



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

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OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

MEMORANDUM

SUBJECT: Clean Water Act Municipal Settlements and Supplemental Environmental Projects (SEPs)

TO: Water Protection/Management Division Directors, Regions I-X
Director, Office of Environmental Stewardship, Region I
Director, Division of Environmental Protection and Planning, Region II
Enforcement and Compliance Assistance Directors, Regions II, VI, and VIII
Water, Wetlands, and Pesticides Division Director, Region VII
Regional Counsels, Regions I-X
Regional Enforcement Coordinators, Regions I-X
NPDES Branch Chiefs, Regions I-X

FROM: Mark Pollins, Director
Water Enforcement Division
Office of Civil Enforcement

Robert Kaplan, Director
Special Litigation and Projects Division
Office of Civil Enforcement

A handwritten signature in blue ink that reads "Robert A. Kaplan".

The purpose of this memorandum is twofold. First, we are providing an explanation of Footnote 13 of the May 1998 Supplemental Environmental Projects (SEP) Policy, which addresses the interaction between the February 28, 1995 Revised Interim Clean Water Act (CWA) Settlement Penalty Policy (CWA Penalty Policy) and the SEP Policy and clarifies when to use the CWA Penalty Policy instead of the SEP Policy.¹ Second, this memorandum will discuss Federal settlements under the CWA where a State is a co-plaintiff and the State accepts an environmental project as its share of the settlement.

¹ This memorandum supercedes the previously issued "Clarification of Interaction Between 1995 Clean Water Act Interim Settlement Policy and the 1998 Supplemental Environmental Project Policy," dated March 22, 2002.

I. Clarification of Footnote 13 of SEP Policy

Footnote 13 in the 1998 SEP Policy states that “[p]ursuant to the February 1995 Revised Interim CWA Settlement Policy, section V, a smaller minimum penalty amount may be allowed for a municipality.” This footnote was intended to clarify that, for purposes of settling CWA cases with municipalities or other public entities (such as a sewer authority), Regional and Headquarters enforcement staff should follow the CWA Penalty Policy when determining the appropriate balance between the penalty and any SEPs.

The SEP Policy and the CWA Penalty Policy each provide for minimum penalty amounts in cases including a SEP. The SEP Policy requires a penalty of at least 25% of the gravity-based component or 10% of the gravity plus the economic benefit, whichever is greater. The CWA Penalty Policy has minimum penalty requirements for municipal cases as described below.

In enforcement cases where a municipality has failed to comply with the CWA but is making a good faith effort to return to compliance, EPA may calculate the penalty using the CWA Penalty Policy’s National Municipal Litigation Consideration (NMLC) tables.² The NMLC tables are discretionary in municipal cases. The NMLC tables consider both the gravity-based variables and economic benefit incurred for violations in municipal cases as well as other factors such as the size of the municipality. The practical impact of these tables is to substantially reduce the required penalty in a municipal CWA case.

In addition to the substantial penalty reduction afforded by the NMLC tables, the CWA Penalty Policy further provides that the “penalty amount established by the tables may be reduced by up to 40 percent for appropriate supplemental environmental projects.”³ This means that, at a minimum, 60% of the final value calculated using the NMLC tables must be assessed as the penalty,⁴ and no more than 40% of the penalty amount provided for by the NMLC tables may be mitigated by performance of an appropriate SEP.⁵ The selected project(s) must meet all other

² CWA Penalty Policy at p. 7-20.

³ CWA Penalty Policy at p. 17.

⁴ For example, if the NMLC generates a preliminary figure of \$1,000,000, the settlement must include a penalty of at least \$600,000. The remaining amount of \$400,000 may be mitigated with SEPs, provided those SEPs comply with EPA’s SEP Policy.

⁵ There may be unique circumstances that necessitate deviating from the 60% minimum penalty when a particular municipality agrees to conduct a SEP as part of a CWA settlement and where the NMLC is used to calculate the penalty. In such situations, a waiver of the CWA Penalty Policy’s minimum penalty requirements must be obtained from the Assistant Administrator for Enforcement and Compliance Assurance. (See SEP Policy at p. 20.)

requirements of the 1998 SEP Policy.⁶ Where the NMLC tables are not used to calculate the penalty in a CWA municipal case, the SEP Policy minimum penalty requirements should be followed.

II. Federal Municipal CWA Settlements Where the State is a Co-Plaintiff

For CWA settlements cases where the state is a co-plaintiff, the state may designate that its share of the penalty be used in any way permitted under state law. If state law allows penalties to be applied to certain projects or funds, the state penalty can be so applied and shall conform to all requirements of the state penalty provisions.

If the state penalty will be applied towards a project or fund, the federal consent decree should include a description of how the penalty will be used. The term “penalty” should be used in federal consent decrees for state penalties even when they are dedicated to projects or funds pursuant to state law. For example:

“Within 60 days after the Date of Entry of this Consent Decree, the City shall pay a total civil penalty in the amount of \$_____. The City shall pay the United States \$_____ and make payment of this amount by tendering a check payable to the “Treasurer, United States of America” and sending it to _____. The City shall pay the State a civil penalty of \$_____. Payment of such penalty shall be paid to X state fund (or other arrangement as authorized by state law.”)

Should you have any questions regarding this matter, please contact Cassandra Rice, Water Enforcement Division at (202) 564-4057. For questions relating to the SEP Policy in general, please contact Beth Cavalier, Special Litigation and Projects Division (SLPD) at (202) 564-3271 or Melissa Raack, also of SLPD, at (202) 564-7039.

cc: SEP Regional and HQ Coordinators
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⁶ CWA Penalty Policy at p. 22.