no regulatory requirements that might significantly or uniquely affect small governments. Therefore, this rule is not subject to the requirements of Section 203 of UMRA.

#### National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Pub. L. 104-113, section 12(d) (15 U.S.C. 272 note) directs us to use voluntary consensus standards in our regulatory activities, unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. The NTTAA directs us to provide Congress, through OMB, explanations when we decide not to use available and applicable voluntary consensus standards.

This rule does not involve technical standards. Therefore, we did not consider the use of any voluntary consensus standards.

#### Executive Order 13045

Executive Order 13045, “Protection of Children from Environmental Health Risks and Safety Risks” (62 FR 19885, April 23, 1997), applies to any rule that: (1) is determined to be “economically significant” as defined under Executive Order 12866, and (2) concerns an environmental health or safety risk that we have reason to believe may have a disproportionate effect on children. If the regulatory action meets both

criteria, we must evaluate the environmental health or safety effects of the rule on children, and explain why the regulation is preferable to other potentially effective and reasonably feasible alternatives.

This rule is not subject to this Executive Order because it is not economically significant as defined in Executive Order 12866. In addition, it does not concern an environmental or safety risk that we have reason to believe may have a disproportionate effect on children.

#### Executive Order 13175

Executive Order 13175, entitled “Consultation and Coordination with Indian Tribal Governments” (65 FR 67249, November 6, 2000), requires agencies to develop an accountable process to ensure “meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.” The phrase “policies that have tribal implications” is defined in the Executive Order to include regulations that have “substantial direct effects on one or more Indian tribes, on the relationship between the Federal government and the Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes.”

This rule does not have tribal implications. It will not have substantial direct effects on tribal governments, on the relationship between the Federal government and the Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes. This rule adjusts the civil penalties in 33 CFR 326.6 to account for inflation, as required by the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended. It is generally consistent with current agency practice and does not

impose new substantive requirements. Therefore, Executive Order 13175 does not apply to this rule.

#### Environmental Documentation

The Corps prepares appropriate environmental documentation, including Environmental Impact Statements when required, for all permit decisions. Therefore, environmental documentation under the National Environmental Policy Act is not required for this rule. This rule only revises our Class I civil penalties to account for inflation, as required by the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended. Appropriate environmental documentation has been, or will be, prepared for each permit action that is subject to the Class I administrative penalty process.

#### Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 et seq., as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. We will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States. A major rule cannot take effect until 60 days after it is published in the Federal Register. This rule is not a “major rule” as defined by 5 U.S.C. 804(2).

#### Executive Order 12898

Executive Order 12898 requires that, to the greatest extent practicable and permitted by law, each Federal agency must make achieving environmental justice part of

its mission. Executive Order 12898 provides that each Federal agency conduct its programs, policies, and activities that substantially affect human health or the environment in a manner that ensures that such programs, policies, and activities do not have the effect of excluding persons (including populations) from participation in, denying persons (including populations) the benefits of, or subjecting persons (including populations) to discrimination under such programs, policies, and activities because of their race, color, or national origin.

This rule is not expected to negatively impact any community, and therefore is not expected to cause any disproportionately high and adverse impacts to minority or low-income communities. This rule relates solely to the adjustments to Class I civil penalties under Section 309(g)(2)(A) of the Clean Water Act and Section 205(e) of the National Fishing Enhancement Act to account for inflation.

#### Executive Order 13211

This rule is not a “significant energy action” as defined in Executive Order 13211, “Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use” (66 FR 28355, May 22, 2001) because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. This rule relates only to the adjustments to Class I civil penalties under Section 309(g)(2)(A) of the Clean Water Act and Section 205(e) of the National Fishing Enhancement Act to account for inflation. This rule is consistent with current agency practice, does not impose new substantive requirements, and therefore will not have a significant adverse effect on the supply, distribution, or use of energy.

#### List of Subjects in 33 CFR Part 326

Administrative practice and procedure, Intergovernmental relations,  
Investigations, Law enforcement, Navigation (Water), Water pollution control,  
Waterways.

Date: January 22, 2013

Approved by: \_\_\_\_\_

Jo-Ellen Darcy

Assistant Secretary of the Army

(Civil Works)

For the reasons set forth in the preamble, the Corps amends 33 CFR part 326 as follows:

PART 326--Enforcement

1. The authority citation for 33 CFR part 326 continues to read as follows:

Authority: 33 U.S.C. 401 et seq.; 33 U.S.C. 1344; 33 U.S.C. 1413; 33 U.S.C. 2104; 33 U.S.C. 1319; 28 U.S.C. 2461 note.

2. Amend § 326.6 by revising paragraph (a)(1) to read as follows:

§ 326.6 Class I administrative penalties.

(a) Introduction. (1) This section sets forth procedures for initiation and administration of Class I administrative penalty orders under Section 309(g) of the Clean Water Act, and Section 205 of the National Fishing Enhancement Act. Under Section 309(g)(2)(A) of the Clean Water Act, Class I civil penalties may not exceed \$11,000 per violation, except that the maximum amount of any Class I civil penalty shall not exceed

\$32,500. Under Section 205(e) of the National Fishing Enhancement Act, penalties for violations of permits issued in accordance with that Act shall not exceed \$11,000 for each violation.

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