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Case No. 11-31117

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA, on behalf of Administrator of Environmental Protection Agency,
Plaintiff - Appellant-Cross-Appellee

STATE OF LOUISIANA, on behalf of Louisiana Department of Environmental Quality,
Plaintiff - Cross-Appellee

v.

CITGO PETROLEUM CORPORATION,
Defendant - Appellee-Cross-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA

RESPONSE AND REPLY BRIEF OF THE UNITED STATES

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CERTIFICATE OF INTERESTED PERSONS

In Case No. 11-31117, *United States of America et al. v. CITGO Petroleum Corp.*, the undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of 5th Cir. Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Parties: United States of America (on behalf of the U.S. Environmental Protection Agency); State of Louisiana (on behalf of the Louisiana Department of Environmental Quality); CITGO Petroleum Corporation.

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RESPONSE BRIEF OF THE UNITED STATES TO CITGO'S CROSS-APPEAL

JURISDICTION

In its cross-appeal, CITGO argues that the district court "lacked subject-matter jurisdiction over this case." Br. 1. As shown *infra* at 4-14, CITGO's jurisdictional argument is wrong. The district court possessed subject-matter jurisdiction over the United States' claims under (*inter alia*) 28 U.S.C. §1331. This Court's jurisdiction over CITGO's timely-filed cross-appeal rests on 28 U.S.C. §1291.

STATEMENT OF THE ISSUE

CITGO seeks reversal of the $6 million civil penalty on the sole ground that the district court lacked subject-matter jurisdiction over the United States' penalty claim. CITGO relies on CWA Section 309(g)(6)(A), 33 U.S.C. §1319(g)(6)(A), which provides in relevant part:

> [A]ny violation – * * * (ii) with respect to which a State has commenced and is diligently prosecuting an action under a State law comparable to this subsection * * * shall not be the subject of a civil penalty action under * * * section 1321(b) of this title.

The issue presented by CITGO's cross-appeal is:

Whether the "diligent prosecution" provision in 33 U.S.C. §1319(g)(6)(A)(ii) is implicated in this case; and even if it is, whether the provision is jurisdictional and bars the United States' claim for a civil penalty here.

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STATEMENT OF THE CASE

On March 15, 2011, CITGO filed a motion to dismiss the United States' claims for a civil penalty and for injunctive relief, arguing that the district court lacked subject-matter jurisdiction over those claims. USCA5 7000-7009. The legal premise of CITGO's motion was that the "diligent prosecution" provision in 33 U.S.C. §1319(g)(6)(A)(ii), quoted above, is jurisdictional. USCA5 7000.

On March 21, 2011, the first day of the bench trial, the district court summarily denied CITGO's motion on the record (USCA5 7935:18-20) and issued a minute order memorializing that ruling (USCA5 7197). In its cross-appeal, CITGO effectively concedes (Br. 34 n.5) that the court possessed jurisdiction to issue the injunctive relief that was ultimately ordered, but argues that the court lacked jurisdiction to issue a civil penalty, and seeks reversal of the $6 million penalty solely on that ground.[1/]

STATEMENT OF FACTS

On June 24, 2008, the United States and the State of Louisiana (on behalf of the Louisiana Department of Environmental Quality (LDEQ)) filed the instant complaint

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[1/] CITGO has waived any alternative argument for reversal of the $6 million penalty by failing to raise such arguments in its opening brief. *E.g.*, *In re Katrina Canal Breaches Litig.*, 620 F.3d 455, 459 n.3 (5th Cir. 2010); *United States v. Jackson*, 426 F.3d 301, 304 n.2 (5th Cir. 2005) (per curiam).

as co-plaintiffs against CITGO in the United States District Court for the Western District of Louisiana. USCA5 40-51. The complaint arose from the June 2006 oil spill at CITGO's Lake Charles refinery. In Claims 1 and 2, the United States sought a civil penalty and injunctive relief under the CWA. USCA5 45-47(¶¶28-40). In Claims 3 and 4, LDEQ sought a civil penalty and recovery of response costs under state law. USCA5 47-49(¶¶41-48).

On March 15, 2011, CITGO filed a motion to dismiss the United States' claims, arguing that the district court lacked subject-matter jurisdiction over the government's civil penalty claim by virtue of the "diligent prosecution" provision in 33 U.S.C. §1319(g)(6)(A)(ii). USCA5 7000-7009. As noted *supra* at 2, the district court summarily denied CITGO's motion on the first day of trial.

STANDARD OF REVIEW

A district court's ruling on a motion to dismiss for lack of subject-matter jurisdiction is reviewed *de novo*. *In re Eckstein Marine Serv., L.L.C.*, 672 F.3d 310, 314 (5th Cir. 2012).

SUMMARY OF ARGUMENT

CITGO's cross-appeal lacks merit. The district court possessed subject-matter jurisdiction over the United States' civil penalty claim. However characterized, §1319(g)(6)(A)(ii) is not implicated here because LDEQ was as a factual matter not

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diligently prosecuting oil-spill claims against CITGO in an administrative proceeding when the United States filed its civil penalty claim in the district court. In any event, CITGO's characterization of this provision as "jurisdictional" is contrary to this Court's decision in *Louisiana Environmental Action Network v. City of Baton Rouge*, 677 F.3d 737 (5th Cir. 2012) (per curiam) (hereafter "*LEAN*"), which held that another similar CWA "diligent prosecution" provision is *not* jurisdictional. Under *LEAN* – which CITGO's principal brief does not address at all – the "diligent prosecution" provision in §1319(g)(6)(A)(ii) is likewise not jurisdictional, and the "time-of-filing" rule on which CITGO relies is therefore inapplicable here.

Alternatively, even if this provision were jurisdictional and barred the United States' civil penalty claim, any arguable "jurisdictional" issue could have been readily resolved by the United States' refiling its claim and proceeding to trial.

ARGUMENT

THE "DILIGENT PROSECUTION" PROVISION IN 33 U.S.C. §1319(g)(6)(A)(ii) IS NOT IMPLICATED HERE AND IS A NON-JURISDICTIONAL PROVISION THAT DID NOT BAR THE UNITED STATES' CLAIM FOR A CIVIL PENALTY IN THIS CASE

In its cross-appeal, CITGO argues (Br. 29-40) that: (i) the "diligent prosecution" provision in 33 U.S.C. §1319(g)(6)(A)(ii) is jurisdictional and therefore the "time-of-filing" rule applies – that is, the district court must have jurisdiction when

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the United States filed its civil penalty claim and subsequent events cannot cure a jurisdictional defect; (ii) when the United States filed its civil penalty claim, LDEQ was diligently prosecuting an administrative civil penalty claim for this oil spill under state law, and the fact that LDEQ dismissed those claims later is irrelevant; and (iii) LDEQ's claims in the federal district court are sufficient to trigger §1319(g)(6)(A)(ii). As shown below, CITGO's contentions are wrong.

A. **However characterized, §1319(g)(6)(A)(ii) is not implicated here because LDEQ was not diligently prosecuting oil-spill claims in an administrative proceeding when the United States filed its civil penalty claim in district court.**

Whether or not §1319(g)(6)(A)(ii) is characterized as jurisdictional, it is not implicated unless, as the statutory text provides, the State "has commenced and is diligently prosecuting" an administrative action. *See McAbee v. City of Ft. Payne*, 318 F.3d 1248, 1251 (11th Cir. 2003) ("diligent prosecution" requires not only commencement of an administrative action but also evidence that State was diligently prosecuting that action). Contrary to CITGO's argument (Br. 34-36), LDEQ was not diligently prosecuting oil-spill claims in an administrative action when the United States filed its claim for a CWA civil penalty in the district court.

CITGO baldly states (Br. 36): "the record conclusively establishes that when this suit was commenced, LDEQ was diligently prosecuting its claims * * * * which

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culminated in a Louisiana Administrative Action." *See also* Br. 6-7. However, that assertion is factually incorrect. CITGO cites only "R. 7012" (Br. 36), which is simply the first page of an administrative complaint filed by LDEQ against CITGO on April 9, 2007. USCA5 7012-7034 (Consolidated Compliance Order & Notice of Potential Penalty). While it is true that LDEQ filed this administrative complaint before June 24, 2008 (the date on which the United States filed its civil penalty claim in district court), CITGO's bare citation merely establishes that LDEQ had *commenced* an administrative proceeding some 14 months before June 24, 2008. CITGO's record citation does *not* speak to whether, much less establish that, LDEQ was *diligently prosecuting* an administrative proceeding as of that date. *See McAbee*, 318 F.3d at 1251.

In fact, LDEQ filed an amended administrative complaint on July 22, 2008. USCA5 7035-7041 (Amended Consolidated Compliance Order & Notice of Potential Penalty). Paragraph XV of the amended complaint states: "Paragraphs III, IV, and IX above will be addressed through the federal complaint, United States of America and State of Louisiana v. CITGO Petroleum Corporation, civil case no. 2:08-cv-893 (W.D. La.)." USCA5 7040. CITGO points to nothing in the record establishing that LDEQ diligently prosecuted the administrative action between April 9, 2007 (when LDEQ filed the original complaint) and July 22, 2008 (when LDEQ dismissed the oil-spill

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portion thereof).

Moreover, as the foregoing demonstrates, LDEQ elected to diligently prosecute its oil-spill claims as a co-plaintiff with the United States in the federal case, rather than in a state administrative action. Under the CWA, a federal court's "deference to the [state] agency's plan of attack should be particularly favored." *North & South Rivers Watershed Ass'n v. Town of Scituate*, 949 F.2d 552, 557 (1st Cir. 1991).

The record also reflects that, well before the federal complaint was filed, LDEQ had decided not to prosecute (diligently or otherwise) its original April 2007 administrative complaint. An internal LDEQ memorandum dated June 26, 2008 explains that, between April and June 2007, CITGO and LDEQ had entered into "dispute resolution discussions" respecting the original administrative complaint. USCA5 7180. Then, "[s]ettlement discussions were put on hold because of an investigation by the EPA Criminal Investigation Division." *Id.* Settlement discussions that have been put "on hold" plainly do not amount to "diligent prosecution" of administrative claims. CITGO cites nothing in the record showing that LDEQ diligently prosecuted the administrative complaint during the time period after the settlement discussions were put "on hold" in June 2007 and the filing of the federal complaint in June 2008.

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The LDEQ memorandum further states that "[t]he Department of Justice along with LDEQ has filed a federal complaint in the Western District of Louisiana, Lafayette Division, on June 23 [*recte* 24], 2008 on paragraphs III, IV and IX of the [original administrative complaint]," and states that LDEQ is requesting its Secretary to grant an administrative hearing "on all paragraphs * * * *except paragraphs III, IV and IX*." *Id.* (emphasis in original).

In short, CITGO's argument that "when this suit was commenced, LDEQ was diligently prosecuting its claims" in an administrative action (Br. 36) is wholly contrary to the record.

B. <u>CITGO errs in labeling §1319(g)(6)(A)(ii) as "jurisdictional."</u>

In any event, under this Court's decision in *LEAN*, §1319(g)(6)(A)(ii) is not a "jurisdictional" provision. Accordingly, the "time-of-filing" rule associated with jurisdiction relied on by CITGO (Br. 30) does not apply here, and any arguable issue was resolved by LDEQ's dismissal of its oil-spill administrative claims after the federal case was filed.

In *LEAN*, this Court stated a "'readily administrable bright line' rule": "A provision is jurisdictional '[i]f the Legislature *clearly states* that a threshold limitation on a statute's scope shall count as jurisdictional.'" 677 F.3d at 747 (quoting *Arbaugh*

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v. Y & H Corp., 546 U.S. 500, 515-16 (2006)) (emphasis added by *LEAN*).[2/]

Under this general clear-statement rule, the "diligent prosecution" provision in §1319(g)(6)(A)(ii) is not jurisdictional. In the statutory text, quoted *supra* at 1, Congress did *not* clearly state that this provision "shall count as jurisdictional." *LEAN*, 677 F.3d at 747. Rather, this provision simply describes CWA violations that "shall not be the subject of a civil penalty action" in specified circumstances. 33 U.S.C. §1319(g)(6)(A). That is, the "diligent prosecution" language establishes a claims-processing rule, but the text does *not* clearly state that the provision, if it applies, deprives courts of subject-matter jurisdiction to hear such claims.

This conclusion is virtually compelled by the rationale of *LEAN*, which held that "the CWA's 'diligent prosecution' provision is *nonjurisdictional*." 677 F.3d at 749 (emphasis added). *LEAN* involved a similar CWA "diligent prosecution" provision, 33 U.S.C. §1365(b)(1)(B), which addresses when citizen suits may be "commenced" in federal district court. *LEAN* held that "[t]he language of §1365(b)(1)(B) does not 'clearly state[ ]' that the 'diligent prosecution' bar is jurisdictional." 677 F.3d at 748 (quoting *Arbaugh*, 546 U.S. at 515). As shown, the

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[2/] There are practical reasons why, absent a clear statement from Congress, the courts should not characterize a provision as "jurisdictional." "'Objections to subject-matter jurisdiction . . . may be raised at any time,' such as after trial, which can result in the waste of 'many months of work on the part of attorneys and the court.'" *Id.* (quoting *Henderson v. Shinseki*, 131 S. Ct. 1197, 1202 (2011)).

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same is true of §1319(g)(6)(A)(ii).

LEAN forecloses CITGO's jurisdictional argument in other respects as well. Regarding §1365(b)(1)(B), *LEAN* concluded that "[t]he placement of the 'diligent prosecution' provision within the CWA also does not indicate that Congress 'wanted [the] provision to be treated as having jurisdictional attributes.'" 677 F.3d at 748 (quoting *Henderson*, 131 S. Ct. at 1205). That is true here too.

Nothing in the placement of the §1319(g)(6)(A)(ii) "diligent prosecution" provision suggests that Congress intended it to be jurisdictional. Rather, §1319(g)(6)(A) is placed next to §1319(g)(6)(B), which is the only other subsection in §1319(g)(6). Subsection (B) addresses the applicability of the limitations in subsection (A) to citizen suits; and *LEAN* teaches that "diligent prosecution" is *not* a jurisdictional limitation on citizen suits. 677 F.3d at 749.

LEAN also noted that the "diligent prosecution" provision in §1365(b)(1)(B) is "located in a provision 'separate' from those granting federal courts subject-matter jurisdiction over . . . [the] claims." *Id.* at 748 (quoting *Reed Elsevier, Inc. v. Muchnick*, 130 S. Ct. 1237, 1245-46 (2010) (ellipsis and bracketed material added by *LEAN*)). Likewise, the "diligent prosecution" provision in §1319(g)(6)(A)(ii) is located separate from provisions granting the district courts subject-matter jurisdiction over claims by the United States for a civil penalty. Such jurisdiction is vested by

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28 U.S.C. §1331 (federal question), 28 U.S.C. §1345 (United States as plaintiff), and 33 U.S.C. §1321(b)(7)(E) (CWA actions to impose a civil penalty for an oil spill). As in *LEAN*, none of those provisions "ties its jurisdictional grant to the issue of diligent prosecution." 677 F.3d at 748.

Finally, *LEAN* inquired whether the Supreme Court historically treated the "diligent prosecution" provision in §1365(b)(1)(B) as jurisdictional. *Id.* *LEAN* answered that question in the negative, and in terms fully applicable to the "diligent prosecution" provision in §1319(g)(6)(A)(ii): "No Supreme Court cases have determined that the 'diligent prosecution' provision of the CWA, or any similar provision in other environmental statutes, is jurisdictional." *Id.*

In sum, *LEAN* forecloses CITGO's argument (Br. 33) that, if triggered, the "diligent prosecution" provision in 33 U.S.C. §1319(g)(6)(A)(ii) "operates as a jurisdictional bar" on a district court's authority to award the United States a civil penalty arising from an oil spill.

C. <u>CITGO cites no authority for its jurisdictional argument.</u>

Surprisingly, CITGO's principal brief does not address *LEAN* at all. However, CITGO does cite this Court's decision in *Lockett v. EPA*, 319 F.3d 678 (5th Cir. 2003); but *Lockett*, if anything, *undermines* CITGO's jurisdictional argument. *Lockett* concluded that the notice-of-intent-to-sue requirement in the CWA citizen-suit

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provision is *not* jurisdictional. *Id.* at 682-83. For the reasons discussed in the previous section, under *LEAN*, the "diligent prosecution" provision in §1319(g)(6)(A)(ii) is not jurisdictional either.

None of the other cases cited by CITGO for its jurisdictional argument is a decision of this Court, and none supports CITGO's argument in any event. Although CITGO discusses (Br. 33-34) *City of Newburgh v. Sarna*, 690 F. Supp. 2d 136 (S.D.N.Y. 2010), *Sarna* did not hold that the "diligent prosecution" provision in §1319(g)(6)(A)(ii) is a "jurisdictional bar." That issue was not presented in *Sarna*; rather, the question was whether the notice-of-intent-to-sue requirement in the CWA citizen-suit provision is jurisdictional. 690 F. Supp. 2d at 151-53. *Sarna* did "not think it necessary to take a position" on that issue. *Id.* at 152. And as just discussed, *Lockett* answered that question in the *negative*.

CITGO also cites (Br. 33 n.5, 34 n.6) decisions of the Eighth and Tenth Circuits, but neither holds that the "diligent prosecution" provision in §1319(g)(6)(A)(ii) is a "jurisdictional bar." In *Arkansas Wildlife Fed'n v. ICI Americas, Inc.*, 29 F.3d 376 (8th Cir. 1994), the court of appeals decided only whether "the district court correctly applied the criteria set forth in 33 U.S.C. §1319(g)(6)(A)(ii) to the facts of the present case." *Id.* at 379. In *Paper, Allied-Industrial, Chemical & Energy Workers Int'l Union v. Continental Carbon Co.*,

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428 F.3d 1285 (10th Cir. 2005), the court of appeals described §1319(g)(6)(A)(ii) as containing a "jurisdictional bar, " but provided no analysis for that characterization. *Id.* at 1297. In any event, nothing in the court's decision turned on whether that characterization is correct. *See id.* at 1292 (addressing, *inter alia*, whether §1319(g)(6)(A)(ii) "applies to claims for declaratory and injunctive relief").

Moreover, to the extent that *Arkansas Wildlife*, *Continental Carbon*, or district court decisions CITGO cites in a footnote (Br. 33 n.4) purport to hold that the "diligent prosecution" provision in §1319(g)(6)(A)(ii) is jurisdictional, such holdings are the sort of "drive-by jurisdictional rulings" that *LEAN* admonished are to be "afforded 'no precedential effect' on whether the 'diligent prosecution' bar is jurisdictional." 677 F.3d at 746 & n.3.

CITGO is also wrong in arguing (Br. 37-39) that LDEQ's decision to diligently prosecute its claims under state law against CITGO *as a co-plaintiff with the United States in the federal district court* deprived that court of jurisdiction to hear the United States' civil penalty claim. CITGO's argument is wrong because the "diligent prosecution" provision in 33 U.S.C. §1319(g)(6)(A)(ii) is triggered only by an action brought by a State in an *administrative*, not a judicial, forum.

The statutory text itself makes clear this important distinction: it speaks in terms of a State's diligent prosecution of "an action under a State law comparable *to this*

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subsection." *Id.* (emphasis added). By "this subsection," the statute plainly refers to §1319(g), which is entitled "Administrative penalties" and authorizes the U.S. Environmental Protection Agency to assess civil penalties for certain CWA violations in an *administrative* proceeding conducted by the agency. *See id.* §1319(g)(1)-(5). Another CWA provision grants federal *courts* jurisdiction over "[a]n action to impose a civil penalty" for an oil spill. *Id.* §1321(b)(7)(E).

Because §1319(g) is a provision that authorizes EPA to impose *administrative* penalties for violations of the CWA, a state law "comparable to" §1319(g) is one that authorizes a state agency to impose *administrative* penalties for violations of state clean-water laws. As this Court has explained, by amending the CWA in 1987 to include §1319(g)(6), Congress "added a separate provision explicitly granting preclusive effect to certain *administrative* penalty actions." *Texans United For a Safe Econ. Educ. Fund v. Crown Cent. Petroleum Corp.*, 207 F.3d 789, 795 n.8 (5th Cir. 2000) (emphasis added). CITGO cites no authority for its overbroad view that §1319(g)(6) is also triggered by penalty actions that are diligently prosecuted by a State in a *judicial* forum, and the case law is to the contrary.[3]

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[3] *See, e.g.*, *Black Warrior Riverkeeper, Inc. v. Cherokee Mining, LLC*, 548 F.3d 986, 988 (11th Cir. 2008) (§1319(g) bars citizen suits "when the federal government or a state agency had commenced an enforcement action through the new *administrative penalties* process") (emphasis added); *Citizens For a Better Env't-Cal.*

(continued...)

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D. Even if this "diligent prosecution" provision were jurisdictional and barred the United States' civil penalty claim, the government would have simply refiled its claim.

Alternatively, even if – contrary to *LEAN* – the "diligent prosecution" in §1319(g)(6)(A)(ii) were jurisdictional and even if – contrary to the record – LDEQ had been diligently prosecuting an administrative action against CITGO when the federal complaint was filed, any arguable "jurisdictional" issue could have been readily resolved by the United States' refiling of its civil penalty claim.

Supposing that the district court had granted CITGO's motion to dismiss in March 2011 (when the motion was filed): because the five-year statute of limitations had not run at that time, 28 U.S.C. §2462, and because (as CITGO concedes, Br. 7) LDEQ was not prosecuting oil-spill claims in an administrative forum at that time, the United States would have simply refiled its penalty claim forthwith and proceeded to trial.

[3/](...continued)
v. Union Oil Co. of Cal., 83 F.3d 1111, 1117 (9th Cir. 1996) (§1319(g) "deals only with administrative penalty actions"); *United States v. Smithfield Foods, Inc.*, 965 F. Supp. 769, 792 (E.D. Va. 1997) (state law is "only comparable to Section 309(g), if it *authorizes* the state to assess *administrative penalties*") (collecting cases; emphasis in original), *aff'd in rel. part*, 191 F.3d 516, 526 (4th Cir. 1999).

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REPLY BRIEF OF THE UNITED STATES AS APPELLANT

SUMMARY OF ARGUMENT

The district court abused its discretion in multiple ways when it awarded the United States a meager penalty of $6 million, a negligible amount for a multibillion-dollar company like CITGO and a mere 10% of the maximum the court could have awarded (even assuming that its no-gross-negligence finding is supported by the record). A significantly higher penalty is justified under the district court's own factual analysis, in which the court found CITGO to have caused a "massive" oil spill that resulted in a "catastrophe," determined the spill was caused by CITGO's negligence, concluded that CITGO had a long history of violations at the Lake Charles refinery, and found that CITGO's "initial response" to the spill was "lacking" in critical respects, *inter alia*, because "the Coast Guard was not properly and fully informed, and the spill was not adequately contained." Those findings alone required that a reasonable penalty be higher than the low-end award ultimately issued.

In addition, however, the district court erred in failing to use a discernible method for calculating a penalty and in failing to make a reasonable approximation of the economic benefit reaped by CITGO from its violation. And finally, the court's findings that CITGO was not grossly negligent and that no more than 54,000 barrels of oil entered waterways are contradicted by the record and are clearly erroneous,

rendering the court's penalty award an abuse of discretion for that reason alone. Indeed, the court's opinion itself creates substantial confusion as to whether the court applied the proper legal standard in rejecting a finding of gross negligence. Accordingly, the penalty should be vacated and the case remanded to the district court for further consideration of an appropriate penalty.

ARGUMENT

A. CITGO's citation to civil penalties in other cases only further establishes that the district court's $6 million penalty was unreasonably low and an abuse of discretion.

As shown in our principal brief (at 29-41), the egregious facts of this case, including many of the district court's own factual findings, demonstrate that the court's $6 million penalty is unreasonable and inadequate, even accepting *arguendo* the court's finding that this massive oil spill was the result of CITGO's ordinary (but not gross) negligence.[4] The court's penalty is based on a low penalty rate of $111/barrel, which is only 10% of the maximum permitted by CWA Section 311(b), 33 U.S.C. §1321(b), in non-gross-negligence cases ($1,100/barrel) at the time of the June 2006 oil spill. U.S. Principal Br. 7.

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[4] Before and after trial, CITGO recommended that the court issue a penalty of approximately $6 million. USCA5 6480 (pre-trial recommendation of $5.85 million); USCA5 7253 (post-trial recommendation of $5.94 million).

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Seeking to defend the $6 million penalty (assuming its cross-appeal is rejected), CITGO argues (Br. 41-42) that "CWA jurisprudence shows that appellate courts routinely affirm civil penalties constituting a fraction of the statutory maximum even in the face of egregious facts not present here." CITGO, however, misunderstands the basis of the penalties imposed in the cases it cites.

As CITGO notes (Br. 43), apart from the present case, *United States v. Egan Marine Corp.*, 2011 WL 8144393 (N.D. Ill. Oct. 13, 2011), is the only other case where a court issued a civil penalty for an oil spill under the penalty factors in 33 U.S.C. §1321(b)(8). *Egan Marine* issued a penalty slightly *over 89% of the statutory maximum*. *Id.* at *6-*7 (finding $112,000 to be the "maximum available penalty" and issuing a penalty of $100,000). CITGO incorrectly states (Br. 43), without explanation, that the penalty in *Egan Marine* was "just 3%" of the statutory maximum.

Furthermore, *Egan Marine* issued a penalty slightly over 89% of the statutory maximum even though the court held the defendant responsible for the discharge of oil on the basis of strict liability – not, as the district court did here, on the basis of the defendant's negligence, which is an obviously greater degree of culpability compared to strict liability. *Id.* at *5, *7. Thus, if anything, *Egan Marine* supports the government's contention that the district court's low 10%-of-maximum penalty here

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represents an abuse of discretion.

CITGO also relies on (Br. 42) *Sierra Club v. Cedar Point Oil Co.*, 73 F.3d 546 (5th Cir. 1996), but misconstrues the basis for the low penalty upheld by the Court in that case. The district court in *Cedar Point* issued a penalty of $186,070 for the defendant's unpermitted discharges of "produced water" in violation of the CWA; that penalty was under 1% of the statutory maximum. 73 F.3d at 550, 573-74. However, CITGO ignores that the $186,070 penalty (i) did represent the *full* economic benefit to the defendant of its CWA violation, which was only "moderately serious," and (ii) was based in part on a determination of the amount the defendant could afford to pay given its financial position and expected future profits. *Id.* at 574.

None of those considerations supports the district court's low penalty here. Unlike *Cedar Point*, this case involves far more than a "moderately serious" CWA violation – we are dealing here with what the district court correctly found to be a "massive," catastrophic oil spill. USCA5 10825, 10834. Unlike the court in *Cedar Point*, moreover, the district court here was not in a position to know whether the $6 million penalty recaptures 100% of CITGO's economic benefit because the court erroneously failed to make a reasonable approximation of that benefit in setting the penalty. U.S. Principal Br. 55-58. And unlike the defendant in *Cedar Point*, CITGO does not contend that it is unable to pay a penalty greater than $6 million; rather, as

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the district court found, CITGO is "a multi-billion dollar, international company." USCA5 10826.

CITGO's reliance (Br. 42) on *United States v. Marine Shale Processors*, 81 F.3d 1329 (5th Cir. 1996), is also misplaced. There, the district court issued a $3 million CWA penalty for the defendant's unpermitted stormwater discharges and thermal pollution; that penalty was less than 8% of the statutory maximum. *Id.* at 1336-37. Nevertheless, the defendant appealed the penalty, and the Court therefore addressed, as in *Cedar Point*, only whether the penalty was unreasonably high (not, as here, whether the penalty was unreasonably low). *Id.* at 1336-39.

The *Marine Shale* Court made two observations pertinent to this case. First, it explained: "[W]hen imposing penalties under the environmental laws, courts often begin by calculating the maximum possible penalty, then reducing that penalty only if mitigating circumstances are found to exist." *Id.* at 1337 (citations omitted). Second, the Court ultimately vacated and remanded the $3 million penalty because it was based in part on a clearly erroneous factual finding by the district court. *Id.* at 1338-39.

Both aspects of *Marine Shale* support the government's challenge to the $6 million penalty here. First, as shown in our principal brief (at 53-54), the district court rejected use of the "top-down" method, which "begin[s] by calculating the

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maximum possible penalty" (*Marine Shale*, 81 F.3d at 1337), on the legally erroneous ground that this method cannot be used outside of criminal cases – a ruling flatly inconsistent with *Marine Shale* (and with *Cedar Point*). As also shown in our principal brief (at 54-55), having rejected use of the "top-down" method for a legally erroneous reason, the court failed to apply the "bottom-up" method or to articulate a discernible alternative method for calculating a penalty.

Second, as shown in our principal brief (at 9-10, 48-50), vacatur and remand is warranted because, like in *Marine Shale*, the penalty here is based in part on a key factual finding that is clearly erroneous; namely, the district court's finding that 11 inches of rain (not 8.3 inches) fell at the CITGO refinery on the date of the spill – the correct figure of 8.3 inches being *within* the ostensible design capacity of the WWTP yet it still failed. As further shown in our principal brief (at 48-50), the court's clearly erroneous rainfall finding of 11 inches was a significant basis for its rejection of a finding of gross negligence – a finding that would have exposed CITGO to a heightened maximum penalty of $4,300/barrel (rather than $1,100/barrel), compared to which the court's penalty rate of $111/barrel is a mere 2.6%.

Later in its brief, when addressing gross negligence, CITGO says (Br. 60 n.11) that "nothing in the [court's] decision remotely suggests that the difference between 8.3 and 11 inches of rain played any role in the court's decision about CITGO's

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culpability." CITGO is simply wrong. The court specifically cited the clearly erroneous 11 inch rainfall finding as one of only two facts on which the court rested its no-gross-negligence ruling. USCA5 10821-10822; U.S. Principal Br. 9-10, 48-50. The parallel to *Marine Shale*, where the Court vacated the penalty and remanded for similar reasons, is quite evident.

Next, CITGO cites three out-of-circuit cases (Br. 43 n.8) but they do not support its argument that the Court should defer to the $6 million penalty. As relevant here, in *United States v. Smithfield Foods, Inc.*, 191 F.3d 516, 528-29 (4th Cir. 1999), the court of appeals affirmed a CWA penalty ($12.6 million) that was based on the district court's use of the "bottom-up" method, and which amounted to about three times the defendant's economic benefit. Similarly, in *United States v. Allegheny Ludlum Corp.*, 366 F.3d 164, 178 n.6 (3d Cir. 2004), and *United States v. Mun. Auth. of Union Twp. (Dean Dairy)*, 150 F.3d 259, 265 (3d Cir. 1998), the court of appeals affirmed "bottom-up" penalties that amounted to twice the defendants' economic benefit.

In stark contrast to those cases, here the district court did not apply the "bottom-up" method to assess a penalty. U.S. Principal Br. 54, 55-58. And unlike the "bottom-up" penalties affirmed in the cited cases, the court here did *not* assess a penalty that can be characterized as falling in the range of two to three times CITGO's

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economic benefit. Rather, the court simply failed, erroneously, to make a reasonable approximation of that benefit in the first place.

CITGO also cites (Br. 43 n.8) several district court decisions, but they do not advance its case. For instance, CITGO cites decisions involving CWA citizen suits brought against *municipalities*. Applying the "top-down" approach, the courts issued penalties significantly below the statutory maximum based in part on factors unique to municipalities. These sorts of municipality-specific rationales for reducing a penalty under the "top-down" approach are plainly inapplicable here.[5]

B. <u>The $6 million penalty represents an abuse of discretion when viewed under the penalty factors in 33 U.S.C. §1321(b)(8).</u>

The United States recognizes that "calculation of discretionary penalties is not an exact science." *Marine Shale*, 81 F.3d at 1338. There is a range of values within which a district court could, in its sound discretion, select a reasonable penalty based on the facts of a given case. As is clear from the government's opening brief (at 26), we have not "glosse[d] over" – as CITGO erroneously alleges (Br. 25) – the deferential standard of review applicable to a district court's penalty determination.

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[5] *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 244 F. Supp. 2d 41, 53, 54 (N.D.N.Y. 2003) (citing reasonableness of City's decision to focus attention on protecting water supply from future terrorist attacks after September 11, 2001), *remanded on other grounds*, 451 F.3d 77 (2d Cir. 2006); *Hawaii's Thousand Friends v. City & County of Honolulu*, 821 F. Supp. 1368, 1390, 1395-97 (D. Haw. 1993) (noting economic impact of maximum penalty on rate payers).

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However, as shown in our principal brief (at 30-41), when viewed under the penalty factors in 33 U.S.C. §1321(b)(8), the district court's $6 million penalty represents an abuse of discretion. The CWA *mandates* that a court consider the §1321(b)(8) penalty factors in setting a penalty; it is thus not an "inconsequential exercise," as CITGO wrongly asserts (Br. 44), for the United States to show on appeal that a trial court's penalty is unreasonable when viewed through the prism of those very penalty factors. Moreover, because many of the egregious facts proved by the government at trial were either undisputed or not subject to serious dispute, CITGO misses the mark in arguing (Br. 25) that the government merely ignores "evidence that contradicts its argument for a higher penalty."

Penalty factor 1. A court must consider "the seriousness of the violation or violations." 33 U.S.C.§1321(b)(8). CITGO argues (Br. 46) that the $6 million penalty is reasonable under this factor because "the evidence showed only minimal, short-term environmental harm." That argument both ignores the district court's findings concerning the seriousness of this oil spill and overlooks undisputed evidence bearing on the substantial environmental harm caused by the spill.[6]

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[6] There is accordingly no basis for CITGO's assertion (Br. 48) that the government has "just cherry-picked" facts supporting its view of the extremely serious nature of CITGO's oil spill. In the "Minimal Environmental Impacts" section of its "Statement of Facts" (Br. 22-24), CITGO largely evades the evidence set forth on (continued...)

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The district court found that CITGO's negligence caused 54,000 barrels of waste ("slop") oil – 2.27 *million* gallons – to enter waterways, namely, the Indian Marais and the Calcasieu River. USCA5 10820, 10825, 10828. The court correctly found an oil spill of this magnitude is an extremely serious CWA violation: the spill was "massive," "excessive," "a tragedy," and a "catastrophe[ ]."[7] USCA5 10822, 10825, 10834. Given our national policy that "there should be *no discharges* of oil" into navigable waters (33 U.S.C. §1321(b)(1); emphasis added)), it is beyond peradventure that a discharge of 2.27 million gallons of waste oil into such waterways is an extremely serious violation. *See* U.S. Principal Br. 6-7.

However, as shown in our principal brief (at 30-31), there is a palpable disconnect between the court's seriousness findings and a low-end penalty rate of $111/barrel. Although CITGO believes that this disconnect can be rationalized by focusing on alleged "short-term environmental harm" (Br. 46) of the spill, the court's own findings both refute CITGO's argument and further highlight the disconnect.

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[6](...continued)
these matters in the government's principal brief (at 11-14).

[7] As shown in our principal brief (at 58-63), the court's figure of 54,000 barrels is incorrectly low and clearly erroneous. That is, for penalty purposes, the seriousness of this oil spill was an even greater "catastrophe" than that found by the court. *See* Section G, *infra*, concerning volume.

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This oil spill occurred in June 2006. The court found that "the environmental impact was almost fully rectified by 2009" – that is, not until some 2½ *years* later. USCA5 10823. It is unreasonable to characterize environmental harm as "short-term" (Br. 46) where the harm persists for a period of years, and even then, is not fully ameliorated. CITGO's argument (Br. 47) that this catastrophic, multi-million gallon oil spill "minimally affected marsh, aquatic life and birds – and only in the short term" is also contrary to the evidence. Concerning marsh habitat, it was undisputed that 154 miles of shoreline were oiled, 94 miles of which was sensitive marsh habitat. U.S. Principal Br. 11-12. These large mileage figures are not reasonably characterized as a "minimal" amount of affected shoreline or marsh habitat. Moreover, CITGO's expert acknowledged that the National Resources Trustees' current draft shoreline injury report identifies *permanent* – not just "short-term" – marsh habitat loss (*e.g.* "shoreline erosion") as a result of the oil spill. USCA5 10039:23-10040:13 (Slocomb).

Concerning birds, the parties' experts agreed that *300 birds* killed by the oil spill is a reasonable estimate. U.S. Principal Br. 13. Concerning aquatic life, CITGO's expert confirmed that the Natural Resources Trustees had developed a working mortality estimate in the range of *hundreds of thousands* of dead fish. *Id.* CITGO's expert further acknowledged that thousands of kilograms and numerous

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types of fish and other aquatic life (*e.g.* shrimp and crab) were killed. USCA5 10032,10036 (Slocomb).[8]

CITGO's effort to minimize the extreme seriousness of this oil spill also ignores that the spill undisputedly blocked the Calcasieu Ship Channel for 10 days, restricted its use for a total of 24 days, and caused the loss of over 10,000 recreational trips. U.S. Principal Br. 13-14. While CITGO states (Br. 47) that it paid "nearly $30 million to local plants to rectify" the financial impact of the spill on local businesses, that figure – $30 million – only *highlights* the extremely serious nature of the spill.

Penalty factor 2. CITGO (Br. 45) criticizes the government for not addressing the factor requiring a court to consider "the economic benefit to the violator, if any, resulting from the violation." 33 U.S.C. §1321(b)(8). That criticism is simply wrong: the government's principal brief (at 55-58) thoroughly addressed the district court's erroneous failure to make findings on a reasonable approximation of CITGO's economic benefit – to which CITGO is largely unresponsive. *See* Section E, *infra*.[9]

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[8] Contrary to CITGO's suggestion (Br. 45), proof of "material environmental harm" is not necessary to a finding that a CWA violation is serious for civil penalty purposes. *See, e.g.*, *United States v. Gulf Park Water Co.*, 14 F. Supp. 2d 854, 859-60 (S.D. Miss. 1998) (collecting cases). In any event, as shown, the government proved that CITGO's massive oil spill caused material environmental harm.

[9] We defer discussion of penalty factor 3, which requires a court to consider "the degree of culpability involved," 33 U.S.C.§1321(b)(8), to Section C, *infra*, where we (continued...)

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Penalty factor 4. CITGO (Br. 44) criticizes the government for not addressing the factor requiring a court to consider "any other penalty for the same incident." 33 U.S.C. §1321(b)(8). The reason the government did not address that factor in its principal brief is simple: the district court found, and we agree, that the criminal fine paid by CITGO for the oil spill "does not directly offset any civil fine." USCA5 10825. CITGO does not challenge that finding.

In another unchallenged finding, the court found that CITGO "has not paid any other 'penalties' for the incident." *Id.* Given that unchallenged finding, CITGO cannot now suggest (Br. 44-45) that the court might nonetheless have mitigated the penalty under this factor based on the amount CITGO paid as a criminal fine. The court was not required to factor the criminal fine into its civil penalty, and nothing in the court's decision indicates that it did so. CITGO also suggests (*id.*) that the court might have mitigated the penalty based on amounts CITGO spent "in post-spill improvements" to the WWTP, or paid to reimburse the Coast Guard for the agency's response costs; but again, the court's decision provides no indication that the court mitigated the penalty on these grounds. Moreover, CITGO provides no authority for the notion that the amount it paid to reimburse the Coast Guard for the agency's

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[9/](...continued)
address whether this oil spill was the result of CITGO's gross negligence.

response costs is properly regarded as "other penalties." CITGO was the owner/operator of the onshore facility that discharged oil into waterways and thus is responsible for the "removal costs" incurred by the Coast Guard to address those discharges. *See* 33 U.S.C. §§2701(31), (32)(B), 2702(a), (b) (provisions of the Oil Pollution Act of 1990).

CITGO further errs in suggesting (Br. 44) that the court might reasonably have mitigated the penalty it awarded the United States to reflect the $3 million penalty it awarded LDEQ. CITGO overlooks that the bulk of the state-law penalty ($2.55 million of $3 million) was *not* based on "the incident" (33 U.S.C. §1321(b)(8)), *i.e.*, the June 2006 oil spill. Rather, the state-law penalty derived largely from CITGO's five-year history of operating the WWTP in violation of its CWA permit and state law *prior to* the June 2006 oil spill. USCA5 10836 (1,825 days of pre-spill violations multiplied by $1,400/day).

CITGO also errs in arguing (Br. 47) that the $6 million penalty is reasonable because the district court had discretion under this factor to consider the $30 million that CITGO (allegedly) paid to "local plants" to "rectify" the negative financial impact of the oil spill. The court's decision does not indicate that the court factored this consideration into its penalty, nor would it be proper for a court to do so. Most obviously, these kinds of payments are not "other penalties" paid by CITGO to the

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federal or state government for this oil spill, but rather, are payments made in the ordinary course of business to avoid or settle private-party litigation resulting from the spill.[10]

Penalty factor 5. A court must consider "any history of prior violations." 33 U.S.C. §1321(b)(8). As shown in our principal brief (at 33-34), the district court found that CITGO had a long history of prior violations at the Lake Charles refinery, but ignored those violations in setting a low-end penalty. CITGO now argues (Br. 51) that the *950 days* of CWA permit exceedances found by the court (USCA5 10825) are actually *consistent* with the court's low penalty because CITGO "presented evidence that it complied with its waste water discharge permits over 99% of the time * * * exceeding the compliance data from the best refinery waste water plants used by EPA to set refinery permit limits." This argument lacks merit.

CITGO overlooks that the district court did *not* purport to rule that it regarded CITGO's 950 days of permit exceedances as a mitigating factor because CITGO complied with its CWA permits the rest of the time. Rather, the court expressly found that CITGO is "guilty of prior violations" and "does not appear to have recognized the

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[10] CITGO's argument misleadingly suggests that CITGO paid the approximately $30 million to which it refers. In fact, those payments were made by CITGO's insurers to the injured parties. U.S. Principal Br. 14.

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importance of compliance, pollution control, environmental responsibility, and the overall duty imposed on businesses to operate safely." USCA5 10826.

However, in setting a $6 million penalty, the court ignored those findings and in particular its finding that CITGO had a prior history of 950 days of permit exceedances at the Lake Charles refinery – which CITGO oddly describes (Br. 14) as a "successful track record" of permit compliance. CITGO's alleged "successful track record" is even odder, given the court's *additional* finding that CITGO "failed to properly maintain and operate its wastewater treatment facility in violation of state law for five (5) years prior to the date of the spill" – that is, over the course of 1,825 days prior to the June 2006 oil spill. USCA5 10836. CITGO ignores these findings altogether in contending that the Court should defer to the $6 million penalty.

Moreover, contrary to CITGO's argument (Br. 51), the methodology used by EPA to set industry-wide effluent limits does *not* authorize regulated parties to exceed the discharge limits in their CWA permits at some accepted violation rate. The case law on this point is settled.[11/] The short of the matter is that the CWA does not include

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[11/] *See National Wildlife Fed. v. EPA*, 286 F.3d 554, 573 (D.C. Cir. 2002) (per curiam) (EPA's "statistical methodology was used as a framework to establish the limitations based on percentiles," not as a license "to violate the limitations at some pre-set rate"); *Marine Shale*, 81 F.3d at 1338 (rejecting defendant's "reliance on EPA publications stating that a properly operated facility should achieve a 95-99% rate of compliance with its NPDES permit limits"). *See also Chem. Mfrs. Ass'n v.* (continued...)

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some accepted rate of violation of discharge permit terms. CITGO's "successful track record" argument is inconsistent with this principle.

As also explained in our principal brief (at 33-34), in setting a low-end penalty, the district court ignored its own finding on a separate aspect of CITGO's history of prior violations at the Lake Charles refinery; namely, that "[s]ince 1994, the government has shown that Citgo discharged oily wastewater to the surge pond on at least six (6) occasions." These unpermitted discharges to the "Surge Pond" totaled approximately 30 million gallons of untreated oily wastewater containing hazardous waste. USCA5 10825; U.S. Principal Br. 20 n.4.

However, CITGO now argues (Br. 51) that its prior history of huge, unpermitted discharges to the Surge Pond are in effect irrelevant under this penalty factor; according to CITGO, those discharges did not "provide[ ] warning of the possibility of the June 2006 spill, because they occurred for entirely different reasons." CITGO's argument, however, is contrary to the testimony of its own environmental department supervisor, Diana LeBlanc, and to its own documents.

[11/](...continued)
U.S.E.P.A., 870 F.2d 177, 229-30 (5th Cir. 1989) (summarizing EPA's statistical methodology for establishing effluent limits and confirming that facilities are required to comply with CWA permit limits at all times unless a regulatory exception applies).

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LeBlanc and CITGO's documents confirmed that on each occasion, CITGO discharged untreated oily wastewater to the Surge Pond in order to avoid overflowing waste oil from the top of the wastewater tanks *during storm events* – the same scenario surrounding the June 2006 oil spill.[12] The testimony cited by CITGO does not address its unpermitted discharges to the Surge Pond.[13]

Penalty factor 6. Respecting "the nature, extent, and degree of success of any efforts of the violator to minimize or mitigate the effects of the discharge" (33 U.S.C. §1321(b)(8)): our principal brief (at 21-26, 34-39) demonstrated that CITGO's effort to contain this massive oil spill during the critical first two days (June 19-20, 2006) was ineffective, incompetent, and marked by a complete lack of candor vis-a-vis the

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[12] *See* USCA5 10408:19-23, 10419-10420 (LeBlanc); U.S.RE Tab 6, p.2 (Exh. P0511, an Oct. 31, 1996 Request for Design Change submitted by CITGO's WWTP supervisor, stating: "Several times it has been necessary to divert wastewater to the refinery surge pond. These diversions were necessary *because of inadequate tankage to contain additional flow as a result of large storm events*") (emphasis added); U.S.RE Tab 9, p.2 (Exh. P0950, a Jan. 7, 1997 CITGO memorandum stating there is "a layer of floating oil on both of these tanks" because the tanks' oil skimming systems "do not work").

[13] At Br. 51, CITGO cites "R. 9637-38," a passage from the testimony of its expert, Dr. Tischler. There, Tischler addressed CITGO's 950 days of exceedances of its CWA permits, *not* its separate unpermitted diversions to the Surge Pond. On the former issue, Tischler opined that the 950 days of prior exceedances were "not related" to the June 2006 oil spill. However, the court found otherwise (in a finding not challenged by CITGO): "Some of these exceedances took place *during normal heavy rain flow* that did not exceed the 1 in 25 year/24 [hour] storm limit." USCA5 10832 (emphasis added).

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Coast Guard concerning the catastrophic nature of the spill. CITGO (Br. 52-54) has no real response to our arguments. Most tellingly, CITGO makes no effort to defend its acts and omissions during the critical first two days. Rather, CITGO (Br. 52-53) cites its *subsequent* actions to clean up the spill after millions of gallons of waste oil had *already* entered the Indian Marais and the Calcasieu River. This is a classic example of chasing down the horse after it has escaped from the barn.

The United States recognizes the district court's finding that, at least after the first two days, CITGO "made a full force effort to minimize the damage from the spill." USCA5 10826. However, for civil penalty purposes, a clean-up effort that, like CITGO's, is large-scale and costly in large part due to the violator's own ineffective and incompetent effort to contain the oil spill *before* it reaches waterways is not a reasonable basis for issuing a low-end penalty. That is particularly so where CITGO's utter lack of candor toward the Coast Guard is the reason why the agency did not mobilize the Gulf Strike Team on the morning of June 19, the first day of the spill. U.S. Principal Br. 38.

CITGO (Br. 18, 53) also refers to a "sheen" notification it gave the Coast Guard on June 19 and states that "the Coast Guard went to the wrong location." This notification, however, was incomplete and provides no excuse for CITGO's incompetent spill response or its failure to notify the Coast Guard about the

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catastrophic nature of the spill. The district court was not persuaded by CITGO's argument, finding instead that CITGO's "initial response was lacking in that * * * the Coast Guard was not properly and fully informed." USCA5 10826. If CITGO had accurately and timely described the spill, the Coast Guard would have been on the scene immediately. The salient fact is that CITGO's communications with the agency on June 19-20 were wholly lacking in candor concerning the catastrophic nature of the spill.

CITGO next cites (Br. 53-54) the money it spent *after* the spill to make improvements at the Lake Charles refinery. However, such post-spill undertakings are plainly not "efforts of the violator to minimize or mitigate the effects of the discharge." 33 U.S.C. §1321(b)(8). Rather, they are measures taken by CITGO to prevent *another* discharge (oil spill) from happening in the future. As the district court found in issuing injunctive relief, CITGO should have undertaken such corrective measures *before* the June 2006 spill, but because CITGO did not, they are necessary now to prevent – as the court put it (USCA5 10829) – "a situation such as the 2006 discharge" from "happen[ing] again."[14]

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[14] CITGO asserts (Br. 23 n.1) that it was "proactive in protecting against any human health risks." That assertion is contrary to the district court's unchallenged finding that CITGO's "initial response was lacking" in that (*inter alia*) "workers were not fully protected." USCA5 10826. CITGO's assertion is also inconsistent with (continued...)

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Penalty factor 8. In our principal brief (at 39-41), we explained that, when it considered "any other matters as justice may require," 33 U.S.C. §1321(b)(8), the district court erred in relying on CITGO's "positive impact and role in the community" (USCA 5 10827) and on the cost to CITGO of the injunctive relief ordered (USCA5 10829) as grounds for mitigating the penalty. CITGO is again largely unresponsive to our arguments.

CITGO primarily relies (Br. 54-56) on citations to three district court decisions, none of which justifies the court's handling of this penalty factor here. For example, in *United States v. Sheyenne Tooling & Manuf. Co.*, 952 F. Supp. 1420, 1426 (D.N.D. 1996), the court found: "justice requires that the defendant, dependant as it is on a narrow base of only a few customers, should not be overburdened lest it be forced to retrench and reduce its work force – thus injuring innocent people."

CITGO, however, is plainly not similarly situated to the defendant in *Sheyenne Tooling*. As the district court found (USCA5 10826), CITGO is "a multi-billion dollar, international company"; and CITGO cites no evidence that a penalty greater than $6 million would have forced it to retrench and reduce its work force at the Lake

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[14/](...continued)
findings of the Louisiana Supreme Court in related tort litigation. *See Arabie v. CITGO Petroleum Corp.*, 89 So.3d 307, 322 (La. 2012) (finding "substantial evidence supporting the trial court's determination that plaintiffs' injuries were caused by exposure to toxic chemicals contained in the slop oil").

Charles refinery or anywhere else.[15]

Finally, on the "as justice may require" factor, CITGO does not challenge the district court's findings that (i) CITGO operated the Lake Charles refinery in violation of its CWA permit during the *five years preceding* the June 2006 oil spill (USCA5 10836), and (ii) notwithstanding recommendations by its own consultants to install needed storage and treatment equipment, CITGO was still not operating the WWTP with adequate capacity even *five years after* the spill, *i.e.*, at the time of the March 2011 bench trial (USCA5 10829, 10831-10832).

These unchallenged findings undermine the notion – expressed by CITGO (Br. 55) and by the court (USCA5 10827) – that justice requires moderating CITGO's penalty due to its "positive impact and role in the community." *Id.* Rather, on these facts, as recently as September 2011 – when the court ordered CITGO to make specific improvements at the WWTP as injunctive relief – the Lake Charles refinery still remained at great risk of once again spilling huge volumes of waste oil into nearby waterways during a heavy rainfall that is within the WWTP's ostensible design

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[15] Other cases cited by CITGO (Br. 54, 56) are inapposite. *United States v. Smithfield Foods, Inc.*, 972 F. Supp. 338, 353-54 (E.D. Va. 1997), *aff'd in rel. part*, 191 F.3d 516, 531 (4th Cir. 1999) (affirming district court's decision *not* to give defendant "credit for its good-faith efforts to comply"); *United States v. Ciampitti*, 615 F. Supp. 116, 124-25 (D.N.J. 1984) (holding penalty in abeyance and noting court's preference that defendant's "resources be initially spent on clean-up of the site").

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capacity. On this record, CITGO's effort to portray itself as a good corporate citizen in Louisiana (Br. 55) rings hollow.

C. CITGO fails to rebut the government's demonstration that this massive oil spill was the result of CITGO's gross negligence.

In our principal brief (at 41-50), we demonstrated that the district court clearly erred in rejecting a finding that this massive oil spill was the result of CITGO's gross negligence. CITGO's response does not meaningfully address the powerful record evidence of gross negligence catalogued in the government's brief.

CITGO (Br. 60) contends that "the district court committed no clear error in finding CITGO was not grossly negligent"; for that contention, CITGO refers to its discussion of the "degree of culpability" penalty factor. The arguments in that section of CITGO's brief (Br. 48-51) lack merit.

1. CITGO argues (Br. 49) that no oil would have escaped from the Lake Charles refinery but for CITGO's installation of an unsealed "junction box" in the containment berm around the WWTP during construction of a third storage tank (which was not completed until 18 months *after* this spill). According to CITGO (*id.*), the unsealed junction box in the containment berm provided the spilled oil's only "means of escape," such that if construction had not begun on the third tank, "the oil would have been contained on CITGO's property."

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This argument, even if it had a factual basis in the record, only provides *further* proof of CITGO's gross negligence. As previously shown, CITGO delayed starting construction of a third storage tank for *ten years* to save money, despite warnings and recommendations of its technical staff and engineering consultants that additional storage and treatment capacity was necessary at the WWTP specifically with regard to heavy rainfall events. U.S. Principal Br. 45-46. Only after ten years of delay did CITGO finally begin construction of a third storage tank and – according to its own argument – CITGO constructed this tank in a manner that also displayed an extreme departure from the care required under the circumstances: CITGO failed to seal a junction box that was (purportedly) the only "means of escape" (Br. 49) from the containment berm for huge quantities of waste oil, in the event that the two then-existing storage tanks overflowed during a storm.

However, the more fundamental problem with CITGO's argument is factual – the unsealed junction box was *not* the spilled oil's only "means of escape" from the containment berm. *See* Br. 49, 50. Rather, CITGO's own investigation determined that there were *multiple* pathways by which oil escaped the containment berm and reached waterways after discharging from the tanks, including: (i) directly through the air from the tops of the tanks, (ii) through leaks in the concrete and earthen portions of the containment berm, and (iii) through an open 16-inch pipe and leaking drain

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pipes in the berm. *See* U.S. Principal Br. 50; Exh. P0214 at CIT0047853 (CITGO's investigation PowerPoint slide identifying multiple breaches in the berm that allowed oil to flow into Indian Marais).[16] Although CITGO takes umbrage at our characterization of the containment berm as a "sieve" (Br. 50), that is precisely what the evidence, including CITGO's investigation, demonstrated.

2. CITGO also errs in arguing (Br. 49, 50) that if it had not begun construction of the third tank, and thus had not installed the improperly unsealed junction box, all or "virtually all" of the spilled oil would have been "contained on CITGO's property" within the containment berm. Simple arithmetic, applied to undisputed facts, shows why CITGO is wrong.

It was undisputed that approximately 21 million gallons of oily materials discharged from the two overflowing tanks. Exh. P0198 at CIT000007 (CITGO's Oct. 20, 2006 revised notice to LDEQ reporting release of 510, 239 barrels, or about 21.4 million gallons, into "diked area"); USCA5 9664:17-21 (CITGO expert confirming that figure). It was also undisputed that the containment berm had a capacity of far *less* than 21 million gallons at the time of the spill. Exh. P0214 at

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[16] *See also* USCA5 9843:20-9844:4 (CITGO corporate representative confirming findings on PowerPoint slide); Exh. P0046 (photograph of heavy oil staining around the outfall of the 16-inch firewater line at the edge of the Indian Marais); USCA5 8064-8065 (Dr. Michel explaining this exhibit).

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CIT0047867 (CITGO's investigation PowerPoint identifying berm capacity at time of spill (during construction) at approximately 15-16 million gallons); Exh. P0396 at CIT0246347 (CITGO/ENSR report identifying post-construction berm capacity of approximately 12 million gallons). Moreover, the containment berm is located immediately adjacent to the Indian Marais, and any overflow or rupture of the containment berm would quickly allow oil to enter that waterway and flow into the Calcasieu River.[17]

Thus, applying simple arithmetic, it is untrue that this 21 million gallon overflow of oily materials from the tanks would have been contained inside the containment berm "on CITGO's property" (Br. 49) if only CITGO had not been building the third tank at the time of the spill. An overflow of 21 million gallons obviously cannot be contained within a berm that has a capacity of only 12-16 million gallons. Even CITGO's expert agreed that 21 million gallons was a volume "greater than what could have stayed within the berm." USCA5 9664:22-24 (Tischler).[18]

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[17] *See* Exh. P0040 (photograph: Indian Marais waterway is located above containment berm along line of trees in center that runs to the right toward River); U.S.RE Tab 4 (Exh. P0058, a photograph similar to Exh. P0040); Exh. P0115 (photograph showing Indian Marais waterway as the curving waterbody in center that flows into the River, where oil boom is deployed).

[18] CITGO's suggestion (Br. 14) that it was free to use the containment berm for planned storage capacity is contrary to recommendations of CITGO's consultants and (continued...)

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3. Shifting gears, CITGO mischaracterizes the record in arguing (Br. 16, 50) that it did not know oil had accumulated in the tanks before the spill. The United States proved, through CITGO's own witnesses and records, CITGO's knowledge of this fact. For example, the year before the 2006 spill, a senior engineer (Doss) and the assistant supervisor of the WWTP (Richards) knew there was at least five feet of oil in the one tank that was checked in 2005. U.S. Principal Br. 18; Exh. P0398, (June 30, 2006 Richards interview mem. at CIT0427420:43-44, stating: "Sludge and oil levels just keeps building. Last year Richard Doss said they had 5' [feet] of oil on [Tank] 330."). *See also* note 12, *supra*.

Moreover, CITGO's corporate representative at trial and lead spill investigator conceded this awareness of the accumulated oil *before* the 2006 spill, and confirmed CITGO's knowledge that it was critical to remove the oil on a regular basis to prevent this kind of disaster. USCA5 9841-9842 (Dunn); *see* U.S.RE Tab 9, p.2 (Exh. P0950, a 1997 CITGO memorandum warning: "Since the system is already marginal for stormwater capacity, it is imperative that excess oil and solids be removed so that this capacity can be used to store stormwater."). Thus, the record demonstrates that

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[18/](...continued)
staff, and poses legal and safety problems. USCA5 9319-9322 (Amendola), 10831-10832 (district court op.). Contrary to CITGO's assertion (Br. 14), the United States' expert was firmly *against* CITGO's use of the containment berm as part of its planned storage capacity. USCA5 9319-9322 (Amendola).

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CITGO knew the obvious: that oil had accumulated in the tanks prior to the spill.

Furthermore, at the time of the June 2006 spill, CITGO undeniably (i) knew that thousands of gallons of waste oil were in its wastewater stream on a daily basis, (ii) knew that the oil skimming system in the tanks had been inoperable for years, and (iii) knew that it was not using any other method to remove the huge amounts of oil accumulating at the top of the tanks. U.S. Principal Br. 15-18, 32-33, 43-47; USCA5 9871-9875 (Dunn). On this record, CITGO's assertion (Br. 50) that it did not know oil had accumulated in the tanks prior to the spill is not credible. CITGO's knowledge of this fact further demonstrates that CITGO operated the WWTP in a grossly negligent manner before the spill.

4. Next, CITGO (Br. 60 n.11) attempts to defend the district court's clearly erroneous rainfall finding. As discussed *supra* at 21-22, the court rested its no-gross-negligence finding in part on a clearly erroneous factual finding that 11 inches of rain (not 8.3 inches) fell at the refinery on the date of the spill, which would be an amount greater than the refinery's ostensible design standard of 10.3 inches. CITGO argues (Br. 60 n.11) that "the higher 11-inch rain estimate came from the Coast Guard, and it would not have been clear error for the district court to adopt that." *See also* Br. 11, 18. CITGO is wrong.

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CITGO mischaracterizes the record in suggesting that the Coast Guard made a final rainfall estimate of 11 inches: the Coast Guard slide cited by CITGO is entitled "*preliminary* findings." Br. 60 n.11 (citing Exh. D-820 at USCG040803) (emphasis added). Plainly, in the text of the cited exhibit, the Coast Guard's estimate of "11 [inches] in 2 HRS [hours]" was stated as only "preliminary." Concerning a *final* rainfall estimate, the United States' and CITGO's witnesses, as well as CITGO's investigation, all confirmed that the certified rain data showed 8.3 inches of rain fell on the date of the spill. U.S. Principal Br. 9, 48; USCA5 9876:9-20 (Dunn). There is no evidentiary basis for CITGO's effort to defend the court's clearly erroneous rainfall finding of 11 inches.

CITGO's assertion (Br. 49) that it was "studying its capacity" prior to the spill only further *highlights* that the court's no-gross-negligence finding is clearly erroneous. By 2006, the year of the spill, CITGO staff had been requesting more tank storage capacity for over *12 years*, but CITGO had built none. U.S. Principal Br. 19-21. Even accepting CITGO's factually erroneous suggestion (Br. 49) that it did not receive a recommendation for additional capacity until 2002, CITGO still took more than *four years* to build one additional storage tank (the third tank), and did not finish construction until 18 months *after* this spill. These facts simply provide additional grounds for a gross-negligence finding.

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D. CITGO does not dispel the substantial confusion created by the district court concerning whether it applied the correct standard in rejecting a finding of gross negligence.

In our principal brief (at 51-53), we demonstrated that the district court created substantial confusion concerning whether it applied the correct definition of "gross negligence" in finding that this massive oil spill was not the result of CITGO's gross negligence. In short, under the CWA, "gross negligence" and "willful misconduct" are separate concepts; gross negligence is a lesser standard that does not require a showing of willfulness or recklessness. However, if the court's reference to Louisiana law led it to conflate gross negligence with reckless or willful conduct, then the court misconstrued the CWA, which alone warrants vacatur and remand. CITGO's discussion of the court's analysis (Br. 57-60) does nothing to dispel this confusion.

CITGO primarily argues (Br. 57) that "it is of no moment if the district court drew from Louisiana law when defining gross negligence because Louisiana and federal law employ the same standard." That is simply incorrect, as the government demonstrated in its principal brief (at 42, 51-52). Under the Louisiana-law definition stated by the court, "gross negligence is *willful, wanton, and reckless conduct* that falls between intent to do wrong and ordinary negligence." USCA5 10821 (quoting *Houston Exploration Co. v. Halliburton Energy Servs., Inc.*, 269 F.3d 528, 531 (5th Cir. 2001) (emphasis added)). This definition of gross negligence plainly requires

"willful, wanton, and reckless conduct" for a court to find "gross negligence." However, the CWA, which expressly distinguishes between "gross negligence" and "willful misconduct," does *not*. U.S. Principal Br. 42, 51-52. CITGO says (Br. 60) the district court "recognized that gross negligence 'falls between intent to do wrong and ordinary negligence.'" But CITGO omits the key, problematic terms in the Louisiana-law definition modified by that clause: "willful, wanton and reckless conduct."

Contrary to CITGO's contention (Br. 58), *Halliburton* does not demonstrate that the CWA definition of gross negligence "corresponds with" the Louisiana-law definition. *Halliburton*, which is not a CWA case, does not address that question. *Halliburton* is an admiralty case involving whether an indemnity agreement was enforceable. 269 F.3d at 531. *Halliburton* did not address (i) whether state law applies to gross negligence determinations in CWA civil penalty cases, or (ii) in any event, whether the CWA definition of gross negligence is equivalent to the Louisiana-law definition.

The same is true of *Cape Flattery, Ltd. v. Titan Maritime, LLC*, 607 F. Supp. 2d 1179 (D. Haw. 2009), *aff'd*, 647 F.3d 914 (9th Cir. 2011), cited by CITGO at Br. 58 – which also is not a CWA case, and, in any event, rested its decision on an analysis of whether the dispute at issue turned on an interpretation of any clause in the

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parties' contract. 647 F.3d at 924. Contrary to CITGO's assertion (Br. 58), *Cape Flattery* was not "decided under a different section of the CWA" – by which we take CITGO to mean a section of the CWA other than 33 U.S.C. §1321(b)(7)(D) (*i.e.*, the gross negligence provision for oil spills). Rather, *Cape Flattery* addressed whether a particular dispute was subject to arbitration and it was decided under "federal arbitrability law." 647 F.3d at 921. To the extent the district court in *Cape Flattery* addressed the meaning of "gross negligence" under the CWA (*see* 607 F. Supp. 2d at 1189), that discussion was dicta. Moreover, none of the definitions of gross negligence stated in *Cape Flattery* is textually the same as Louisiana-law definition stated by the district court here.

CITGO also cites a definition of gross negligence from admiralty law – "some extreme departure from reasonable care coupled with a conscious awareness of the risk of harm" – and again intimates that this definition is no different from the Louisiana-law definition stated by the district court. Br. 58-59 (quoting *Lobegeiger v. Celebrity Cruises, Inc.*, 2011 WL 3703329, at *16 (S.D. Fla. Aug. 23, 2011)). However, even assuming *arguendo* that it is proper for a court to borrow an admiralty-law definition to decide gross negligence issues in CWA civil penalty cases, it is evident that the *Lobegeiger* definition does not define gross negligence in terms of "willful, wanton and reckless conduct."

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Finally with respect to this issue, CITGO argues (Br. 59) that the Louisiana-law definition of gross negligence "echoes that in CERCLA"[19] and therefore should be applied in CWA civil penalty cases because CERCLA and the CWA are "closely related" statutes. That argument cannot be squared with the text of the CERCLA provision on which CITGO relies, 42 U.S.C. §9607(d)(2). That provision limits state or local government liability in undertaking emergency responses to hazardous releases to the payment of costs or damages resulting from their gross negligence or intentional misconduct. It then states: "*For the purpose of the preceding sentence*, reckless, willful, or wanton misconduct shall constitute gross negligence." *Id.* (emphasis added). This statutory definition is textually limited to that particular liability provision and has no application here.

E. CITGO offers no justification for the district court's erroneous failure to make findings as to a reasonable approximation of CITGO's economic benefit.

In setting the amount of a civil penalty for an oil spill under 33 U.S.C.§1321(b)(8), a court must consider "the economic benefit to the violator, if any, resulting from the violation." *Id.* (penalty factor 2). As demonstrated in our principal brief (at 55-58), the district court failed to discharge this statutory obligation

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[19] "CERCLA" refers to the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §9601 *et seq.*

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in setting the $6 million penalty. Although the court expressly found that "the failure to complete projects which could have prevented the damage done by the spill in this case *did result in an economic benefit* to Citgo" (USCA5 10824; emphasis added), the court erroneously declined to make a reasonable approximation of that economic benefit – finding instead only that CITGO's benefit fell somewhere along an enormous spectrum between $719.00 and $83 million. USCA5 10825.

CITGO recognizes (Br. 60) that, under the Court's precedent, a district court must make a reasonable approximation of the violator's economic benefit in setting a CWA civil penalty, yet CITGO does not explain how the district court satisfied that requirement here. CITGO does not assert that the district court's finding – that CITGO's economic benefit falls somewhere between $719 and $83,000,000 – is a "reasonable approximation." It plainly is not. Absent a "reasonable approximation," moreover, a district court is not in a sound position to "consider * * * the economic benefit to the violator, if any, resulting from the violation," as the CWA mandates in §1321(b)(8).

CITGO contends (Br. 60-61) that a court is not "required to issue a penalty that exceeds the calculation of benefit." That issue need not be decided now. Our appeal is from the district court's erroneous failure to make a reasonable approximation of CITGO's economic benefit – a failure that made it impossible for the court to assess

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whether or not a $6 million penalty recovers CITGO's economic benefit. That is, the court lacked a basis for knowing whether $6 million *equals, exceeds, or is less than* the amount of CITGO's economic benefit.

CITGO's argument is also in tension with the settled principle that the amount of a CWA civil penalty must be sufficient to punish and deter. U.S. Principal Br. 7, 28. That objective generally is not met if the penalty is only equal to the violator's economic benefit because "such a penalty would make the violator no worse off than complying in a timely manner." *Smithfield Foods*, 972 F. Supp. at 352, *aff'd in rel. part*, 191 F.3d 516.[20] In short, a penalty that recaptures only the violator's economic benefit should be reserved for unusual circumstances and must be supported by a compelling case-specific rationale. *E.g.*, *Cedar Point*, 73 F.3d at 574. This, however, is not such a situation.

Shifting gears, CITGO argues (Br. 63; emphasis added): "[g]iven that the district court *could have* reasonably found no benefit – or minimal benefit – there is nothing in its treatment of this factor that shows an abuse of discretion." That argument, however, misconceives the nature of an appellate court's role in a case like

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[20] *See Catskill Mountains Chapter of Trout Unlimited*, 244 F. Supp. 2d 41 at 48, *aff'd in rel. part*, 451 F.3d 77; *United States v. Mun. Auth. of Union Twp. (Dean Dairy)*, 929 F. Supp. 800, 806 (M.D. Pa. 1996), *aff'd*, 150 F.3d 259 (3d Cir. 1998); *accord Gulf Park Water Co.*, 14 F. Supp. 2d at 862-63.

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this. This Court's role is *not*, as CITGO suggests, to sift this lengthy trial record, resolve disputed factual issues, and determine in the first instance whether there is an evidentiary basis from which the district court "could have" reasonably found that CITGO's economic benefit was zero (or *de minimis*). Br. 63. That is what remands are for. *Freeman v. Northwest Acceptance Corp.*, 754 F.2d 553, 560 (5th Cir. 1985) (it is "not our function" to make findings of fact). *See Wood v. Milyard*, 132 S. Ct. 1826, 1834 (2012) (admonishing that appellate courts are to act "as a court of review," not "as one of first view").

In any event, CITGO's suggestion that this Court can and should find that CITGO's economic benefit was zero or *de minimis* is wrong. CITGO contends (Br. 61) that it presented evidence "showing that it reaped no economic benefit" because its "criminal fine and response and legal costs – totaling at least $29 million in out-of-pocket expenses – outweighed any benefit." However, CITGO ignores that the court *rejected* this argument when it found that CITGO in fact *did reap* an economic benefit (USCA5 10824), and CITGO does not challenge that finding. CITGO also ignores evidence presented by the government, from CITGO's own records, that CITGO was reimbursed approximately *$100 million* for its post-spill costs by its multiple insurers. Exh. P0739 (CITGO's insurance summary table). This is a matter for the district court to address on remand.

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CITGO also argues (Br. 62) that it did not reap significant economic gain from failing to prevent the spill because it provided evidence that the spill "could have been avoided by preventing oil accumulation and sealing the junction box, which would have cost less than $25,000 in 2005." Contrary to CITGO's suggestion that the government presented no evidence on this issue (*id.*), the United States provided expert testimony that the least costly method of compliance was far higher than CITGO's $25,000 figure.[21/] Again, this is a matter for the district court to address on remand.

F. <u>The United States does not contend that the district court was required to use the "top-down" method.</u>

CITGO attacks a straw man in arguing (Br. 63) that "[t]he district court was not required to employ a top-down methodology to calculate its penalty." That is not the government's position. Rather, as we argued in our principal brief (at 53-55), the district court possessed discretion to use another discernible method to calculate the penalty. But the court abused its discretion by rejecting use of the "top-down" method for a legally erroneous reason – namely, that it cannot be used outside of criminal

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[21/] *E.g.*, Exh. P1059-08 (Amendola's chart, styled "CITGO Avoided and Delayed Costs For Economic Benefit Considerations," listing (*inter alia*) "investment cost" of $15.65 million for a fourth wastewater storage tank and noting "May 1994" as "Date for Economic Benefit" calculation); USCA5 9358:23 (Amendola presenting "lowest cost alternatives for CITGO").

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cases – and by failing to articulate any discernible alternative method ("bottom-up" or another method) in setting the $6 million penalty. *Id.*

CITGO attempts to defend the district court's approach by arguing (Br. 64) that *Egan Marine* "refused to apply a top-down calculation." That argument is unresponsive to our contentions and is simply wrong; *Egan Marine* in fact *applied* the "top-down" method. 2011 WL 8144393, at *6-*7. *See supra* at 18. Moreover, *Egan Marine* discussed the two generally accepted methods for calculating a civil penalty ("top-down" and "bottom-up"); rejected the "bottom-up" approach as "inapposite" for the case at hand; and applied the "top-down" approach to issue a penalty that was 89% of the statutory maximum. 2011 WL 8144393, at *6-*7 ("reduc[ing]" the penalty from statutory maximum based on defendant's lack of culpability).

Far from supporting the district court's decision here, *Egan Marine* illustrates the kind of exercise of discretion in choosing a method for calculating a civil penalty that is *lacking* in the court's decision. CITGO's citation to other decisions (Br. 64 n.15) is puzzling because in those cases – unlike here – the district courts used either the "top-down" or "bottom-up" method.[22]

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[22] *Sierra Club v. El Paso Gold Mines, Inc.*, 2003 WL 25265873, at *5-*7 (D. Colo. Feb. 10, 2003) (finding "bottom-up" method "better suited to the facts of this case"); *Student Pub. Interest Research Grp. of N.J., Inc. v. Monsanto Co.*, 1988 WL 156691, at *15, *17-*18 (D.N.J. Mar. 24, 1988) (using statutory maximum per-
(continued...)

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CITGO also argues (Br. 64) that "[i]t was not legal error to refuse to apply a top-down or bottom-up methodology." In fact, the cases cited by CITGO reviewed penalties that were calculated using the "bottom-up" method and do not support its argument. *Dean Dairy*, 150 F.3d at 265; *Smithfield Foods*, 191 F.3d at 528. Moreover, the case law (including this Court's decisions in *Marine Shale* and *Cedar Point*) indicates that the "top-down" and "bottom-up" methods are the generally accepted methods for calculating a civil penalty under federal environmental statutes.[23] In any event, CITGO does not dispute that the district court failed to apply an alternate discernible method to determine a penalty.

G. **The district court's spill volume finding of 54,000 barrels is incorrectly low and clearly erroneous.**

In our principal brief (at 58-63), we demonstrated that the court's finding that 54,000 barrels of waste oil entered waterways is clearly erroneous because that figure: (i) ignores undisputed evidence that an additional 3,418 barrels entered waterways and remained stranded on the shoreline after clean-up; (ii) accepts an unsupported, non-

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[22](...continued)
day rate and finding no reason to reduce penalty below statutory maximum).

[23] *See, e.g.*, *Pound v. Airosol Co.*, 498 F.3d 1089, 1094-95 (10th Cir. 2007); *Smithfield Foods*, 191 F.3d at 528-29; *Dean Dairy*, 150 F.3d at 265; *Marine Shale*, 81 F.3d at 1337; *Cedar Point*, 73 F.3d at 573-76; *Atlantic States Legal Found., Inc. v. Tyson Foods, Inc.*, 897 F.2d 1128, 1140-42 (11th Cir. 1990).

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credible CITGO estimate of the volume of waste oil that evaporated after spilling into waterways – an estimate that is 18,800 barrels too low; and (iii) ignores undisputed evidence that an additional 259,000 barrels of oily wastewater entered waterways.

CITGO does not respond to our argument concerning the first volume category (stranded oil), which we take as a concession. Concerning the second volume category (evaporated oil), CITGO does not respond to our careful demonstration that CITGO's evaporation figure is premised entirely on an unsupported, non-credible calculation performed by a CITGO employee named Luke Evans, who did not testify at trial. U.S. Principal Br. 61-62. We take this as a concession that Evans' evaporation figure is indefensible.

Instead of attempting to defend Evans' figure, CITGO challenges the qualifications and methods used by the government's expert, Dr. Michel, to estimate an evaporation figure. CITGO argues (Br. 65) that Dr. Michel had "no engineering training or expertise." Engineering, however, is not the relevant discipline; rather, determining oil evaporation volume requires an analysis of the fate and transport of spilled oil. On that subject, Dr. Michel is a preeminent oil spill scientist and a leader in the field of oil spill assessment. USCA5 7941:12-7946:5 (Dr. Michel describing her oil-spill experience going back to 1978); Exh. P1050-11 (Dr. Michel's resume noting, *inter alia*, her spill assessment work on *Exxon Valdez* disaster and her

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numerous publications, *e.g.*, on "oil/chemical spill effects and fate research").

CITGO also argues (Br. 65) that the government's evaporation model was unreliable and that Dr. Michel "never used or checked the model before this case." That is incorrect. Dr. Michel testified she has used this evaporation model – known as "ADIOS2" – over 100 times in her professional work. USCA5 8139; *see* USCA5 8149:15-23. Dr. Michel further explained that ADIOS2, which was developed by the National Oceanic and Atmospheric Agency, is "widely recognized as one of the best models," and is "the most frequently used oil spill model." USCA5 8138-8139. As Dr. Michel observed in explaining why the ADIOS2 model is "widely recognized as one of the best models" for doing oil-spill assessment, oil is "not one compound, it's many pieces of compounds that are sorted by how quickly they boil off with heating." USCA5 8138:15-19.

Furthermore, CITGO is simply wrong to assert (Br. 65) that only its calculation of the total volume of oil that entered waterways was "based on real-world data." The United States' volume figure (76,800 barrels of waste oil) results from adding together: (i) the undisputed "real-world" amount of oil that was recovered by CITGO from waterways, (ii) the amount of oil that Dr. Michel calculated to have evaporated after reaching waterways, and (iii) the undisputed "real-world" amount of oil left stranded on the shoreline after clean-up. USCA5 8137:17-8138:7. By contrast,

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CITGO's volume figure of 54,000 barrels (Br. 65) results from adding the "oil recovered during the response," *i.e.*, element (i), to a completely unsubstantiated statement by Evans about evaporation amounts, *i.e.*, element (ii) (Exhs. P0242, D-198 (CITGO volume memoranda)), and ignores the stranded oil, *i.e.*, element (iii).

Finally, concerning the 259,000 barrels of oily wastewater: in dismissing the significance of these 259,000 barrels, CITGO states (Br. 66) "oil and water, as the saying goes, don't mix." However, in an unchallenged ruling, the district court firmly *rejected* that argument on the record as "almost disingenuous" and "chicken manure[ ]." USCA5 6393:18, 6394:2. Instead, the court correctly likened the oily wastewater to "a gumbo." USCA5 6389:2. *Cf.* 33 U.S.C. §1321(a)(1) (defining "oil" as "oil of any kind or in any form"). But having made those rulings, the district court simply ignored these 259,000 barrels in setting a penalty. That was clear error by the court. The district court should address this component of the spill on remand in determining a new penalty.

CITGO also tries to minimize the 259,000 barrels of oily wastewater by arguing (Br. 66-67) that it contained only 337 parts per million (ppm) of oil, or only 160 barrels. CITGO overlooks that its figure of 337 ppm derives from a laboratory analysis of just *one* sample of oily wastewater taken by CITGO at a single point in time during the spill on June 19-20, 2006. This single sample, however, is "not

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representative of * * * the nature of the wastewater that was discharged over the entire period." USCA5 8112-8113 (Dr. Michel); *see also* USCA5 8316-8317 (Dr. Michel).

Indeed, it was undisputed that CITGO violated its own written procedures by taking just *one* sample of the oily wastewater. CITGO's procedures called for periodic sampling from multiple locations, beginning at the start of a spill and continuing throughout the day. Exh. P0234 at CITGO-LC0000326-327 (CITGO's Standard Operating Procedure for "Heavy Rain Conditions"); USCA5 8114-8116 (Dr. Michel explaining this exhibit). Thus, the lack of additional and more representative data is the direct result of CITGO's failure to follow its own sampling procedures. These facts further highlight that the district court clearly erred in failing to consider this component of the spill in determining the penalty.

* * * *

In sum, the $6 million penalty should be vacated and the case remanded to the district court for further consideration of an appropriate penalty.

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CONCLUSION

For the reasons stated in this brief, and in the government's principal brief, the $6 million civil penalty should be vacated and the case remanded to the district court for further consideration of an appropriate penalty. For the reasons stated in this brief, the district court's denial of CITGO's motion to dismiss the United States' civil penalty claim for lack of subject-matter jurisdiction should be affirmed.

Respectfully submitted,

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2. This brief contains 13,867 words according to Word Perfect X3, in compliance with the type-volume limitation of Fed. R. App. P. 28.1(e)(2)(A)(i).

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CERTIFICATE OF SERVICE

I hereby certify that on October 19, 2012, I electronically filed the foregoing Response and Reply Brief of the United States with the Clerk of Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. I also certify that the other participants in this appeal are Filing Users and that service will be accomplished by the appellate CM/ECF system.

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USCA No. 11-31117, USA, et al v. Citgo Petroleum Corporation
USDC No. 2:08-CV-893

The following pertains to your brief electronically filed on October 19, 2012.

You must submit the seven paper copies of your brief required by 5TH CIR. R. 31.1 within 5 days of the date of this notice pursuant to 5th Cir. ECF Filing Standard E.1.

Sincerely,

LYLE W. CAYCE, Clerk

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