



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

OCT 9 1998 RECEIVED

NOV 4 1998

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MEMORANDUM

SUBJECT: Guidance on Implementation of EPA's Penalty/Compliance Order Authority Against Federal Agencies Under the Clean Air Act (CAA)

FROM: Steven Herman
Assistant Administrator

TO: Regional Counsels, Regions I-X
Air Program Directors, Regions I-X

I. INTRODUCTION

The Clean Air Act (CAA or Act) contains several provisions authorizing the Agency to assess administrative civil penalties¹ and to issue administrative compliance orders² for violations of the Act and its implementing regulations. These provisions also authorize the Agency to assess administrative civil penalties or issue compliance orders against Federal agencies. This guidance will assist in the implementation of the CAA's administrative penalty authority and compliance order authority when used against a Federal agency.

II. BACKGROUND

In response to a proposed rulemaking concerning CAA field citations (under section 113(d)(3) of the Act), the Department of Defense took the position that EPA did not have authority to issue citations against a Federal agency. To resolve this issue, EPA sought the opinion of the Office of Legal Counsel (OLC) in the Department of Justice (DOJ). The OLC is the office within the Department of Justice (DOJ) that settles legal disputes between Executive Branch agencies pursuant to Executive Order No.12146. On July 16, 1997, OLC issued an opinion confirming EPA's authority to assess administrative penalties against Federal agencies

¹ CAA sections 113(d), 205(c), 211(d)(1) and 213(d), 42 U.S.C. §§ 7413(d), 7424(c), 7545(d)(1), and 7547(d).

² 42 U.S.C. § 7413(a).

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¹ CAA sections 113(d), 205(c), 211(d)(1) and 213(d), 42 U.S.C. §§ 7413(d), 7424(c), 7545(d)(1), and 7547(d).

² 42 U.S.C. § 7413(a).

³ While the OLC decision does not expressly address EPA's penalty authority under Section 213(d), EPA believes the same analysis applies to that provision.

assess administrative penalties against Federal agencies, and that separation of powers concerns do not bar EPA from exercising this authority.⁴

III. CAA ADMINISTRATIVE PENALTY ACTIONS

A. Hearing Procedures/Settlement

The hearing procedures set forth at 40 C.F.R. Part 22 apply when EPA issues a penalty order against Federal agencies in the same manner as when EPA files an administrative action against private parties. Private parties and Federal agencies have an opportunity to challenge a CAA penalty complaint using the 40 C.F.R. Part 22 procedures. For instance, if the Region files an administrative penalty action against a Federal agency under CAA section 113(d)(1), EPA would file pursuant to EPA's procedural rules in Part 22. Under the Part 22 procedures, service on an officer or agency of the United States can be accomplished in several ways. For example, as a matter of practice, EPA has successfully served the base commander when a military service is involved with a copy of the action to that service's headquarters. If the case proceeded to hearing, it would be conducted in the same manner as a case against a private party.

Settlement with a Federal agency is encouraged in the same circumstances as with a private party. See 40 C.F.R. § 22.18. EPA should use the same conference and settlement discussion procedures with Federal agencies that it uses with private parties under Part 22. Except where the parties have reached a settlement, a case against a Federal agency would

⁴This authority can be exercised consistent with Articles II and III of the Constitution. For example, the Act does not preclude the President from authorizing any process he chooses to resolve disputes between EPA and other Federal agencies over assessment of administrative penalties. DOJ noted that nothing in the Act prevented, and EPA intended to provide, a Federal agency with an opportunity to confer with the Administrator before any assessment is final.

Congress has addressed this issue of providing such an opportunity to confer under other environmental statutes. In the 1992 amendments to RCRA, Congress provided that "[n]o administrative order issued to such department, agency, or instrumentality shall become final until such...agency...has had the opportunity to confer with the Administrator." This concerned both penalty and compliance orders. 42 U.S.C. § 6961(b)(2). A similar provision was adopted in the 1996 amendments to the Safe Drinking Water Act concerning administrative penalties. 42 U.S.C. § 300j-6(b).

In response to the 1992 RCRA amendments, EPA revised its hearing procedures to provide the opportunity to confer. 40 C.F.R. § 22.37(g). This provided an opportunity to confer at the end of the administrative hearing process. EPA recently proposed to revise the Part 22 hearing procedures so that this same regulatory approach for an opportunity to confer would apply generally to administrative hearings under Part 22 involving Federal agencies. 63. Fed. Reg. 9464, 9476, 9491 (February 25, 1998).

proceed to hearing under the provisions of Part 22 just as in a case against a private party, including the opportunity for either party to appeal an initial decision to the Environmental Appeals Board. Often, however, settlement discussions continue on a parallel track with the hearing procedures. Cases that settle do not require a conference with the Administrator, as discussed below. In settling a matter, the respondent Federal agency waives its opportunity to confer on the settled matter.

As with private parties, any voluntary resolution or settlement of such an action shall be set forth in a consent agreement/consent order. In addition, Federal parties have the same opportunity to confer with the appropriate Agency official or employee provided under 40 C.F.R. § 22.18. Regions should not confer with the Federal agency outside of their usual procedures to implement 40 C.F.R. § 22.18. As a result, after EPA issues the complaint, the respondent Federal agency may confer with the complainant (EPA employee authorized to issue the complaint) under Part 22 concerning settlement whether or not the respondent requests a hearing. This Part 22 opportunity to confer, however, does not affect the 30-day deadline for filing an answer under § 22.43, just as with a private party under § 22.18(a). Moreover, throughout this administrative process, the Regions should follow Part 22's requirements regarding ex parte communications.

B. Opportunity to Confer⁵

Before a penalty becomes final, the respondent Federal agency must be afforded an opportunity to confer with the Administrator. EPA will provide the same opportunity to confer with the Administrator prior to final assessment of a CAA administrative penalty as is currently provided in implementing the RCRA provision, and as proposed in general for Part 22. Although the "opportunity to confer" requirement can be satisfied by providing an opportunity to confer with a Regional official with properly delegated authority within a reasonable period of time following issuance of the penalty order, as a matter of practice, the Administrator will retain the opportunity to confer personally, as set out below. This is an appropriate way to implement EPA's existing administrative penalty authority, thereby preserving the President's authority to resolve disputes within the executive branch. As a result, EPA will provide the respondent Federal agency an opportunity to confer with the Administrator before a penalty order becomes final.⁶

Federal agencies will have the opportunity to meet with the Administrator only after exhaustion of other Part 22 procedures. Placing the conference at the end of the process will enable the Agency to proceed with their enforcement case against the Federal agency in the same

⁵EPA believes this guidance is consistent with Executive Order No. 12088, as it establishes an efficient and orderly procedure for implementing an opportunity for the head of the affected Federal agency to confer with the Administrator on disputed issues.

⁶As discussed below, such opportunity will not be available for administrative penalty orders unless the Part 22 administrative hearing procedures have been exhausted.

manner as they do against private parties. Similarly, placing the conference at the end of the hearing process was adopted in implementing the RCRA provision noted above, and has worked effectively in practice. See 58 Fed. Reg. 49044 (September 21, 1993).

Under the current Part 22 provisions, the EAB issues a final order under section 22.31, and sets the effective date of the order. A private party or a Federal agency may seek reconsideration of the order by filing a motion with the EAB, and the EAB may, if appropriate, stay the effective date of the final order pending such reconsideration. However, the Administrator does not participate in a case unless the matter has been referred by the EAB to the Administrator under section 22.04(a).

In cases involving a respondent Federal agency, the EAB will issue a final order under section 22.31, with an effective date that is no earlier than 30 days from issuance of the order. If a Federal agency wishes to confer with the Administrator, it must file a motion to reconsider the EAB's final order with the EAB under section 22.32 within 10 days of service of the EAB's final order (5 additional days where service is by mail). In its motion, the Federal agency must indicate that it desires an opportunity to confer with the Administrator, either in person or through an exchange of letters, and identify the issues which the Federal agency proposes to discuss with the Administrator. The motion to reconsider should also raise to the EAB any matters deemed to have been erroneously decided and the nature of the alleged errors. Upon receipt of such a request, the EAB will refer the request for a conference to the Administrator and stay the effective date of its final order pending the outcome of the referral and conference with the Administrator.⁷

The referral from the EAB pursuant to section 22.04(a) will authorize the Administrator, upon completion of the conference, to either issue a final order superseding the EAB's order, or refer the matter back to the EAB to issue a new final order or reaffirm its previous order on behalf of the Agency. If the matter is referred back to the EAB, the EAB shall resolve, as necessary, those issues raised in the motion for reconsideration relating to any errors allegedly made by the EAB.

Failure to request a conference with the Administrator in this manner and within this time frame will be deemed a waiver of the right to confer with the Administrator. If there is no timely

⁷Under the proposed Part 22 procedures, if the respondent Federal agency desires a conference with the Administrator, the head of the affected Federal agency must request a conference with the Administrator within 30 days of the EAB's service of a final order and serve that request on the parties of record. In that event, a decision by the Administrator shall become the final order. A motion for reconsideration of a final order shall not stay the 30-day period to request the conference unless specifically so ordered by the EAB.

request for a conference with the Administrator, any motion to reconsider filed with the EAB will be ruled on by the EAB.

The conference with the Administrator can occur directly or through an exchange of letters. A request for a direct conference should be included in the Federal agency's motion for reconsideration of the EAB's final order with a copy to the Director of the Federal Facilities Enforcement Office (FFEO) and all parties/counsel of record.⁸ The request for a direct conference should specifically identify the issues which the Federal agency proposes to discuss with the Administrator, and should specifically identify who will represent the respondent Federal agency. In addition, as part of its request for a direct conference, the head of the Federal agency should attach copies of all prior administrative decisions and substantive briefs in the underlying proceedings. Copies of these briefs and underlying decisions also should be provided to the Director of FFEO.

The parties/counsel of record may request to be present during the direct conference. A request to attend the direct conference should be in writing and served on the Director of FFEO and the parties/counsel of record. The Administrator or her designee shall notify the head of the Federal agency who requested the direct conference and the parties/counsel of record regarding her plan and arrangements for the direct conference.

Following the conclusion of the direct conference, a person designated by the Administrator will provide a written summary of the issues discussed and addressed. Copies of the written summary shall be provided to the parties/counsel of record. Within thirty (30) days of the conference, the Administrator shall issue a written decision with appropriate instruction regarding the finality of the order. This decision shall be filed with the Clerk of the EAB and made part of the administrative case file.

Instead of the direct conference, the conference with the Administrator may be conducted through an exchange of letters. If so, the head of the Federal agency should include the letter in its motion for reconsideration of the EAB's final order with a copy to the Director of FFEO and all parties/counsel of record. In addition, the letter should specifically identify the issues which the Federal agency proposes that the Administrator consider. The head of the Federal agency should also attach copies of all prior administrative decisions and substantive briefs in the underlying proceedings. Copies of these briefs and underlying decisions should be provided to the Director of FFEO. Within thirty (30) days of receipt of the head of the Federal agency's letter in the event of a conference by letter, the Administrator shall issue a written decision with appropriate instruction regarding the finality of the order. As in the direct conference, this decision shall be filed with the Clerk of the EAB and made part of the Administrative case file.

If the Board referred the matter to the Administrator for decision under section 22.04(a) prior to the filing of a motion to reconsider under section 22.32, and if the Federal agency wants to

⁸Participation by non-Federal parties in the Administrator's conference will be determined on a case-by-case basis.

request a conference with the Administrator, it must do so prior to the Administrator's decision. To assure that Federal agencies are aware of these procedures, Regions should refer the Federal agency to Part 22 and other relevant Agency guidance.

IV. COMPLIANCE ORDERS

Unlike RCRA, the CAA does not have a separate statutory provision specifically addressing Federal agency penalty/compliance orders and requiring a conference with the Administrator prior to an order's becoming effective. The CAA, however, does provide a general conference opportunity under section 113(a)(4), prior to a compliance order's becoming effective.⁹ CAA compliance orders to Federal agencies should follow the same procedures as for the issuance of such orders to private parties. For example, as with a private party, a Federal agency respondent should be provided an opportunity to confer with a Regional official with the authority to issue a compliance order before the order becomes effective. Because EPA issues a compliance order to achieve expeditious compliance with CAA requirements and not to assess a penalty, the time period to request a conference generally should be less than the 30 days afforded to seek a conference for penalty orders. Ultimately, based on the seriousness of the violations and the nature of the compliance activities, the Regional office will determine the time period in which the Federal agency may request a conference, and specify that deadline in the cover letter transmitting the compliance order or in the compliance order itself. The approach of providing an opportunity to confer before a compliance order becomes final has worked well under the Safe Drinking Water Act.

With regard to section 113 compliance orders, section 113 mandates that such orders require the person to whom it was issued to comply within one year of the date the order was issued, and shall be nonrenewable. For private parties, EPA would most likely pursue a civil judicial action against a violator should a schedule longer than a year be required for a return to compliance. For executive branch agencies, this option is not available to EPA. Therefore, when a Region believes that a schedule less than a year is infeasible to achieve compliance, the Region should negotiate a Federal Facility Compliance Agreement (FFCA) which either contains an order with a delayed issuance date to go into effect when compliance can be reached in one year or, instead, the Region could first negotiate an FFCA and then issue a separate order when compliance can be reached within one year. FFEQ strongly recommends that when the Region uses the FFCA, it be submitted for public comment via publication in the Federal Register in order to ensure public awareness of the compliance order's contents. This is similar to public comment

⁹As a matter of practice, while EPA will also provide such opportunity to Federal agencies for compliance orders relating to violations of CAA section 112, 42 U.S.C. § 7412, the opportunity for a conference does not suggest that the Federal agency may delay taking steps to come into compliance with these requirements or any other requirements under the CAA.

on judicial consent decrees. Where compliance is achievable within one year of issuance, Regions should issue orders.

V. WAIVERS

Under the CAA Section 113(d)(1)(C), the Administrator's administrative penalty authority is limited to matters where the total penalty sought does not exceed \$220,000 and the first alleged date of violation occurred no more than 12 months prior to the initiation of the administrative action, except where the Administrator and the Attorney General jointly determine that a matter involving a larger penalty amount or longer period of violation is appropriate for administrative penalty action. Where the Regions determine that a waiver should be granted in an action against a Federal agency, the Regions should direct their request for a waiver to the Director, FFEO with a copy to the Director, Air Enforcement Division, Office of Regulatory Enforcement. Waiver requests should follow the same format as similar requests in cases against private parties and include reasons justifying the waiver and a fact sheet on the matter.

VI. PENALTIES

Federal agencies are liable for EPA-assessed CAA civil administrative penalties just like any other person.¹⁰ If violations occurred prior to July 16, 1997 and are ongoing, EPA could assess penalties for the violations from July 16, 1997 until correction of the violation. Moreover, EPA can require correction of and, in some case, may seek penalties for violations that occurred prior to July 16, 1997. If a Region believes that seeking penalties for violations occurring prior to July 16, 1997 is warranted, the Region should submit a justification to the Director of the Federal Facilities Enforcement Office. Regions should consider the size of violator when determining the appropriate penalty against a Federal agency. In many instances, Federal agencies would be considered large violators; in these cases, the Regions should apply the 50% formula, under which the size of the violator component, if very large, may be reduced to 50% of the total penalty at the discretion of the Agency.

In determining an appropriate penalty, EPA will apply its penalty policies, the October 25, 1991, CAA Stationary Source Civil Penalty Policy, and amendments thereto, and the Mobile Source Penalty Policies¹¹, including capturing economic benefit for avoidance of costs, against a

¹⁰ This policy does not intend to require any conduct contrary to the Anti-Deficiency Act.

¹¹Interim Tampering Enforcement Policy, 6/25/74, Civil Penalty Policy for Incorrect Aftermarket Catalytic Converter Applications, 4/18/88, Sale and Use of Aftermarket Catalytic Converters, contained in 51 Fed. Reg. 28133 (8/5/86), Enforcement Policy for Aftermarket Catalytic Converter Violations, 12/22/88, Volatility Civil Penalty Policy, 12/01/89, Aftermarket

Federal agency for violations of the CAA in the same manner and to the same extent as against any private party. The May 1, 1998, "Supplemental Environmental Projects Policy" and any subsequent updates also apply in this context. Moreover, for settled compliance cases that require work, stipulated penalties should be included in the Compliance Agreement.

VII. PRESS RELEASE FOR CAA ENFORCEMENT ACTIONS

EPA uses the publicity of enforcement activities as a key element of the Agency's program to promote compliance and to deter noncompliance with environmental laws and regulations. Publicizing EPA enforcement actions against private parties and Federal agencies informs both the public and the regulated community of EPA's efforts to ensure compliance and take enforcement actions. EPA's decision to issue a press release and the contents of press releases are not negotiable with Federal agencies or other regulated entities. Upon the issuance of an order or the filing of a complaint, FFEO strongly encourages Regions to issue a press release.

VIII. CONCLUSION

FFEO is issuing this guidance to clarify enforcement procedures for Federal facility enforcement under the CAA. This guidance supersedes earlier guidance regarding CAA enforcement at Federal facilities such as that found in the 1988 Federal Facilities Compliance Strategy. Should you have any concerns or questions, please have your staff call Mary Kay Lynch at (202)564-2574 or Sally Dalzell at (202) 564-2583.

IX. NOTICE

This guidance and any internal procedures adopted for its implementation are intended solely as guidance for employees of the U.S. Environmental Protection Agency. Such guidance and procedures do not constitute rule making by the Agency and may not be relied upon to create a right or benefit, substantive or procedural, enforceable at law or in equity, by any person. The Agency may take action at variance with this guidance and its internal implementing procedures.

Attachment

cc: Air Enforcement Branch Chiefs

Converter Enforcement and Penalty Issues, 8/10/90, Proposed Policy for Enforcing the New Defeat Device Authority with regard to Catalyst Replacement Pipe Manufacturers and Sellers, 1/02/91, Civil Penalty Policy for Administrative Hearings, 1/14/93, Manufacturers Programs Branch Interim Penalty Policy, Appendix I: Manufacturers Programs Branch MFB Imports Program Penalty Policy, 3/31/93, Interim Diesel Civil Penalty Policy, 2/08/94, Tampering and Defeat Device Civil Penalty Policy for Notices of Violation, 2/28/94.

Federal Facility Coordinators, Regions I-X