"Guidance on Effect of Clean Water Amendment Civil Penalty Assessment Language", distributed August 28, 1987.

GUIDANCE ON EFFECT OF CLEAN WATER ACT

AMENDMENT CIVIL PENALTY ASSESSMENT LANGUAGE

-- Appropriate Calculations Per Day
and/or Per Violations

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Summary

In this guidance, the Agency concludes that each Clean Water Act violation is subject to a separate civil judicial penalty of $25,000 per day, or administrative penalty of $10,000 per day, subject to the Class I administrative maximum assessment of $25,000 and the Class II administrative maximum of $125,000. For guidance on the new statutory language regarding "single operational upset" and any effect it may have on civil penalty liability calculated as the statutory maximum amount, see a separate guidance document to be distributed to the Regions at a later date.

Background

When Congress amended the Clean Water Act, providing for increased civil penalties and for administrative penalties, it phrased each penalty provision slightly differently. An analysis of the language and legislative history, viewed in the light of Agency practice, indicates that all provisions are to be interpreted in a similar manner. Thus, all violations of separate Clean Water Act requirements or permit conditions are separately subject to penalty assessment on each and every day such violations continue.

The manner in which penalty liability is alleged in civil or administrative complaints is affected by interpretion of this statutory language, as is the Agency's assessment of penalties. With respect to civil or administrative complaints or proposed orders, EPA will operate from the strongest position where such pleadings allege the precise statutory language for penalties up to each applicable statutory maximum penalty amount.

In considering the number of violations contributing to penalties in judicial or administrative proceedings, Agency enforcement personnel should account for the total number of violations of Clean Water Act requirements, permit conditions or limitations that occur in a day, as well as the number of days each violation continues. The amount thus calculated may serve two purposes: first, it may be considered as one of the factors in determining whether to proceed under administrative penalty authority or to initiate judicial action (See Guidance on Choosing Among Clean Water Act Administrative, Civil and Criminal Enforcement Remedies in this guidance package); and secondly, the Region may cite this amount as its proposed assessment in an administrative complaint and proposed order, subject to the statutory caps on total penalty assessment.

The Provisions

The following chart sets out the evolution of the various penalty provisions in the process of amending the Clean Water Act.

	CIVIL JUDICIAL	ADMINISTRATIVE: CLASS I MAX. $25,000	ADMINISTRATIVE: CLASS II MAX. $125,000
Before 1987 Amendments	$10,000 per day of such violation		
Sen. Bill, S1128	$25,000 per day for each violation		$10,000 per day for each violation
S. Rep. 50	$25,000 per violation		$10,000 per day for each violation of a Clean Water Act requirement
House Bill, HR 8	$25,000 per day of such violation		$10,000 per day of violation
H. Rep. 189	$25,000 per day		$10,000 per day violation
1986 Conf. Bill/1987 Amendments	$25,000 per day for each violation	$10,000 per violation	$10,000 per day for each day during which the violation continues

At issue is the question whether EPA may assess a number of violations in a single day, or only a single violation continuing for several days.

Discussion of Interpretation

In amending the enforcement provisions of the Clean Water Act, Congress generally sought to expand the Agency's enforcement authorities.[1] Additionally, the legislative history reflects

1. 133 Cong. Rec. S736 (January 14, 1987)(statement of Sen. Chafee)

no intent to limit the Agency's past practice, either in pleading the statutory maximum or in using the penalty policy. In fact, Congress ratified the Agency's penalty policy and practices by incorporating its basic principles in the Act. See §313 (c) which amends §309 (d) to specify the factors to be considered in determining penalty amounts.

There is no doubt that there was no change, except as to dollar ceiling, to civil judicial penalties. On its face, the amended statute states that a violator shall be subject to $25,000 per day for each violation. Furthermore, Congress says clearly that "Section 309 and 404 of the Act are amended ... to clarify that each distinct violation is subject to a separate daily penalty assessment of up to $25,000..." H.R. Rep. No. 1004, 99th Cong., 2d Sess., 132 Cong. Rec. H10569 (Oct. 15, 1986).

For administrative penalties, the question is whether a more restrictive interpretation applies. Class I penalties are to be assessed "per violation". Congress explicitly states that "The maximum first tier penalty that may be assessed in any enforcement action is $25,000, regardless of the number of violations or number of days of violation. H.R. Rep. No. 1004, 99th Cong., 2d Sess., 132 Cong. Rec. H10571 (Oct. 15, 1986) (emphasis added). Accordingly, the number of violations and the number of days of violation are to be considered in Class I penalty assessment, up to the cap on liability. The Class II penalty provision, which states that the penalty shall be per day for each day during which the violation continues, should be interpreted similarly.

In conclusion, the Agency's policy with respect to calculating counts (i.e. violations and days) of civil penalty liability has been unchanged by the Clean Water Act amendments, and may be extended in application to the new administrative penalty provisions. For further information, please contact Patricia Mott, attorney in OECM/Water (FTS 475-8320).