"Guidance on State Action Preemption Civil Penalty Actions under the Federal Clean Water Act", distributed August 28, 1987.

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GUIDANCE ON STATE ACTION
PREEMPTING CIVIL PENALTY ACTIONS
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I. Introduction

The Water Quality Act of 1987, which on February 4, 1987, amended the Clean Water Act, contains language limiting EPA's authority to commence a judicial action for civil penalties under Sections 309(d) or 311(b) of the Act under certain narrowly circumscribed conditions relating to ongoing State administrative civil penalty actions.1/ This guidance addresses the question of when, and under what conditions, might the commencement and diligent prosecution, or completion, of a State civil penalty action preempt EPA enforcement action for the same violation or violations.2/

II. What Federal Enforcement Actions can be Preempted by the Appropriate State Action?

The operative language of the Act, as amended, is in Section 309(g)(6)(A). The language is clear that the actions that may under certain circumstances be preempted, are "...civil penalty action[s] under subsection (d) of this section [§309(d), judicial civil penalties] or Section 311(b)

1/ The relevant section is 309(g)(6)(A), which follows:

> "(6) Effect of Order.- (A) Limitation On Actions Under Other Sections. Action taken by the Administrator or the Secretary, as the case may be, under this subsection shall not affect or limit the Administrator's or Secretary's authority to enforce any provision of this Act; except that any violation - (i) with respect to which the Administrator or the Secretary has commenced and is diligently prosecuting an action under this subsection, (ii) with respect to which a State has commenced and is diligently prosecuting an action under a State law comparable to this subsection, or (iii) for which the Administrator, the Secretary, or the State has issued a final order not subject to further judicial review and the violator has paid a penalty assessed under this subsection, or such comparable State law, as the case may be, shall not be the subject of a civil penalty action under subsection (d) of this section or section 311(b) or section 505 of this Act."

2/ Many of the same considerations and conclusions also may apply to State action precluding citizen enforcement actions for civil penalties under CWA §505.

[judicial civil penalties for spills of oil or designated hazardous substances] or Section 505 [citizens suits]." [Material in brackets added.] Therefore it is clear that EPA's authority to issue administrative orders for compliance under Section 309(a), to seek judicial injunctive relief under Section 309(b), to judicially prosecute criminal violations under Section 309(c), and to administratively assess civil penalties under Section 309(g) are unaffected by the new language regarding preemption by state action. EPA's authority to issue and enforce administrative orders for compliance under Section 309(a) is not only exempted from this new limitation, but is explicitly preserved by new Section 309(g)(11).

It is similarly clear from the legislative history that the new language on preemption of Federal judicial civil penalty actions "... is not intended to lead to the disruption of any Federal judicial penalty action then underway, but merely indicates that a Federal judicial civil penalty action or a citizen suit is not to be commenced if an administrative penalty proceeding is already underway." Remarks of Senator Chafee, Cong. Record, Jan. 14, 1987, p. S737. (See Attachment.)

In summary, the federal enforcement actions affected by the new preemption language of Section 309(g)(6)(A) are limited to:

1. Judicial Civil Penalties for the same violations under Section 309(d); and

2. Judicial Civil Penalties for the same violations under Section 311(b).

The preemption does not affect:

1. Administrative Orders for compliance under Section 309(a);

2. Judicial Injunction Actions under Section 309(b);

3. Criminal Actions under Section 309(c);

4. Ongoing Judicial Civil Penalty Actions under Section 309(d);

5. Administrative Civil Penalty Assessments under Section 309(g); or

6. Any Federal enforcement action to the extent it addresses violations different from those addressed in the appropriate State penalty action.

III. What State Actions Can Preempt Commencement of Federal Judicial Penalty Actions Under Sections 309(d) and 311(b)?

EPA's policy can be summarized as follows:

Absent compelling circumstances, EPA will not commence a judicial civil penalty action to collect a penalty for any violation for which an approved NPDES State has collected, or has commenced and is diligently prosecuting under comparable authorities and by comparable procedures, an appropriate and adequate administrative civil penalty. The factors which define comparable authorities and procedures, and an adequate penalty, are described below.

A. The State Must be Implementing an Approved NPDES Program:

In the words of Senator Chafee on the floor of the Senate (Cong. Record, Jan. 14, 1987, p. S737), "... the limitation on Federal civil penalty actions clearly applies only in cases where the State in question has been authorized under Section 402 to implement the relevant permit program." In other words, the first criterion for determining whether State preemption is possible is to ascertain whether the relevant State is authorized to implement the relevant Clean Water Act program (e.g. direct discharge, pretreatment, dredge and fill, sludge disposal) within its borders. If not, EPA and the State would be enforcing distinct legal requirements (e.g. a Federal v. a State discharge permit) and thus would be enforcing against different violations and not be subject to the §309(g)(6) bar against judicial penalty actions for the same violation.

B. The State Action must be Concluded, or Commenced and Diligently Prosecuted:

The second criterion comes directly from the statutory language: Has the State either "... commenced and is [it] diligently prosecuting an action ...", or has the State "... issued a final order not subject to further judicial review and the violator has paid a penalty ..."? Unless the State administrative civil penalty action has been concluded as noted, or has been commenced and is being diligently prosecuted, no preemption can occur. Thus the mere commencement of a State administrative penalty action is insufficient to preempt a federal action if there is evidence that the State action is collusive, or is not being prosecuted diligently for reasons either intentional or wholly inadvertent as, for example, when resource constraints prevent a State from holding or concluding requested administrative hearings in a timely manner. The determination of whether a State administrative penalty action is proceeding with due diligence must be made on a case by case basis, with the realization that Congress did not intend partial or inadequate

State action to be a shield for violators of the Act, but rather intended to prevent unnecessarily redundant actions at the State and Federal levels.

c. The State Statutory Provision must be Comparable to Section 309(g):

The final set of criteria for determining if Federal judicial penalty action may be preempted are found underlying the statutory wording limiting preemption to cases where the State administrative penalty action is concluded, or has been commenced and is being diligently prosecuted "... under a State law comparable to this subsection ...", meaning Section 309(g). Again Senator Chafee's remarks on the Senate floor, Cong. Rec., January 14, 1987, p. S737, are extremely helpful in interpreting the meaning of the phrase "... comparable to this subsection ...." Senator Chafee lists the following elements which must be present in the State statutory provision to make it "comparable" and thus able to support a State administrative penalty action which can preempt a subsequent federal judicial civil penalty action:

1. The right to a hearing;

2. Public participation procedures similar to those set forth in Section 309(g);

3. Analogous penalty assessment factors;

4. Analogous judicial review standards; and

5. Other provisions analogous to the other elements of Section 309(g).

The following paragraphs expand these elements. To be "comparable," and thus able to support a State action capable of preempting a subsequent federal judicial penalty action, the State statute must provide:

1. The right of the person to be assessed an administrative penalty to a hearing analogous to that provided in Section 309(g)(2), which provides at least a reasonable opportunity to be heard and to present evidence in all cases and, in cases where the potential liability exceeds $25,000, the opportunity for a hearing on the record in accordance with Administrative Procedure Act procedures (5 U.S.C. §554).

2. Public participation procedures which must be analogous to Section 309(g)(4), which provides that EPA must give the public notice of any proposed administrative penalty assessment, the right of any person who commented on a proposed

penalty assessment to be heard and to present evidence in any hearing requested by the violator, and if the violator does not request a hearing, the right of a prior commenter to petition EPA to set aside the penalty and to hold a hearing thereon.

3. Penalty assessment factors analogous to those enumerated in Section 309(g)(3). Based on language in the Conference Report, Cong. Rec., October 15, 1986, p. H10570,3/ EPA believes that for preemption to occur, it is not sufficient that the maximum potential penalty liability under the State statute be equivalent to the federal limits, or that the factors to be considered in arriving at the appropriate penalty be comparable, but also that the actual penalty collected or assessed must be adequate and appropriate. This interpretation is expressed clearly in the Conference Report. It also is consistent with EPA's current policy which holds that a prior State judicial penalty action yielding a grossly deficient penalty does not preempt a subsequent federal "overfiling" for a more adequate civil penalty. This criterion is also reflected in the general principle enunciated above; namely that EPA will not commence a judicial civil penalty action for any violation for which an approved NPDES State has already collected, or has commenced and is diligently prosecuting, under comparable authorities and by comparable procedures, an appropriate and adequate administrative penalty.

4. Standards of judicial review analogous to Section 309(g)(8), which provides that judicial review can be had by filing an appeal within 30 days after penalty assessment, and that the court shall not set aside or remand the penalty unless there is not substantial evidence in the record supporting the finding of a violation or unless the assessment constitutes an abuse of discretion. The requirement that to be capable of preempting federal action, the State statute must impose such a heavy burden on the appellant, and grant such

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3/ "When a State has proceeded with an enforcement action relating to a violation with respect to which the Administrator or the Secretary is authorized to assess a civil penalty under this provision the Administrator and the Secretary are not authorized to take any action under this subsection if the State demonstrates that the state-imposed penalty is appropriate."

deference to the State agency's decision, is reasonable because a lesser standard of judicial review would undermine the integrity and predictability of the State administrative penalty process.

5. Among the other elements alluded to by Senator Chafee, that must be present in a State statute which might preempt federal judicial penalty action, is a system for judicial collection of unpaid administrative penalties analogous to Section 309(g)(9). This Section provides for a streamlined judicial assessment of the unpaid penalty plus interest, attorneys fees, court costs, and an additional quarterly nonpayment penalty of 20% of the aggregate amount owed at the beginning of such quarter. The validity and amount of the administrative penalty are not subject to review in the collection action. This requirement is important because the absence of such a streamlined judicial collection system, which insulates the issues of penalty validity and amount from a second judicial review, again would greatly undermine the predictability of the State's process. EPA should certainly not be preempted from, nor should it hesitate to commence a judicial penalty action against a violator who evades payment, for whatever reason, of a State-assessed administrative penalty.

In summary, in order to preempt federal judicial penalty action, the NPDES State must have collected, or at least commenced and be diligently prosecuting, an appropriate and adequate administrative penalty under a statute comparable to Section 309(g) in at least the following ways:

1. Right to a hearing;
2. Analogous rights of public participation;
3. Equivalent civil penalty maximum liabilities;
4. Analogous penalty assessment factors;
5. Analogous standards of judicial review; and
6. Analogous collection authorities and streamlined judicial collection procedures.

IV. Final Thoughts

From the foregoing it should be clear that federal judicial penalty actions are not likely to be preempted by State administrative penalty actions unless States begin to implement legislation specifically patterned on Section 309(g). Until that time, which EPA welcomes, the individual State/EPA Enforcement Agreements might be the appropriate forum for establishing some voluntary ground rules for preventing unnecessary duplication of efforts between EPA and approved NPDES States. Nothing in this guidance should be construed as limiting the ability of the States and EPA to agree to certain rules or principles in furtherance of their cooperative efforts to implement strong and consistent NPDES programs.

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

Attachment: [Floor Remarks of Senator Chafee]

thority aggressively against illegal polluters, even if a memorandum of agreement is not concluded with the Secretary of the Army.

The corps enforcement record—and the Corps of Engineers is involved in this—shows the corps has not been vigorous enough against illegal dumpers. Now we have given EPA the authority to move against these polluters.

New paragraph 309(g)(6) sets out limitations that preclude citizen suits where the Federal Government or a State has commenced and is diligently prosecuting an administrative civil penalty action or has already issued a final administrative civil penalty order not subject to further review and the violator has paid the penalty. The same provision limits Federal civil penalty actions under subsections 309(d) and 311(b) for any violation of the Federal Water Pollution Control Act. While redundant enforcement activity is to be avoided and State action to remedy a violation of Federal law is to be encouraged, the limitation on Federal civil penalty actions clearly applies only in cases where the State in question has been authorized under section 402 to implement the relevant permit program.

A single discharge may be a violation of both State and Federal law and a State is entitled to enforce its own law. However, only if a State has received authorization under section 402 to implement a particular permitting program can it prosecute a violation of Federal law. Thus, even if a nonauthorized State takes action under State law against a person who is responsible for a discharge which also constitutes a violation of the Federal permit, the State action cannot be addressed to the Federal violation, for the State has no authority over the Federal permit limitation or condition in question. In such case, the authority to seek civil penalties for violation of the Federal law under subsections 309(d) or 311(b) or section 505 would be unaffected by the State action, notwithstanding paragraph 309(g)(6).

In addition, the limitation of 309(g)(6) applies only where a State is proceeding under a State law that is comparable to section 309(g). For example, in order to be comparable, a State law must provide for a right to a hearing and for public notice and participation procedures similar to those set forth in section 309(g); it must include analogous penalty assessment factors and judicial review standards; and it must include provisions that are analogous to the other elements of section 309(g).

Finally, section 309(g)(6)(A) provides that violations with respect to which a Federal or State administrative penalty action is being diligently prosecuted or previously concluded "shall not be the subject of" civil penalty actions under sections 309(d), 311(b), or 505. This language is not intended to lead to the disruption of any Federal judicial penalty action then underway, but merely indicates that a Federal judicial civil penalty action or a citizen suit is not to be commenced if an administrative penalty proceeding is already underway.

NOTICE OF CONSENT DECREES

This bill requires that, in connection with citizen suits, notification of proposed consent decrees be provided to the Attorney General and to the Administrator.

It was originally proposed in the Administration's bill 2 years ago. The Administration bill contained a clause which specifically disclaimed that the United States could be bound by judgments in cases to which it is not a party.

That provision merely restated current law and thus we decided that it is not necessary to include it in this bill. The amendment is not intended to change existing law that the United States is not bound, since that rule of law is necessary to protect the public against abusive, collusive, or inadequate settlements, and to maintain the ability of the Government to set its own enforcement priorities.

Compliance dates for industries for which effluent guidelines have not been promulgated have been extended to March of 1989.

We have had a big problem over when you have to come into compliance because of the guidelines. EPA has not been quick enough to come out and tell industry A or industry F what they can and cannot do. So we have reluctantly given them an extension on these guidelines. The latest is March 1989, or 3 years from the date of promulgation of the guidelines by EPA, whichever is sooner. EPA is strongly encouraged to get these guidelines finalized so industry can comply with the discharge requirements as soon as possible. Until such guidelines are promulgated, the Agency is expected to proceed under its current policy with respect to noncompliance dischargers to meet the deadline.

A provision establishing a progressive stormwater control program is included in the bill. Although the law now requires EPA to establish discharge requirements for the stormwater point sources, EPA has been unable to develop a final permit program for these sources. This legislation sets up a program whereby EPA must issue permits for storm water point source discharges in municipalities with population of over a quarter million within 4 years of enactment.

Within 5 years of enactment, permits for stormwater point sources discharges are required in cities with populations between 100,000 and 250,000. These discharge requirements are to contain control technology or other techniques to control these discharges and should conform to water quality requirements. Requirements for storm water discharges associated with industrial activities are unaffected by this provision. The Age[illegible] unable to move forward [illegible]th a [illegible]gram, because the current law did [illegible] give enough guidance to the Age[illegible] This provision provides such guid[illegible] and I expect EPA to move rapid[illegible] implement this control program.

The legislation also contains [illegible] Senate provision relating to the Ch[illegible]go tunnel and reservoir project. Th[illegible] something that has been around [illegible] many, many years. This provision [illegible] allows funding for this project u[illegible] section 201(g)(1) without regard to [illegible] limitation contained in the provisio[illegible] the Administrator determines [illegible] such projects meets the cost-effec[illegible] requirements of section 217 and 21[illegible] the act without any redesign or re[illegible]struction. The Governor of Illi[illegible] must demonstrate to the satisfac[illegible] of the Administrator the water qua[illegible] benefits of the project. This provi[illegible] does not apply to the cost-sharing [illegible]quirements under the other applica[illegible] provisions of the bill.

The legislation modifies EPA's [illegible]rent policy with respect to antiba[illegible] sliding on best practical judgment [illegible] water quality-based permits. [illegible] thrust of this provision is to gener[illegible] prohibit affected permittees fr[illegible] weakening their discharge requ[illegible]ments as a result of subsequently p[illegible]mulgated guidelines. Or[illegible] narrow circumstances car[illegible] be permitted, and in no eve[illegible] permitted even if, after a dischar[illegible] leaves a stream, there is an impro[illegible]ment in water quality, unless the a[illegible] degradation policy test is met. Th[illegible] test states that water quality may [illegible]lowered only if widespread adve[illegible] social and economic consequences [illegible] be demonstrated through a full int[illegible] governmental review process.

S. 1 also embodies many of the c[illegible]struction grants and revolving lo[illegible] fund proposals contained in the [illegible] first passed by the Senate in 1985. [illegible] other words, this bill was passed, a[illegible] mentioned earlier, in 1985; we went [illegible] conference with the House, but [illegible] kept many of the provisions deali[illegible] with the construction grants and [illegible] revolving loan.

The bill extends the current $2.4 b[illegible]lion annual authorization for title [illegible] construction grants for 3 years. [illegible] fiscal years 1989 and 1990, the annu[illegible] authorization for title II would be [illegible]duced to $1.2 billion. After that, the[illegible] is no more; no further authorizatio[illegible] would be made for title II after fis[illegible] year 1990, and the money is shift[illegible] over into the revolving grants pr[illegible]gram.

States would be provided with suf[illegible]cient lead time to begin setting [illegible] State revolving loan prog[illegible] T[illegible] bill encourages the creati[illegible] self-sustaining financing [illegible] the earliest opportunity by p[illegible] each State with an option of conve[illegible]ing title II construction grants fun[illegible] into capitalization grants for SRF's.