EC-G-1998-143

III.A.2.

"Use of Stipulated Penalties in Administrative Orders on Consent under the CWA", dated September 6, 1985.

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

SEP 6 1985

OFFICE OF ENFORCEMENT
AND COMPLIANCE
MONITORING

MEMORANDUM

SUBJECT: Use of Stipulated Penalties in Administrative Orders on Consent under the Clean Water Act

FROM: Glenn L. Unterberger
Associate Enforcement Counsel
for Water

TO: Paul A. Seals
Regional Counsel, Region VI

I am responding to Region VI's request for specific guidance on whether the use of stipulated penalties in administrative orders is permissable under the Clean Water Act, Section 309.

After extensive legal research by both my office and the Office of General Counsel, and consultation with the Department of Justice, it is our judgment that, as a matter of policy, EPA generally will not include stipulated penalties in administrative orders on consent under the Clean Water Act. The one exception to this policy (which probably has limited practical effect) is that EPA may consider using administrative orders on consent with a provision for stipulated penalties under the following terms:

1) that stipulated penalties provided for in an administrative order on consent (possibly though a confession of judgment clause) are collectible only through the commencement of an enforcement action for violations of the order and the statute or permit in federal district court; and

2) that any such order shall also provide that, irrespective of the penalty amounts so stipulated or confessed in judgment, the government shall reserve the right to seek whatever penalty amount it deems appropriate in an action to enforce the terms of the order and will not be bound by the amounts stipulated.

By this approach, we remove any doubt of the enforceability of the terms of the order by retaining the responsibility for imposing civil penalties or other appropriate remedies with the court as explicitly authorized in CWA Sections 309(b) and (d). In doing so, we also act consistently with the letter of 28 U.S.C. §§516 and 519 and the spirit of the Memorandum of Understanding between EPA and the Department of Justice that the Department settles and compromises claims of the United States which EPA is to bring through litigation. Also, the reservation clause ensures that if additional violations or other pertinent facts come to light after the AO on consent is entered into, the government will not be limited to the penalties contained in the AO.

If a Region chooses to employ the practice where the requisite criteria can be met, it should be done on a highly selective basis and only when, in the opinion of the Regional office, an administrative order without these stipulated penalty provisions will not result in final compliance as quickly or as well.

Since orders on consent with stipulated penalties are inherently more complex than traditional administrative orders and involve negotiations which may affect subsequent judicial enforcement actions, the Office of Regional Counsel must be involved from the outset, if their use is contemplated.

The above guidance may be short-lived, since the proposed amendment to the Clean Water Act giving EPA administrative penalty authority, if passed, will also probably give us stronger authority to use stipulated penalties in consent AOs. Should the administrative penalty authority amendment be enacted, we will develop guidance on the use of such authority, with the expectation that stipulated penalties in consent AOs meeting certain procedural preconditions probably will be acceptable.

cc: Associate Enforcement Counsels
Regional Counsels
Bill Jordan
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