

Date Signed: May 29, 1998

MEMORANDUM

SUBJECT: Guidance on Federal Facility Penalty Order Authority
Under the Safe Drinking Water Act, as amended in 1996

FROM: Steven A. Herman
Assistant Administrator

TO: Addressees

On August 6, 1996, the Safe Drinking Water Act (SDWA) Amendments of 1996, Pub. L. No. 104-182 (the Amendments), became law. Prominent among the Amendments, are several provisions uniquely applicable to federal entities. The new SDWA clarifies that Federal agencies could be subject to a penalty order for a violation of an administrative order. This guidance explains the Amendment's application to federal entities and offers advice to regions when exercising the enhanced SDWA authorities. In brief, the Amendments:

- significantly enhanced the SDWA's pre-existing waiver of sovereign immunity,
- reiterated EPA's express enforcement authority over federal entities,
- streamlined the pre-existing statutory process for issuing public water system compliance orders,
- expanded EPA's administrative penalty authority for any violation of the SDWA, including the public water supply and underground injection control requirements and requirements imposed by an administrative order,
- provided citizens the opportunity to obtain judicial review of penalty orders, and
- required states to use any penalty or fine collected from a federal entity under section 1447 for environmental purposes.

I. Summary of the Federal Facility Amendments

The Committee Report accompanying the Amendments provides information on what Congress viewed as the purpose and need for the federal facility amendments. The Committee on Commerce wrote:

The Federal Government owns or operates more than 4,200 public drinking water systems at military bases, National parks and other Federal facilities. The number of Federal systems cited for violations increased from 830 in FY 1991 to 946 in 1994.

Federal agencies also own or operate facilities in wellhead protection areas. These facilities--both civilian and military--routinely generate, manage and dispose of large quantities of hazardous waste

containing acids, nitrates, solvents, radioactive materials and heavy metals which can impact the safety of drinking water supplies. The Committee's efforts to ensure the compliance of Federal facilities with various Federal environmental statutes extends back several Congresses.

Section 202(a) adds a new section 1429 [sic] to the Act to **reaffirm in more explicit language the original intent of Congress that each department, agency, and instrumentality of the United States be subject to all of the provisions of Federal, State, interstate and local laws with respect to drinking water and protection of wellhead areas....**

This waiver subjects the Federal government to the full range of available enforcement tools, including, but not limited to the mechanisms specifically listed in the language of new section 1429, to penalize intermittent or continuing violations as well as to coerce future compliance.

H. Rep. No. 104-632, Part 1, 2nd Sess., *reprinted in* Cong. Rec. H6711 (1996) (Commerce Committee Report) (emphasis added). The Committee's Report and the plain text of the Amendments eliminate any doubt federal entities are subject to the full force and effect of the SDWA.

The waiver of sovereign immunity to which the Committee Report refers became new §1447(a), 42 U.S.C. §300j-6, replacing the SDWA's earlier waiver. Under the amended waiver, all federal, state, interstate, and local substantive and procedural requirements, including all administrative orders, respecting the protection of wellhead areas, respecting public water systems, and respecting underground injection apply to each "department, agency and instrumentality of the executive, legislative, and judicial branches" of the federal government (federal entities) to the same extent as any person is subject to the requirements. Federal entities subject to the requirements are those: 1) owning or operating any facility in a wellhead protection area; 2) engaged in any activity at such facility resulting, or which may result, in the contamination of water supplies in any such area; 3) owning or operating any public water system; or 4) engaged in any activity resulting, or which may result in underground injection which endangers drinking water.

Second, in addition to strengthening the waiver of sovereign immunity, Congress also added in §1447, 42 U.S.C. §300j-6, a clear statement of EPA's administrative penalty authority over federal entities. Section 1447 gives EPA authority to assess a civil penalty against a federal entity in an amount not to exceed \$25,000 per day per violation of an "applicable requirement under this subchapter...." Section 1447 (b)(1) and (b)(2), 42 U.S.C. §300j-6(b)(1) and (b)(2). The "subchapter" to which this subsection refers includes the entire SDWA, including, as referenced

in the waiver, requirements of administrative orders. Thus, any schedule or requirement an administrative order imposes would be an "applicable requirement," a violation of which could provide grounds for a penalty order under §1447, 42 U.S.C. §300j-6.¹ Section 1447(b), 42 U.S.C. §300j-6(b), requires EPA, before the penalty order becomes final, to provide the federal entity with notice, an opportunity for a hearing and a conference with the Administrator.

Third, the Amendments streamlined the administrative procedures for issuing a compliance order under §1414(g), 42 U.S.C. §300g-3(g). Under the amended section, which is applicable to compliance orders issued to federal and private parties alike, EPA no longer is required to provide the respondent with notice and an opportunity for a hearing before a compliance order is final. However, Congress retained the SDWA's pre-Amendment requirement that EPA give a state prior notice of an enforcement action.² EPA also may issue compliance orders against federal entities when requested by the Chief Executive Officer of the state in which is located the public water system.

Fourth, the Amendments ensure that penalty orders EPA issues to a federal entity are accountable to the public and the courts. Section 1447(b)(4)(A), 42 U.S.C. §300j-6(b)(4)(A), provides any interested person may obtain judicial review in U.S. District Court of the penalty orders issued under section 1447, 42 U.S.C. §300j-6. As part of the review, the District Court may impose additional civil penalties against the federal entity if the court finds that EPA's penalty assessment constituted an abuse of discretion. The court must uphold the EPA penalty order unless it finds that there is not substantial evidence in the record to support the finding of a violation or that the assessment constitutes an abuse of discretion.

Finally, new section 1447(c), 42 U.S.C. §300j-6(c), requires states to use the penalties and fines collected pursuant to §1447(b), 42 U.S.C. §300j-6(b), "only for projects designed to improve or protect the environment or to defray the costs of environmental protection or enforcement."³

II. Administrative Procedures for §1414(g), 42 U.S.C. §300g-3(g), Compliance Orders

Section 1414(g), 42 U.S.C. §300g-3(g), governs EPA's authority to issue SDWA public water system compliance orders against private persons and federal entities, alike. Before the Amendments, §1414(g) required EPA to provide notice and an opportunity for a public hearing before a compliance order could take effect. The amended section 1414(g) no longer requires this process.

¹ "Applicable requirements under this subchapter" also include requirements or permits issued pursuant to an approved state program under section 1413, 42 U.S.C. §300g-2.

² In a primacy state, §1414(a), 42 U.S.C. §300g-3(a), requires EPA to give the state 30 days to take action before EPA may issue a compliance order under §1414(g), 42 U.S.C. §300g-3(g). In a nonprimacy state, §1414(a), 42 U.S.C. §300g-3(a), requires EPA to notify an appropriate local elected official with jurisdiction over the public water system of the planned EPA enforcement action before taking the action.

³ Congress exempted from these use restrictions state laws in effect on the date of enactment of the Amendments that would prohibit such a limitation on penalties collected and further exempted states from this limitation if the state's constitution requires the funds to be used in a different manner. Section 1447(c), 42 U.S.C. §300j-6(c).

In general, compliance orders issued under §1414(g) to federal entities generally should follow the same procedures governing issuance of a §1414(g) compliance order to a private party. However, EPA believes that providing a federal agency respondent an opportunity to confer with an appropriate regional official who has authority to issue the section 1414(g) order is warranted even in the absence of a statutory provision requiring one. When giving the federal entity the opportunity to confer, the regions may establish a time period in which the conference must be requested or the opportunity is waived. Because §1414(g) order is issued to achieve expeditious compliance with SDWA requirements and not to assess a penalty, the time period to request a compliance order conference generally should be less than the 30 days afforded to seek a conference for penalty orders. Ultimately, based on the seriousness of the violations and the nature of the compliance activities, the regional office will determine the time period during which the conference would be available. Once the order is final, the requirements of the order become applicable requirements, subject to the penalty provisions of §1447(b).

III. Administrative Procedures for §1431 Imminent and Substantial Endangerment Orders

Section 1431, 42 U.S.C. §300i, authorizes the Administrator to take any action she deems necessary upon her "receipt of information that a contaminant which is present in or is likely to enter a public water system or an underground source of drinking water may present an imminent and substantial endangerment to the health of persons..." Actions the Administrator may take under this section include, but are not limited to, issuing orders to protect human health, including orders to provide drinking water. Regions may issue an imminent and substantial endangerment order either as part of a comprehensive order relying also on other SDWA enforcement authorities, or as a separate order. For example, the region could issue a §1431 order in conjunction with a compliance order pursuant to §1414(g), 42 U.S.C. §300g-3(g).⁴ As with §1414(g) compliance orders, §1431 does not require EPA to offer the opportunity to confer with the Administrator, or require EPA to provide notice and an opportunity for hearing, before an imminent and substantial endangerment order becomes final. As discussed above for §1414(g) compliance orders, however, when practicable based on the circumstances of the order, the regions may offer the federal entity an opportunity to confer with an appropriate regional official who has authority to issue the §1431 order before the order becomes final. The region may determine based on the facts of the individual case whether it would be practicable to provide an opportunity to confer and if so, the period of time in which the conference would be available. Due to the nature of §1431 orders, any opportunity to confer may be limited.

As is the case for §1414 compliance orders, the terms of §1431 emergency orders become "applicable requirements under the subchapter" for purposes of the administrative penalty order authority granted the Administrator in §1447(b)(1). Accordingly, in the event the federal entity fails to comply with an order issued under section 1431, EPA may issue a penalty

⁴ For more information, see EPA's "Final Guidance on Emergency Authority Under Section 1431 of the Safe Drinking Water Act," signed on September 27, 1991 by James R. Elder, Director, Office of Ground Water and Drinking Water and Frederick Stiehl, Enforcement Counsel, Office of Enforcement.

order under section 1447(b).⁵

IV. Administrative Procedures, including Opportunity to Confer with the Administrator, for §1447(b), 42 U.S.C. §300j-6(b), Penalty Orders⁶

Under §1447(b)(1), 42 U.S.C. §300j-6(b)(1), EPA may assess a penalty for violation of an "applicable requirement under this subchapter." Although EPA does not rely on a waiver of sovereign immunity to enforce the provisions of the SDWA against a federal entity, the new waiver clarifies the scope of section 1447(b)'s penalty provision. Section 1447(a) provides that the "federal state, interstate, and local substantive and procedural requirements referred to in this subsection include, but are not limited to, all administrative orders...." Thus, for example, requirements imposed by administrative orders issued pursuant to sections 1414 (public water system requirements), 1423 (protection of underground sources of water) and 1431 (emergency powers) could form the basis for issuing a section 1447 penalty order. Additionally of course, a violation of any statutorily mandated requirement could subject the federal entity to a section 1447 penalty order. For example, section 1445 requires, among several requirements, monitoring and record keeping. A violation of this section would subject the federal entity to penalties under section 1447(b).

In assessing penalties against a federal entity under section 1447, 42 U.S.C. §300j-6, EPA may evaluate the penalty based on the seriousness of the violations, the population at risk and other appropriate factors. EPA would calculate the penalty amount in a manner consistent with Agency policy and in the same manner it would calculate a penalty for a private person capturing the economic benefit for avoidance of costs.⁷ In some cases it may be appropriate to offer the federal entity the opportunity to negotiate a settlement of the penalty action before the region formally files the complaint. Offering pre-filing settlement negotiations of SDWA penalty actions is analogous to the pre-filing settlement negotiation opportunities the Department of Justice provides before filing complaints in civil court.

Subsection 1447(b), 42 U.S.C. §300j-6(b), requires that before a penalty order becomes final the Administrator provide the federal entity with notice and an opportunity for a formal hearing on the record in accordance with the Administrative Procedures Act. 40 C.F.R. Part 22 sets forth EPA's general rules of administrative practice governing the assessment of administrative penalties. If EPA issues an order and no settlement eventually is reached, the head of the federal entity may request an opportunity to confer with the Administrator following

⁵ As a matter of practice, EPA will seek penalties against a Federal agency which violates or fails or refuses to comply with a §1431 order not to exceed \$15,000 for each day in which such violation occurs or failure to comply continues.

⁶ Note: settlement may be reached at any point in the administrative process. See section V for settlement guidance.

⁷ Congress clarified in the Amendments' legislative history that any fine or penalty assessed is to be paid from an entity's appropriations and not from the U.S. Judgement Fund. "This will assure the proper measure of accountability for Federal entities and assist in deterring future violations of drinking water laws and regulation." H. Rep. No. 104-632, Part 1, 2nd Sess., *reprinted in* Cong. Rec. H6711 (1996) (Commerce Committee Report).

exhaustion of the Part 22 process.⁸

To initiate the Part 22 process, EPA files a complaint with the Regional Hearing Clerk. 40 C.F.R. §22.13. The respondent federal entity then may file an answer, in which it must clearly admit, deny, or explain each factual allegation of the complaint, and it may request a hearing. 40 C.F.R. §22.15. If the case proceeds to a hearing, a Presiding Officer is assigned to hear and decide the case. Following the Presiding Officer's decision, Part 22 provides opportunities for reopening the hearing or appealing the decision to the Environmental Appeals Board. 40 C.F.R. §§22.28, 22.30.

EPA will provide the federal entity with an opportunity to confer with the Administrator after the federal entity exhausts its Part 22 administrative process. This means that EPA will provide the federal entity with the opportunity to confer with the Administrator after the matter has been elevated to and decided by the Environmental Appeals Board. EPA will provide the federal entity thirty days following the Environmental Appeals Board's order issued under §22.31 to request a conference, regardless if the entity petitions for reconsideration under §22.32. Under section 22.32, motions to reconsider the Environmental Appeals Board's order must be filed within ten days after service of the order. A motion for reconsideration will not toll the thirty-day period EPA provides the federal entity to seek an opportunity to confer with the Administrator. If no written request to confer is filed within the thirty-day period, the administrative order is final under the terms of §1447(b)(3), 42 U.S.C. §300j-6(b)(3), of the SDWA.

EPA may satisfy the opportunity to confer requirement by providing the federal entity an opportunity to confer with a regional official with authority to issue the §1447(b) order. However, consistent with guidance issued under the FFCA⁹ and as a matter of general policy, the head of the federal entity may confer with the Administrator, under the circumstances described below.

The conference with the Administrator can occur directly or through an exchange of letters. A request for a direct conference should be served on the Administrator with a copy to the Director of the Federal Facilities Enforcement Office (FFEO) and all parties/counsel of record. The request for a direct conference should specifically identify the issues which the federal entity proposes to discuss with the Administrator, and should specifically identify who will represent the federal entity. In addition, as part of its request for a direct conference, the head of the federal entity should attach copies of all prior administrative decisions and briefs in the underlying proceedings. Copies of the briefs and underlying decisions also should be provided to the Director of FFEO.

The parties/counsel of record may request to be present during the direct conference.

⁸ The Administrator's obligation to provide an opportunity to confer is only in connection with EPA-issued orders, not State orders. Therefore, EPA will not confer with federal entities regarding State-issued orders.

⁹ See Memorandum from Steven A. Herman, Final Enforcement Guidance on Implementation of the Federal Facility Compliance Act, July 6, 1993.

This request to attend the direct conference, likewise, should be in writing and served on the Director of FFEO and the parties/counsel of record. The Administrator or her designee shall notify the head of the federal entity who requested the direct conference and the parties/counsel of record regarding her plan and arrangements for the direct conference.

Following the conclusion of the direct conference, a person designated by the Administrator will provide a written summary of the issues discussed and addressed. Copies of the written summary will be provided to the parties/counsel of record. Ordinarily, within thirty (30) days of the conference, or within thirty (30) days following the receipt of the letter from the head of the federal entity in the event of no direct conference, the Administrator shall issue a written decision with appropriate instruction regarding the finality of the order. This decision shall be filed with the Regional Hearing Clerk and made part of the administrative case file.

If the conference with the Administrator is conducted through an exchange of letters, the head of the federal entity should serve a letter on the Administrator with a copy to the Director of FFEO and all parties/counsel of record. In addition, the letter should specifically identify the issues which the federal entity proposes that the Administrator consider. The head of the federal entity should also attach copies of all prior administrative decisions and briefs in the underlying proceedings. Copies of the briefs and underlying decisions also should be provided to the Director of FFEO.

If the Environmental Appeals Board referred the matter to the Administrator for decision under §22.04(a) rather than deciding the matter itself and if the federal entity wants to request a conference with the Administrator, the federal entity must do so prior to the Administrator's decision. To assure that federal entities are aware of these procedures, Regions should refer the federal entity to Part 22 and other relevant Agency guidance.

V. Section 1447(b), 42 U.S.C. §300j-6(b), Penalty Order Settlements

The process for administrative settlements is set out at 40 C.F.R. §22.18. This provision provides an opportunity for the respondent to confer with the complainant (an EPA employee authorized to issue the complaint) concerning settlement regardless if the respondent requests a hearing. Whenever a settlement or compromise has been proposed, the parties must forward a written consent agreement and proposed order to the Regional Administrator and the Environmental Appeals Board for EPA Headquarters-issued complaints. Throughout the administrative process, the regions should follow Part 22's requirements regarding ex parte communications.

Each settlement between EPA and a federal entity should include, in addition to the provisions typically included in private party settlements, a waiver of the federal entity's opportunity for a conference with the Administrator under §1447(b)(3), 42 U.S.C. §300j-6(b)(3). Moreover, whenever EPA reaches a settlement that includes work to achieve compliance with the SDWA, stipulated penalties should be included in the settlement reached under section 1447(b) and 1414. In appropriate circumstances, EPA may use the May 8, 1995 "Interim Revised EPA Supplemental Enforcement Projects Policy" and future revisions to it to resolve

penalty enforcement actions under §1447, 42 U.S.C. §300j-6.¹⁰

VI. Administrative Procedures for Administrative Orders under UIC Program

Section 1447 waives federal sovereign immunity and provides EPA express enforcement authority, including UIC enforcement authority, over federal entities. Accordingly, the federal government is subject to the requirements of the UIC provisions to the same extent as a private party.

Under section 1423(c), 42 U.S.C. §300h-2(c), EPA may issue UIC compliance orders after giving the person to whom it is directed written notice of the proposed order and an opportunity to request a hearing on the order. The §1423 hearing is not subject to the Administrative Procedures Act, but the process must provide a reasonable opportunity to be heard and present evidence. Violation of a §1423 compliance order could subject the federal entity to a penalty order under §1447.¹¹

Like §1414(g), 42 U.S.C. §300g-3(g), section 1423 does not require EPA to provide the federal entity with an opportunity to confer on a compliance order. Based on the circumstances of the case, however, EPA believes that providing an opportunity to confer with an appropriate regional official who has authority to issue the §1423 order is warranted even in the absence of a statutory provision requiring one. The time period to request a conference generally should be less than that afforded to seek a conference for penalty orders. The regional office may determine based on the seriousness of the violations and the nature of the compliance activities to be undertaken the time period in which the federal entity may request a conference.

VII. Timing of Issuance of SDWA Administrative Order(s)

The EPA regional offices may determine, based on the facts of the particular enforcement case, whether it is appropriate to issue a §1414, 42 U.S.C. §300g-3, compliance order or a section 1447 penalty order, separately or in combination. Similarly, the region may issue a §1423 UIC compliance order separately or in combination with a §1447 penalty order.

VIII. Press Releases for SDWA Enforcement Actions at Federal Facilities

It is the policy of EPA to use the publicity of enforcement activities as a key element of the Agency's program to promote compliance and to deter noncompliance with environmental laws and regulations. Publicizing EPA enforcement actions against private parties and Federal agencies on an active and timely basis informs both the public and the regulated community of EPA's efforts to ensure compliance and take enforcement actions. The issuance of press releases in appropriate circumstances can be a particularly effective tool for expediting timely

¹⁰ The SEP policy also may be used to settle penalty actions, including actions brought under Section 1423, 42 U.S.C. section 300-h, (for violation of underground injection control program requirements).

¹¹ As noted above, in assessing a penalty under section 1447(b), 42 U.S.C. § 300j-6(b), EPA regional offices will calculate the penalty amount based on the seriousness of the violations, the population at risk and other appropriate factors.

compliance at violating federal facilities. EPA's decision to issue a press release and the contents of press releases are not negotiable with federal agencies or other regulated entities. We encourage the regions to use press releases as one of the effective tools for enforcement under the SDWA.

IX. Conclusion

FFEO is issuing this guidance to clarify its expectations for federal facility enforcement under the SDWA. This guidance supersedes earlier guidance regarding SDWA enforcement at federal facilities such as that found in the 1988 Federal Facilities Compliance Strategy. Should you have any questions or concerns, please call Mary Kay Lynch at (202) 564-2574, Sally Dalzell at (202) 564-2583, or Jean Rice at (202) 564-2589.

X. Notice

This guidance and any internal procedures adopted for its implementation are intended solely as guidance for employees of EPA. Such guidance and procedures do not constitute rule making by the Agency and may not be relied upon to create a right or benefit, substantive or procedural, enforceable at law or equity, by any person. The Agency may take action at variance with this guidance and its internal implementing procedures.

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