



## DEPARTMENT OF TRANSPORTATION

### Saint Lawrence Seaway Development Corporation

#### 33 CFR Part 401

#### RIN 2135-40

#### Civil Penalties

**AGENCY:** Saint Lawrence Seaway Development Corporation (SLSDC), Department of Transportation (DOT).

**ACTION:** Interim Final Rule.

**SUMMARY:** This interim final rule updates the maximum civil penalty amounts for violations of statutes and regulations administered by SLSDC pursuant to the Federal Civil Penalties Inflation Adjustment Improvement Act of 2015. This final rule amends our regulations to reflect the new civil penalty amounts for violations of the Seaway Regulations and Rules under the authority of the Ports and Waterways Safety Act of 1972, as amended (PWSA).

**DATES:** *Effective date:* This rule is effective [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**FOR FURTHER INFORMATION CONTACT:** Carrie Lavigne, Chief Counsel, SLSDC, telephone (315) 764-3231, 180 Andrews Street, Massena, NY 13362.

#### **SUPPLEMENTARY INFORMATION:**

##### **I. Background**

On November 2, 2015, the Federal Civil Penalties Inflation Adjustment Improvement Act (the 2015 Act), Pub. L. 114-74, Section 701, was signed into law. The purpose of the 2015 Act is to improve the effectiveness of civil monetary penalties and to maintain their deterrent

effect. The 2015 Act requires agencies to make an initial catch up adjustment to the civil monetary penalties they administer through an interim final rule and then to make subsequent annual adjustments for inflation. The amount of increase of any adjustment to a civil penalty pursuant to the 2015 Act is limited to 150 percent of the current penalty. Agencies are required to issue the interim final rule with the initial catch up adjustment by July 1, 2016.

The method of calculating inflationary adjustments in the 2015 Act differs substantially from the methods used in past inflationary adjustment rulemakings conducted pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990 (the Inflation Adjustment Act), Pub. L. 101-410. Previously, adjustments to civil penalties were conducted under rules that required significant rounding of figures. For example, a penalty increase that was greater than \$1,000, but less than or equal to \$10,000, would be rounded to the nearest multiple of \$1,000. While this allowed penalties to be kept at round numbers, it meant that penalties would often not be increased at all if the inflation factor was not large enough. Furthermore, increases to penalties were capped at 10 percent. Over time, this formula caused penalties to lose value relative to total inflation.

The 2015 Act has removed these rounding rules; now, penalties are simply rounded to the nearest \$1. While this creates penalty values that are no longer round numbers, it does ensure that penalties will be increased each year to a figure commensurate with the actual calculated inflation. Furthermore, the 2015 Act “resets” the inflation calculations by excluding prior inflationary adjustments under the Inflation Adjustment Act, which contributed to a decline in the real value of penalty levels. To do this, the 2015 Act requires agencies to identify, for each penalty, the year and corresponding amount(s) for which the maximum penalty level or range of

minimum and maximum penalties was established (i.e., originally enacted by Congress) or last adjusted by statute or regulation other than pursuant to the Inflation Adjustment Act.

The Director of the Office of Management and Budget (OMB) provided guidance to agencies in a February 24, 2016 memorandum on how to calculate the initial adjustment required by the 2015 Act.<sup>1</sup> The initial catch up adjustment is based on the change between the Consumer Price Index for all Urban Consumers (CPI-U) for the month of October in the year the penalty amount was established or last adjusted by Congress and the October 2015 CPI-U. The February 24, 2016 memorandum contains a table with a multiplier for the change in CPI-U from the year the penalty was established or last adjusted to 2015. To arrive at the adjusted penalty the agency must multiply the penalty amount when it was established or last adjusted by Congress, excluding adjustments under the Inflation Adjustment Act, by the multiplier for the increase in CPI-U from the year the penalty was established or adjusted provided in the February 24, 2016 memorandum. The 2015 Act limits the initial inflationary adjustment to 150 percent of the current penalty. To determine whether the increase in the adjusted penalty is less than 150 percent, the agency must multiply the current penalty by 250 percent. The adjusted penalty is the lesser of either the adjusted penalty based on the multiplier for CPI-U in Table A of the February 24, 2016 memorandum or an amount equal to 250 percent of the current penalty. This interim final rule adjusts the civil penalties for violations of statutes and regulations that SLSDC administers consistent with the February 24, 2016 memorandum.

## **II. Inflationary Adjustments to Penalty Amounts in 33 CFR Part 401**

The Ports and Waterways Act of 1972, as amended by the Ports and Tanker Safety Act, Pub. L. 95-474, sec. 2, Oct. 17, 1978, 92 Stat. 1471 (1978), established a maximum civil penalty of

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<sup>1</sup> Memorandum from the Director of OMB to Heads of Executive Departments and Agencies, Implementation of the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (Feb. 24, 2016), *available at* [www.whitehouse.gov/sites/default/files/omb/memoranda/2016/m-16-06.pdf](http://www.whitehouse.gov/sites/default/files/omb/memoranda/2016/m-16-06.pdf).

\$25,000 for each violation of the Seaway Rules and Regulations at 33 CFR Part 401. This civil penalty has not been updated since it was established, except for inflationary adjustments pursuant to the Inflation Adjustment Act of 1990. Applying the multiplier for the increase in CPI-U for 1978 in Table A of the February 24, 2016 memorandum (3.54453) results in an adjusted civil penalty of \$88,613, which is below the 150 percent cap Accordingly, paragraph (a) of § 401.102 is being amended to change the amount of the penalty to \$88,613.

### **Public Comment**

SLSDC is promulgating this interim final rule to ensure that the civil penalties amount contained in 33 CFR 401.102 reflects the statutorily mandated ranges as adjusted for inflation. Pursuant to the 2015 Act, SLSDC is required to promulgate a “catch-up adjustment” through an interim final rule. Pursuant to the 2015 Act and 5 U.S.C. 553(b)(3)(B), SLSDC finds that good cause exists for immediate implementation of this interim final rule without prior notice and comment because it would be impracticable to delay publication of this rule for notice and comment and because public comment is unnecessary. By operation of the Act, SLSDC must publish the catch-up adjustment by interim final rule by July 1, 2016. Additionally, the 2015 Act provides a clear formula for adjustment of the civil penalties, leaving the agency little room for discretion. For these reasons, SLSDC finds that notice and comment would be impracticable and is unnecessary in this situation.

### **III. Rulemaking Analyses and Notices**

#### **Executive Order 12866, Executive Order 13563, and DOT Regulatory Policies and Procedures**

SLSDC has considered the impact of this rulemaking action under Executive Order 12866, Executive Order 13563, and the Department of Transportation’s regulatory policies and

procedures. This rulemaking document was not reviewed under Executive Order 12866 or Executive Order 13563. This action is limited to the adoption of adjustments of civil penalties under statutes that the agency enforces, and has been determined to be not “significant” under the Department of Transportation’s regulatory policies and procedures and the policies of the Office of Management and Budget. Because this rulemaking does not change the number of entities that are subject to civil penalties, the impacts are limited.

We also do not expect the increase in the civil penalty amount in 33 CFR 401.102 to be economically significant. Since January 1, 2010 to the present, the SLSDC assessed a total of approximately \$27,000 in civil fines and penalties. Thus, increasing the current civil penalty amount would not result in an annual effect on the economy of \$100 million or more.

#### **Regulatory Flexibility Act**

We have also considered the impacts of this rule under the Regulatory Flexibility Act. I certify that this rule will not have a significant economic impact on a substantial number of small entities. The following provides the factual basis for this certification under 5 U.S.C. 605(b). The St. Lawrence Seaway Regulations and Rules primarily relate to the activities of commercial users of the Seaway, the vast majority of whom are foreign vessel operators. Therefore, any resulting costs will be borne mostly by foreign vessels.

#### **Executive Order 13132 (Federalism)**

Executive Order 13132 requires SLSDC 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.” “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.” Under Executive Order 13132, the agency may not issue a regulation with Federalism implications, that imposes substantial direct compliance costs, and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by State and local governments, the agency consults with State and local governments, or the agency consults with State and local officials early in the process of developing the proposed regulation.

This rule will not 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, as specified in Executive Order 13132.

The reason is that this rule will generally apply to commercial users of the Seaway, the vast majority of whom are foreign vessel operators. Therefore, any resulting costs will be borne mostly by foreign vessels. Thus, the requirements of Section 6 of the Executive Order do not apply.

#### **Unfunded Mandates Reform Act of 1995**

The Unfunded Mandates Reform Act of 1995, Public Law 104-4, requires agencies to prepare a written assessment of the cost, benefits and other effects of proposed or final rules that include a Federal mandate likely to result in the expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of more than \$100 million annually. Because this rule will not have a \$100 million effect, no Unfunded Mandates assessment will be prepared.

#### **Executive Order 12778 (Civil Justice Reform)**

This rule does not have a retroactive or preemptive effect. Judicial review of a rule may be obtained pursuant to 5 U.S.C. 702. That section does not require that a petition for reconsideration be filed prior to seeking judicial review.

### **Paperwork Reduction Act**

In accordance with the Paperwork Reduction Act of 1980, we state that there are no requirements for information collection associated with this rulemaking action.

### **Privacy Act**

Please note that anyone is able to search the electronic form of all comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the Federal Register published on April 11, 2000 (Volume 65, Number 70; Pages 19477-78), or you may visit <http://dms.dot.gov>.

### **List of Subjects in 33 CFR Part 401**

Hazardous materials transportation, Navigation (water), Penalties, Radio, Reporting and recordkeeping requirements, Vessels, Waterways.

Accordingly, the Saint Lawrence Seaway Development Corporation is amending 33 CFR Part 401 as follows:

## **PART 401 – SEAWAY REGULATIONS AND RULES**

### **Subpart A – Regulations**

1. The authority citation for subpart A of part 401 is revised to read as follows:

**Authority:** 33 U.S.C. 981-990, 1231 and 1232, 49 CFR 1.52, unless otherwise noted.

2. In § 401.102, paragraph (a) is revised to read as follows:

**§ 401.102 Civil penalty.**

(a) A person, as described in § 401.101(b) who violates a regulation is liable to a civil penalty of not more than \$88,613.

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Issued on June 22, 2016

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Carrie Lavigne  
Chief Counsel

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