EC-G-1998-147

III.B.2.

" Final Rules of Practice Governing the Administrative Assessment of Class II Civil Penalties under the Clean Water Act," issued June 12, 1990, effective July 12, 1990. Published at 55 F.R. 23838 (June 12). Replaces the Interim Final Rules dated August 10, 1987.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

" 1 ? 1990

OFFICE OF
ENFORCEMENT AND
COMPLIANCE MONITORING

MEMORANDUM

SUBJECT: Final Rule for Administrative Assessment of Class II Civil Penalties, 40 CFR Part 22

FROM: Patricia Chor
OE-Water Intern

TO: OE-Water Attorneys
Regional Counsels, Regions I-X

Attached is the final rule governing administrative assessment of Class II penalties. The rule was issued June 12, 1990 and becomes effective July 12, 1990. Please contact Susan Cary Watkins at (703) 768-2950 for further information.

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ENVIRONMENTAL PROTECTION AGENCY

FR Part 22

[...-3845-7]

Rules of Practice Governing the Administrative Assessment of Class II Civil Penalties Under the Clean Water Act

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is today promulgating a final rule establishing procedures for its administrative assessment of Class II civil penalties under the Clean Water Act (CWA). There have been no substantive changes to this rule since it was issued as an interim final rule. See 52 FR 30671 (August 17, 1987). This rule provides that EPA's administrative assessment of Class II penalties will be governed by EPA's Consolidated Rules of Practice for assessing administrative penalties. EPA is taking this action in response to amendments to the CWA, made by the Water Quality Act of 1987, which authorize the Administrator to assess administrative penalties for specified violations of the CWA. The authority granted to the Administrator to assess administrative penalties was immediately effective on February 4, 1987, the date the Water Quality Act was enacted.

DATES: The final rule is effective July 12, 1990. EPA will use the interim final rule for conducting these proceedings before the date the final rule becomes effective.

FOR FURTHER INFORMATION CONTACT: Susan Cary Watkins, Office of Enforcement and Compliance Monitoring (LE-134W), U.S. Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460, 202-382-2858.

SUPPLEMENTARY INFORMATION: On February 4, 1987, section 309 of the CWA, 33 U.S.C. 1319, was amended by section 314 of the Water Quality Act, Pub. L. 100-4, to authorize the Administrator of EPA to assess administrative penalties for violations of the CWA. The amendments to section 309 created a new subsection 309(g) establishing two classes of administrative penalties, which differ with respect to procedure and maximum penalty amounts.

Class I administrative penalty proceedings are not subject to the Administrative Procedure Act, 5 U.S.C. 554, 556, and authorize a maximum penalty of $25,000. Notice of the availability of procedural guidance for Class I proceedings was published in the Federal Register. See 52 FR 30730 (August 17, 1987).

The final procedures promulgated today apply only to Class II. Class II proceedings authorize a maximum penalty of $125,000 and are subject to the requirements of the Administrative Procedure Act, 5 U.S.C. 554, 556. Class II proceedings are similar to administrative penalty proceedings subject to the Administrative Procedure Act under other environmental statutes.

EPA promulgated Consolidated Rules of Practice, 40 CFR part 22, governing the administrative assessment of penalties under other statutes administered by EPA. The Consolidated Rules provide a common set of procedural rules for certain of EPA's administrative penalty programs to reduce paperwork, inconsistency, and the burden on persons regulated. See 45 FR 24360 (April 9, 1980).

Because of the similarity of Class II proceedings to other administrative penalty proceedings subject to the Administrative Procedure Act, EPA concludes that the Consolidated Rules of Practice should be used as the procedural framework for Class II administrative penalty enforcement under the CWA. Accordingly, EPA is today promulgating a final rule providing that the Consolidated Rules shall govern adjudicatory proceedings for the assessment of Class II administrative penalties under section 309(g) of the CWA.

EPA published this rule in interim final form in the Federal Register with a 30-day comment period. See 52 FR 30671 (August 17, 1987). The Agency received six comment letters. Comments fell into seven areas of concern:

1. Economic impact on small business. One commenter wanted the Agency to perform an economic impact analysis. This regulation is not considered a major rule by the Agency because it will not have an annual effect on the economy of $100 million or more and, therefore, no regulatory impact analysis is required. The economic effect on most small businesses is slight, therefore, no regulatory flexibility analysis is required. Moreover, this regulation will have no effect at all on small businesses that comply with the Clean Water Act.

2. Public notice of complaints. One commenter asked that the standard public comment period be 30 days, that non-party commenters be allowed to submit late comments only when the commenter shows good cause, and that the Agency provide for late submission by parties to the enforcement action. Another commenter wanted the Agency to give notice of a violation and a reasonable time for correction before issuing an administrative penalty order. The 30-day comment period after public notice is set forth in 40 CFR 22.38(d). Also § 22.38(d) provides that non-party commenters can submit late comments after showing good cause. A party to the action is not covered by the § 22.38(d) provision for submitting comments; party submissions are governed by 40 CFR 22.07(b) and 22.15. The Clean Water Act imposes strict liability and does not require the Agency to give notice of violations before enforcing the Act. These administrative penalties are for past violations. Corrective action will not affect liability. Because administrative penalty orders usually will be based on self-reported permit violations, the discharger should know of the violation before the Agency publishes a notice of the complaint.

3. Timing of state consultation. One commenter wanted the timing of state consultation clarified to ensure that state and federal actions are not initiated simultaneously. The state consultation occurs before the Agency assesses a Class II civil penalty in a final order.

4. Evidentiary issues arising at a hearing. One commenter wanted these supplemental regulations clarified as to admissability and relevance of evidence. The Presiding Officer follows the existing requirements of 40 CFR 22.22 to determine the admissibility of evidence.

5. Participation at a hearing by a commenter who is not an intervenor. One commenter wanted to ensure that a person who is not a party but presents evidence at a hearing is subject to cross-examination. That commenter also wanted the regulations to state that a person who is not a party cannot cross examine witnesses. Under 40 CFR 22.38(d), a commenter who is not a party has no right to cross examine witnesses. Other participation by a commenter is governed by 40 CFR 22.22 and 22.38(d). Parties may cross examine. See 40 CFR 22.22(b).

6. Right to trial by jury. One commenter wanted the regulations to provide for a trial by jury on the issue of liability for administrative penalties. There is no right to a jury trial on the issue of liability in an administrative proceeding. *Atlas Roofing Co., Inc.* v. *Occupational Safety and Health Review Commission*, 430 U.S. 442 (1977). *Accord Tull* v. *U.S.*, 412 U.S. 481, 418 n.4 (1987). The purpose of the administrative penalty authority is to expedite enforcement in straightforward cases in which violations are clearly documented and are unlikely to be contested by a

violator. The Consolidated Rules of Practice and this supplemental rule provide adequate due process protections for respondents.

7. Criteria for assessing a penalty. Three commenters wanted specific criteria for determining a proposed penalty amount. The criteria are stated in section 309(g)(3) of the Clean Water Act, 33 U.S.C. 1319(g)(3). EPA has not issued specific guidelines under the Clean Water Act for calculating administrative penalties for adjudicatory hearings. The Agency issued guidance for calculating a settlement penalty amount on August 28, 1987. The Uniform Civil Penalty Policy, issued February 16, 1984, provides a general framework for determining administrative penalties. See 40 CFR 22.14(c).

Statutory Requirements

Under section 309(g) of the CWA, the Administrator assesses a Class II penalty by a final order after opportunity for a hearing on the record. Under section 309(g), the Administrator also must consult with the State in which the violation occurs before assessing the penalty.

Under section 309(g), the Administrator must provide public notice and reasonable opportunity to comment upon the complaint. The section provides that, if a hearing on the complaint is conducted, the Administrator shall give any citizen who commented on the complaint notice of the hearing, and a reasonable opportunity to be heard and to present evidence at the hearing. The section further provides that the Administrator shall give any person who comments on a complaint notice of the order assessing a penalty.

Under section 309(g), if no hearing is held, any person who commented on the complaint may petition the Administrator to set aside the order and to provide a hearing on the complaint. In addition, section 309(g) provides that the Administrator must set aside the order and provide a hearing if the Administrator determines that the evidence presented by the petitioner is material and was not considered in the issuance of the order. Under section 309(g), if the Administrator denies a hearing, the Administrator shall provide to the petitioner, and publish in the Federal Register, notice of and the reasons for the denial.

Section 309(g) did not change the procedures for issuing and enforcing administrative compliance orders under other subsections of section 309. See section 309(g)(11). Accordingly, the rule promulgated today does not apply to or change the procedures for issuing or enforcing compliance orders issued by EPA under, for example, section 309(a) of the CWA.

Consolidated Rules of Practice

EPA concludes that the Administrator may use the Consolidated Rules of Practice, 40 CFR part 22, to assess Class II penalties under section 309(g) of the CWA. The Consolidated Rules were developed for administrative penalty actions like these that are subject to the Administrative Procedure Act.

Under the Consolidated Rules, as supplemented by this final rule, EPA will assess Class II penalties by a final order after opportunity for a hearing on the record. Before issuing an order, EPA will give written notice to the person to be assessed the civil penalty by filing and service of a proposed order and complaint under the Consolidated Rules. Under 40 CFR 22.15, the complaint will include a notice of the respondent's right to request, within 20 days, a hearing on the complaint.

EPA will provide public notice and reasonable opportunity to comment on the complaint under the Consolidated Rules. If EPA conducts a hearing on the complaint, EPA shall provide to any person who commented on the complaint a copy of the notice of hearing required by 40 CFR 22.21(b), and a copy of any final order assessing a penalty. Commenters who wish to participate at a hearing may be heard and present evidence without right of cross examination or may move formally to intervene under 40 CFR 22.11. If no hearing is held, persons who commented on the complaint may petition to have the order set aside and to have a hearing on the complaint.

This final rule is effective 30 days after publication in the Federal Register. The Consolidated Rules of Practice and the interim final rule will govern proceedings for the assessment of Class II administrative penalties under the CWA for which a complaint is filed before the effective date of this final rule.

The final rule affirms that actions of the Administrator for which judicial review could have been obtained under section 509(b)(1) of the CWA (for example, issuance of a waste water discharge permit) will not be subject to review in a Class II penalty assessment proceeding. The final rule makes clear that a person who is not a party to a penalty assessment proceeding may nevertheless comment on a complaint and petition for a hearing. The rule requires that these persons file written comments with the regional hearing clerk and serve a copy of the comments upon each party. The rule cont[illegible] [illegible]at a person wishing to intervene as party in a Class II penalty proce[illegible] may move for leave to intervene under the Consolidated Rules.

Regulatory Flexibility Act

Under the Regulatory Flexibility Act, 5 U.S.C. 601–612, whenever an agency is required to publish a general notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment, a regulatory flexibility analysis that describes the impact of the rule on small entities, i.e., small business, small organizations, and small governmental jurisdictions. The Administrator may certify that the rule will not have a significant economic impact on a substantial number of small entities.

This regulation will impose no significant costs on any small entities. The overall economic impact on small entities is slight. Accordingly, I hereby certify that this proposed regulation will not have a significant impact on a substantial number of small entities. This regulation does not require a regulatory flexibility analysis.

Executive Order 12291

Under Executive Order 12291, EPA must judge whether a regulation is major and, therefore, subject to the requirement of a Regulatory Impact Analysis. Major rules are those which impose a cost on the economy of $100 million or more annually or have certain other economic impacts. The Agency has determined that this proposed rule does not meet the criteria of a major rule set forth in section 1(b) of the Executive Order. The Agency submitted this regulation to the Office of Management and Budget for review as required by Executive Order 12291.

Paperwork Reduction Act

Under the Paperwork Reduction Act, EPA must submit all information collections to the Office of Management and Budget for approval. As the present rule contains no information collection requirements, this stipulation does not apply.

Dated: May 30, 1990.

William K. Reilly,

Administrator.

Accordingly, the interim final rule amending 40 CFR part 22, published at 52 FR 30671 (August 17, 1987) is ado[illegible] as a final rule with the following changes:

PART 22—CONSOLIDATED RULES OF PRACTICE GOVERNING THE ADMINISTRATIVE ASSESSMENT OF CIVIL PENALTIES AND THE REVOCATION OR SUSPENSION OF PERMITS

1. The authority citation for part 22 is revised to read as follows:

Authority: 15 U.S.C. sec. 2615; 42 U.S.C. secs. 7545 and 7601; 7 U.S.C. secs 136(l) and 136(m); 33 U.S.C. secs. 1361, 1319(g), 1415, and 1418; 42 U.S.C. secs. 6912, 6928, and 6991(e) and 6992(d).

2. Section 22.38 is revised to read as follows:

§ 22.38 Supplemental rules of practice governing the administrative assessment of Class II penalties under the Clean Water Act.

(a) *Scope of these supplemental rules.* These supplemental rules of practice shall govern, in conjunction with the preceding Consolidated Rules of Practice (40 CFR part 22), administrative proceedings for the assessment of any Class II civil penalty under section 309(g) of the Clean Water Act (33 U.S.C. 1319(g)).

(b) *Consultation with states.* The Administrator will consult with the state in which the alleged violation occurs before issuing a final order assessing a Class II civil penalty.

(c) *Public notice.* Before issuing a final order assessing a Class II civil penalty, the Administrator will provide public notice of the complaint.

(d) *Comment by a person who is not a party.* A person not a party to the Class II proceeding who wishes to comment upon a complaint must file written comments with the Regional Hearing Clerk within 30 days after public notice of the complaint and serve a copy of the comments upon each party. For good cause shown the Administrator, the Regional Administrator, or the Presiding Officer, as appropriate, may accept late comments. The Administrator will give any person who comments on a complaint notice of any hearing and notice of the final order assessing a penalty. Although commenters may be heard and present evidence at any hearing held under section 309(g) of the Act, commenters shall not be accorded party status with right of cross examination unless they formally move to intervene and are granted party status under § 22.11.

(e) *Administrative procedure and judicial review.* Action of the Administrator for which review could have been obtained under section 509(b)(1) of the Act shall not be subject to review in an administrative proceeding for the assessment of Class II civil penalty under section 309(g).

(f) *Petitions to set aside an order and to provide a hearing.* If no hearing on the complaint is held before issuance of an order assessing a Class II civil penalty, any person who commented on the complaint may petition the Administrator, within 30 days after issuance of the order, to set aside the order and to provide a hearing on the complaint. If the evidence presented by the petitioner in support of the petition is material and was not considered in the issuance of the order, the Administrator will immediately set aside the order and provide a hearing in accordance with the Consolidated Rules of Practice and these supplemental rules of practice. If the Administrator denies a hearing under section 309(g)(4)(C) of the Act, the Administrator will provide to the petitioner, and publish in the Federal Register, notice of and the reasons for the denial.

[FR Doc. 90-13347 Filed 6-11-90; 8:45 am]

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