



MEMORANDUM

SUBJECT: Modifications to EPA Penalty Policies to Implement the Civil Monetary Penalty Inflation Rule (Pursuant to the Debt Collection Improvement Act of 1996)

FROM: Steven A. Herman
Assistant Administrator //Signed May 9, 1997//

TO: Regional Administrators

The Environmental Protection Agency ("EPA") published a new rule in the Federal Register -- 40 CFR Part 19, Adjustment of Civil Penalties for Inflation -- implementing the Debt Collection Improvement Act of 1996 ("DCIA"), on December 31, 1996. At the same time, we also published minor conforming amendments to 40 CFR Part 27, Program Fraud Civil Remedies. The rule took effect thirty days later on January 30, 1997. This means all violations occurring on or after January 31, 1997, are subject to the new inflation-adjusted penalty amounts. We have attached a copy of the published rule, and the March 20, 1997, correction, for your convenience.

This penalty policy memorandum modifies all of our existing civil penalty policies to conform to the DCIA and the new rule. This memorandum also provides guidance on how to plead penalties and how to determine the new maximum penalty amounts that may be sought in single administrative enforcement actions under the Clean Water Act ("CWA"), the Safe Drinking Water Act ("SDWA"), and the Clean Air Act ("CAA").

OVERVIEW

The primary purpose of the DCIA is to restore the deterrent effect of civil statutory penalty provisions which have been eroded by inflation. In particular, the DCIA directed each federal agency to review its respective civil monetary penalty ("CMP") provisions and to issue a regulation adjusting them for inflation. The DCIA also requires periodic review and adjustment of the CMP's at least once every four years.

This first penalty inflation adjustment was limited by the DCIA to 10% above the existing statutory provision's maximum amount. For EPA, this meant all the penalty provision maximums, with the exception of a few new penalty provisions added by the 1996 SDWA amendments (which did not require any adjustment), have been adjusted upward by 10%.

The statutory penalty provisions and the new maximum penalty amounts are found in the attached Table 1 of 40 CFR 19.4 (as corrected on March 20, 1997). These increases in the CMPs apply only to violations which occur after the date the increases take effect on January 30, 1997 - that is, violations which occur on or after January 31, 1997. For example, CWA Section 309 previously authorized judicial penalties of up to \$25,000 per day per violation; and now, since the new rule became effective, the new maximum penalty amount is \$27,500. Therefore, if a violation subject to CWA section 309(d) started on January 1, 1997, and continued through February 2, 1997, the maximum statutory penalty liability would consist of 30 days of violations at \$25,000 per day, plus 3 days of violation at \$27,500.

PENALTY POLICY CALCULATION CHANGES

For the time being, we are not planning to amend the specific language, penalty matrices or formulas in any of our existing penalty policies based on the revised penalty maximums contained in 40 CFR Part 19. If a sufficient need to revise the particular provisions of one or more of the policies is identified, we will consider taking such action at a later time. We are, however, by this Policy, modifying all of our existing penalty policies, to increase the initial gravity component of the penalty calculation by 10% for those violations subject to the new rule. We believe this is consistent with the Congressional intent in passing the DCIA and is necessary to implement effectively the mandated penalty increases that we have set forth in 40 CFR Part 19. Accordingly, each penalty policy is now modified to apply the appropriate guidelines set forth below. These new guidelines apply to all penalty policies, regardless of whether the policy is used for determining a specific amount to plead in a complaint or for determining a bottom-line settlement amount. (A complete list of all of our existing penalty policies is provided at the end of this memorandum.)

A. If all of the violations in a particular case occurred before the effective date of the new rule, no changes in our penalty policies are necessary.

B. For those judicial and administrative cases in which some, but not all, of the violations occurred after the effective date of the new rule, the penalty policy calculations are modified by following these five steps:

1. Perform the economic benefit calculation for the entire period of the violation, going beyond the January 30, 1997, effective date of the new rule if appropriate. Do not apply any mitigation or adjustment factors (such as, good

faith, ability to pay, litigation considerations or supplemental environmental projects) at this point.

2. Apply the gravity component of the penalty policy in the standard way (without economic benefit which has been covered in step 1, above) for all violations to produce the gravity component value. Do not apply any mitigation or adjustment factors (such as good faith, self-audits, ability to pay, litigation considerations or supplemental environmental projects) at this point.

3. Determine the percentage of the resulting gravity component value which occurred after the effective date of the penalty inflation adjustment, January 30, 1997. Multiply the post-effective date percentage by 0.10. Next, add 1 to the resulting value, and this will provide the gravity adjustment factor. For example, if approximately 40% of the violations in a case occurred on or after January 31, 1997, the gravity adjustment factor would be calculated as follows: $[0.10 \times .40] + 1 = 1.040$ (the resulting gravity adjustment factor).

4. Multiply the gravity component from step 2 by the gravity adjustment factor from step 3. This produces a gravity component that has been adjusted based on the penalty inflation rule.

5. Add the subtotals from steps 1 and 4, above. Adjust the total, as appropriate pursuant to the applicable policy, for good faith, self-audits, ability to pay, litigation considerations, supplemental environmental projects, or other applicable mitigation factors.

C. If all the violations in a particular case occurred on or after the effective date of the new rule, the penalty policy calculation is modified by following these three steps:

1. Following the existing guidance, calculate the economic benefit covering the entire period of the violations. Do not apply any mitigation or adjustment factors (such as good faith, ability to pay, litigation considerations or supplemental environmental projects) at this point.

2. Apply the penalty policy in the standard way to calculate the gravity component (essentially everything except economic benefit, covered in step 1, above, is gravity). Do not apply any mitigation or adjustment factors (such as good faith, self-audits, ability to pay, litigation considerations or supplemental environmental projects) at this point. After this calculation has been completed, multiply it by 1.10. This produces a gravity amount increased by 10 % in accordance with the DCIA.

3. Add the adjusted gravity amount in step 2 to the economic benefit component. Adjust this sum, as appropriate, pursuant to the applicable policy for

good faith, self-audits, ability to pay, litigation considerations, supplemental environmental projects or other applicable mitigation factors.

PENALTY PLEADING

If all of the violations in a particular case occurred before the effective date of the new rule, no changes in our pleading practices are necessary. If some of the violations in a particular case occurred after the effective date, then in judicial cases using "notice pleading" -- that is pleading "up to the statutory maximum amount" (and in any administrative cases which use notice pleading), the penalty amount pled should use the newly adjusted maximum amounts. For example, in a civil judicial complaint alleging violations of section 301 of the Clean Water Act, the prayer for relief would be written as follows:

Pursuant to Section 309(d) of the Clean Water Act, 33 U.S.C. § 1319(d), and 40 CFR Part 19, assess civil penalties against [name] not to exceed \$25,000 per day for each violation of Section 301(a) of the Act, 33 U.S.C. §1311(a), that occurred prior to January 31, 1997; and \$27,500 per day for each violation of Section 301 of the Act, 33 U.S.C. § 1311, that occurred on or after January 31, 1997, up to the date of judgment herein.

If all of the violations in a particular case occurred after the effective date of the new rule, then in judicial cases using "notice pleading" (and in any administrative cases which use notice pleading) the penalty amount pled should use the newly adjusted maximum amounts. For example, in a civil judicial complaint alleging violations of section 301 of the Clean Water Act, the prayer for relief would be written as follows:

Pursuant to Section 309(d) of the Clean Water Act, 33 U.S.C. § 1319(d), and 40 CFR Part 19, assess civil penalties against [name] not to exceed \$27,500 per day for each violation of Section 301 of the Act, 33 U.S.C. §1311, up to the date of judgment herein.

ADMINISTRATIVE PENALTY CAPS FOR CWA, SDWA, AND CAA

The DCIA and 40 CFR Part 19 raised the maximum penalty amounts that may be sought for individual violations in administrative enforcement actions, as well as the total amounts that may be sought in a single administrative enforcement action. This increase is particularly relevant for administrative enforcement actions under the CWA, SDWA, and CAA which are limited by penalty maximums that may be sought in a single action, (commonly called "caps"). For example, prior to the DCIA and 40 CFR Part 19, CWA Class II administrative penalties were authorized up to \$10,000 per violation and not to exceed \$125,000 in a single administrative action; since the effective date of the new rule, the new penalty maximums are now \$11,000 and \$137,500, respectively. Similarly, Part

19 also raised the total penalty amounts that may be sought in a single administrative enforcement action under the CAA from \$200,000 to \$220,000 (although higher amounts may still be pursued with the joint approval of the Administrator and Attorney General).

The new penalty maximums/caps may be used only in a single administrative enforcement action under the CWA, SDWA, and CAA, provided the individual penalties for the post-effective date violations equal or exceed the previous unadjusted maximums (caps). In other words, the penalties assessed can only exceed the old maximums/caps, up to the new maximums/caps, based solely on penalties for the new violations. For example, in a CWA Class II administrative enforcement complaint, there must have been at least 12 violations occurring after January 30, 1997, in order to exceed the previous maximum penalty of \$125,000 (12 violations X \$11,000 = \$132,000). If there are not at least 12 violations occurring after January 30, 1997, then the maximum amount which may be sought in a CWA Class II administrative enforcement action is still \$125,000.

As another example, in a CAA administrative enforcement action for violations of Section 203(a)(1) of the CAA, there must be at least eight violations that occurred after January 30, 1997, for the new \$220,000 maximum penalty cap to apply (8 violations X \$27,500 = 220,000). If there are not at least eight violations after January 30, 1997, then the maximum amount that may be sought in such a CAA administrative enforcement action is still \$200,000 (unless otherwise increased by joint agreement of the Administrator or Attorney General).

CHALLENGES IN THE COURSE OF ENFORCEMENT PROCEEDINGS

If a defendant should choose to challenge the validity of applying the adjusted penalty provisions on the grounds that EPA did not have the authority to promulgate the rule which adjusted the penalty maximums, please notify the Multimedia Enforcement Division of the challenge, so that OECA and the Region can coordinate our response before a response is filed. We expect our response to argue that the statutory penalties were raised by an Act of Congress, and, therefore, the Agency merely carried out a non-discretionary ministerial duty in publishing a rule identifying the specific provisions and applying the Congressional formula for the adjustment.

FURTHER INFORMATION

Any questions concerning the new rule and implementation can be directed to Steven Spiegel in the Multimedia Enforcement Division, our workgroup chair, via email, or to (703) 308-8507. Additionally, offices that identify penalty policies which may need individual modifications should send a memorandum via email to Steven Spiegel, specifying the policy and the suggested changes.

LIST OF EXISTING EPA CIVIL PENALTY POLICIES
MODIFIED BY THIS MEMORANDUM

General

Policy on Civil Penalties (2/14/84)

A Framework for Statute-Specific Approaches to Penalty Assessments (2/14/84)

Guidance on Use of Penalty Policies in Administrative Litigation, (12/15/95)

Clean Air Act - Stationary Sources

Clean Air Act Stationary Source Civil Penalty Policy (10/25/91) (This is a generic policy for stationary sources.)

Clarifications to the October 25, 1991 Clean Air Act Stationary Source Civil Penalty Policy (1/17/92)

There are a series of appendices that address certain specific subprograms within the stationary source program.

Appendix I - Permit Requirements for the Construction or Modification of Major Stationary Sources of Air Pollution (Not Dated)

Appendix II - Vinyl Chloride Civil Penalty Policy (Not Dated)

Appendix III - Asbestos Demolition and Renovation Civil Penalty Policy (Revised 5/5/92)

Appendix IV - Volatile Organic Compounds Where Reformulation of Low Solvent Technology is the Applicable Method of Compliance (Not Dated)

Appendix V - Air Civil Penalty Worksheet

Appendix VI - Volatile Hazardous Air Pollutant Civil Penalty Policy (Revised 3/2/88)

Appendix VII - Residential Wood Heaters (Not Dated)

Appendix VIII - Manufacture or Import of Controlled Substances in Amounts Exceeding Allowances Properly Held Under Protection of Stratospheric Ozone (11/24/89)

Appendix IX - Clean Air Act Civil Penalty Policy Applicable to Persons Who Perform Service for Consideration on a Motor Vehicle Air Conditioner Involving the Refrigerant or Who Sell Small Containers of Refrigerant in Violation of 40 CFR Part 82, Protection of Stratospheric Ozone, Subpart B (Not Dated)

Appendix X - Clean Air Act Civil Penalty Policy for Violations of 40 CFR Part 82, Subpart F: Maintenance, Service, Repair, and Disposal of Appliances Containing Refrigerant (6/1/94)

Appendix XI - Clean Air Act Civil Penalty Policy for Violations of 40 CFR Part 82, Subpart C: Ban on Nonessential Products Containing Class I Substances and Ban on Nonessential Products Containing or Manufactured with Class II Substances (Not Dated)

Clean Air Act - Mobile Sources

Volatility Civil Penalty Policy (12/1/89)
Civil Penalty Policy for Administrative Hearings (1/14/93)
Manufacturers Programs Branch Interim Penalty Policy (3/31/93)
Interim Diesel Civil Penalty Policy (2/8/94)
Tampering and Defeat Device Civil Penalty Policy for Notices of Violation (2/28/94)
Draft Reformulated Gasoline and Anti-Dumping Settlement Policy (6/3/96)

TSCA

Guidelines for the Assessment of Civil Penalties Under Section 16 of TSCA (7/7/80) (Published in Federal Register of 9/10/80. Note that the first PCB penalty policy was published along with it, but the PCB policy is now obsolete.) This is a generic policy for TSCA sources. There are a series of policies that address certain specific subprograms within TSCA. They are as follows:

Record keeping and Reporting Rules TSCA Sections 8, 12, and 13 (8/5/96)
PCB Penalty Policy (4/9/90)
TSCA Section 5 Enforcement Response Policy (6/8/89), amended (7/1/93)

TSCA Good Laboratory Practices Regulations Enforcement Policy (4/9/85)
TSCA Section 4 Test Rules (5/28/86)
TSCA Title II - Asbestos Hazard Emergency Response Act (AHERA)
Interim Final ERP for the Asbestos Hazard Emergency Response Act (1/31/89)
ERP for Asbestos Abatement Projects; Worker Protection Rule (11/14/89)

Safe Drinking Water Act - UIC

Interim Final UIC Program Judicial and Administrative Order Settlement Penalty Policy -- Underground Injection Control Guidance No. 79 (9/27/93)

Safe Drinking Water Act - PWS

New Public Water System Supervision Program Settlement Penalty Policy (5/25/94)

EPCRA

Final Penalty Policy for Sections 302, 303, 304, 311, and 312 of EPCRA and Section 103 of CERCLA (6/13/90)

Enforcement Response Policy for Section 313 of EPCRA and Section 6607 of the Pollution Prevention Act (8/10/92); Low Volume Alternate Threshold ERP Revisions (12/18/96)

Clean Water Act

Revised Interim Clean Water Act Settlement Penalty Policy, February 28, 1995
Clean Water Act Section 404 Civil Administrative Penalty Actions Guidance on Calculating Settlement Amounts

RCRA

RCRA Civil Penalty Policy (October 1990)

UST

U.S. EPA Penalty Guidance for Violations of UST Regulations (November 1990)
Guidance for Federal Field Citation Enforcement (OSWER Directive- No. 9610-16) (October 1993)

CERCLA

Final Penalty Policy for Sections 302, 303, 304, 311, and 312 of EPCRA and Section 103 of CERCLA (6/13/90)

FIFRA

General FIFRA Enforcement Response Policy (7/2/90)
FIFRA Section 7(c) ERP (2/10/86)
Enforcement Response Policy for the Federal Insecticide, Fungicide and Rodenticide Act: Good Laboratory Practice (GLP) Regulations (9/30/91)

Attachments

cc: (w/attachments)

OECA Office Directors

ORE Division Directors

OSRE Division Directors

Regional Counsels, Regions I - X

Director, Office of Environmental Stewardship, Region I

Director, Division of Enforcement and Compliance Assurance, Region II

Director, Compliance Assurance & Enforcement Division, Region VI

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