"Guidance on "Claim-Splitting" in Enforcement Actions under the Clean Water Act", distributed August 28, 1987.

GUIDANCE ON "CLAIM-SPLITTING" IN ENFORCEMENT ACTIONS UNDER THE CLEAN WATER ACT

GUIDANCE ON "CLAIM-SPLITTING" IN ENFORCEMENT ACTIONS UNDER THE CLEAN WATER ACT

I. What is "Claim Splitting"?

Claim splitting, in this context means either 1.) pursuing separate administrative and judicial civil penalty enforcement actions simultaneously for the same violation or violations, or 2.) dividing an existing set of known past CWA violations by one violator and pursuing each subset through a separate civil penalty enforcement action. This guidance addresses the appropriateness of such claim splitting activities in the context of CWA enforcement.

II. Parallel Administrative and Judicial Proceedings

The enforcement structure of the amended CWA allows the agency to seek administrative [§ 309(g)] or judicial [§ 309(d)] civil penalties against violators of specific sections of the Act or of conditions or limitations implementing such sections in 402 or 404 permits. The amendments make clear that the agency may not seek to impose both types of civil penalty - administrative and judicial - for the same violation or violations. Section 309 (g)(6)(A) states that although the taking of an administrative penalty action shall not limit the agency's authority to enforce any provision of the CWA, "...any violation...with respect to which the Administrator...has commenced and is diligently prosecuting an action under this subsection [Administrative Penalties],... shall not be the subject of a civil penalty action under subsection (d) of this section [Judicial Civil Penalties] or Section 311(b) [Penalties for Spills]..." [bracketed material added].

As a matter of policy, EPA intends not to impose an administrative penalty for any violation for which a judicial penalty has already been assessed.

Where a CWA violator is responsible for multiple violations, the Agency may simultaneously pursue administrative penalties of up to $125,000 for some violations, and judicial civil penalties of up to $25,000 per day for each violation" for other violations not addressed

by the administrative penalty proceeding. See Sections 309(g) and 309(g). Arguably, EPA may choose to "split" its civil penalty claims between simultaneous administrative and judicial actions against the same violator for different past violations. As a matter of practice, however, such claim-splitting could result in an inefficient use of Agency resources that could impair CWA enforcement efforts. To pursue two simultaneous civil penalty proceedings would require duplication of efforts by both legal and technical staffs, and could even result in unequal or inconsistent results. In addition, the prosecution of two simultaneous civil penalty actions in different forums, one administrative and one judicial, might provide the violator with an argument for staying one or the other of the enforcement proceedings to prevent inconsistency, thus potentially delaying resolution of some of the outstanding violations.

For the above reasons, EPA should generally avoid initiating parallel or simultaneous administrative and judicial civil penalty proceedings. This guidance does <u>not</u> apply to parallel civil (administrative or judicial) and criminal actions, which may sometimes be appropriate, nor does it apply to <u>serial</u> civil penalty actions, either administrative or judicial, in any order or combination, if the new civil penalty action addresses only violations which occurred after the date of the earlier concluded civil penalty action.

In addition, EPA must be particularly careful in framing its penalty orders and judicial complaints to identify as precisely as possible the violations which the Agency intends the enforcement action to address so as to avoid possible preemption of future claims for civil penalties.

Finally, EPA may, of course, pursue judicial enforcement under Section 309(b) of an administrative order for compliance issued pursuant to Section 309(a). And EPA may at any time initiate administrative or judicial civil penalty actions for the same violations that were the basis for an earlier (or indeed simultaneous) Section 309(a) administrative order for compliance.

III. <u>Simultaneous Administrative Penalty Proceedings</u>

Although nothing in the Clean Water Act or Amendments prohibits simultaneous administrative civil penalty actions for different past violations by the same violator, EPA will be on the strongest legal ground by avoiding simultaneous administrative penalty actions against a single violator. Should EPA initiate separate administrative penalty

actions for different sets of past violations by one violator, EPA may have to rebut the argument that it has split its claims in an effort to circumvent the Act's $125,000 cap on administrative penalties. See Section 309(g)(2)(B).. In cases in which EPA is aware of past violations by one violator of sufficient number and seriousness to warrant a civil penalty in excess of $125,000 (taking into account the factors for determining penalty amounts enumerated in Section 309(d) for judicial penalties and in Section 309(g)(3) for administrative penalties), EPA would be better advised to proceed with a single judicial civil penalty action which has no civil penalty cap. This approach not only avoids the charge of circumvention of the administrative penalty cap by claim splitting, but will eliminate the inefficiency caused by duplication of enforcement efforts in the two forums. Finally, the desirability of securing injunctive relief under Section 309(b) against most serious repetitive violators will often tip the balance away from not only simultaneous, but even serial administrative penalty actions, and toward a judicial action for injunction and penalty.

For further information or clarification of this guidance, contact Jed Z. Callen, Esq. at FTS 597-9882 or Gary Hess of OECM at FTS 475-8183.