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"Guidance on the Distinction Among Pleading, Negotiating and litigating Civil Penalties for Enforcement Cases under the Clean Water Act", dated January 19,1989.

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

JAN 19 1989

OFFICE OF
ENFORCEMENT AND
COMPLIANCE MONITORING

MEMORANDUM

SUBJECT: Guidance on the Distinctions Among Pleading, Negotiating, and Litigating Civil Penalties for Enforcement Cases Under the Clean Water Act

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TO: Deputy Regional Administrators
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Attached you will find a major guidance on the subject of how to develop CWA civil penalty demands under many different circumstances. We have found a certain amount of confusion in this area, with the creation of new administrative remedies and subsequent use of the CWA penalty settlement policy in inappropriate situations.

Upon circulation of a draft of this guidance to NPDES contacts, a few commenters noted that they believed the CWA penalty policy should be applied in setting penalty amounts in administrative complaints, and that the CWA penalty policy should also be explained to and considered by administrative judges in their assessment of penalties. We understand this approach, which the Agency does follow in other enforcement programs, but have decided to follow the majority sentiment that we place ourselves in a stronger negotiating position by pleading for penalties without direct reference to our bottom-line settlement calculations and retaining the option of litigating for civil penalties well in excess of settlement policy amounts. (We have

found that administrative judges more often lower a penalty policy amount requested in an administrative complaint than maintain it, even though in these other programs judges are to take such policies into account when assessing civil penalties under 40 C.F.R. §22.27[b].)

We also received a number of comments noting some ambiguity in the draft's discussion of how high a penalty to plead for in an administrative complaint. The final guidance clarifies that we cannot plead for a penalty greater than we could justify to an administrative judge under the relevant statutory assessment factors, but that in many, if not most cases, this amount will be the same as the statutory maximum "cap."

Because the points discussed in this guidance apply in principle equally to the §404 program, we have widened the scope of the guidance to encompass wetlands judicial and administrative enforcement cases.

Attachments

cc: Regional Counsel Water Branch Chiefs
Regional Water Management Division
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CLEAN WATER ACT

DISTINCTIONS AMONG PLEADING, NEGOTIATING AND LITIGATING CIVIL PENALTIES FOR ENFORCEMENT CASES

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

Effective Date: _____

Clean Water Act
Distinctions Among Pleading, Negotiating and Litigating Civil Penalties for Enforcement Cases

Summary

This policy provides guidance on some of the distinctions for determining appropriate penalty amounts to pursue at three different stages of a Clean Water Act enforcement action -- pleading for penalties in a judicial or administrative complaint, settling penalty claims in a judicial or administrative action, and litigating for penalties in a legal proceeding before a judge or hearing officer where a case does not settle.

Specifically, this guidance emphasizes the following points:

1. EPA's Clean Water Act civil penalty policy governs only the bottom-line dollar amount which EPA will accept in settlement of civil penalty claims in a judicial or administrative NPDES enforcement case.

2. The CWA civil penalty policy is not intended to be used to calculate either the amount which EPA requests a judge or a hearing officer to assess in a judicial or administrative complaint, or the amount which EPA argues a judge or hearing officer should assess in a litigated proceeding where a case does not settle. Those amounts will be significantly higher than the CWA penalty policy indicates for settlement purposes.

3. In litigating a claim for CWA civil penalties either judicially or administratively, counsel representing EPA typically should argue for assessment of a penalty amount which is well above the internal bottom-line settlement amount derived through application of the CWA penalty policy.

4. Counsel should support its arguments for the "litigation amount" based upon reasoned application of the statutory penalty assessment criteria and citation of precedent, not through arithmetic calculations derived according to the CWA penalty settlement policy.

5. In judicial complaints, as has been the practice to date, the United States typically will continue to request civil penalties of "up to $10,000 per day of such violation for violations occurring before February 4, 1987, and up to $25,000 per day per violation for violations occurring thereafter."

6. In an administrative penalty complaint initiating a Class I or Class II proceeding, EPA enforcement officials should request assessment of a penalty amount which is:

a) Within statutory ceilings;

b) Justifiable based on the statutory penalty assessment criteria of CWA §309(g)(3); and,

c) Set at a level which will facilitate negotiation of an appropriate settlement amount and recovery of an appropriate amount through litigation if the case does not settle (since we cannot litigate for a higher figure than we request in the administrative complaint).

Application of these principles should, among other things, help EPA obtain adequate CWA civil penalty judgments if judicial or administrative cases do not settle. At the same time, they will help preserve EPA's leverage to obtain satisfactory civil penalties through settlement of these enforcement actions.

Effect of Guidance

To the extent there may be any conflict with existing Agency CWA policy, this guidance supersedes any such policy regarding the pleading, negotiating, or litigating of Clean Water Act civil penalties in NPDES and §404 judicial and administrative enforcement cases. This guidance does not apply to cases brought under §311 of the Clean Water Act. This guidance does not apply to CWA administrative or judicial enforcement cases in which a complaint or equivalent document has been served, but shall apply to every case initiated after the date of this guidance.

Pleading Civil Penalties

An administrative complaint[1] typically only opens and describes the Agency's case, just as a complaint in federal

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[1] These are sometimes titled per the August 28, 1987, guidance as "Administrative Complaint, Findings of Violation, Notice of Proposed Assessment of a Civil Penalty, and Notice of Opportunity to Receive a Hearing Thereon." In order to avoid confusion over the role of the complaint in an administrative penalty action, Regional enforcement officers have the discretion to modify the caption of the §309(g) pleading to read "Administrative Complaint."

Although the longer caption accurately recites the statutory functions the Agency implements in an enforcement action, that title may contribute to the existing confusion over the particular role we play as Agency prosecutors initiating a case. A change in caption will more accurately describe to the general public our action, which is often described in press releases as the actual imposition of a fine.

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District Court opens a judicial enforcement case. To the extent possible, we intend to treat administrative and judicial enforcement complaints the same, both procedurally and substantively.

It is Agency and Department of Justice practice in civil judicial cases to paraphrase the Clean Water Act in pleading for penalties. At the present time, our Prayers for Relief typically include the request for "$10,000 per day of such violation before February 4, 1987, and $25,000 per day per violation thereafter." This formulation has worked well and will continue as our usual judicial policy.[2] At the outset of a case, the government often does not have complete information on the number or extent of violations, but as a litigant, it preserves its rights by pleading for the statutory maximum penalty by using this phrasing.

Similarly, EPA's interests as a plaintiff in an administrative penalty complaint are best served by pleading for an administrative penalty which is high enough to facilitate negotiation of a settlement which is based on the CWA penalty policy for settlements or an approved §404 settlement amount. Moreover, the penalty amount pled in the administrative complaint also must be high enough to permit the Agency to obtain an appropriate penalty under statutory assessment criteria if the case must be litigated.

In many cases, it will be necessary to name the statutory maximum amount (i.e., $25,000 for Class I cases and $125,000 for Class II cases) in the administrative complaint to preserve EPA's ability to negotiate and litigate for as high a penalty as is possible under the facts of the case. Nevertheless, EPA Regions have discretion to plead for a lesser amount by weighing other case-by-case considerations such as what amount is likely to produce an adequate settlement, as well as a duty to consider what amount, taking into account the statutory penalty factors, is supported by the facts.

To ensure that CWA administrative complaints comply with the statute and present Class II rules of practice by explaining the basis for the penalty sought, Agency water enforcement staff are to follow the August 27, 1987, guidance by pleading:

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[2] For reasons peculiar to the present administrative penalty process, EPA staff should not use this formula in administrative complaints, but instead request a specific dollar amount (as more precisely described below). In case of a default, using a specific dollar amount in the complaint will result in a more enforceable penalty assessment.

> The proposed penalty amount was determined by EPA after taking into account the nature, circumstances, extent and gravity of the violation or violations, and Respondent's prior compliance history, degree of culpability for the cited violations, any economic benefit accruing to Respondent by virtue of the violations, and Respondent's ability to pay the proposed penalty, all factors identified at Section 309(g)(3) of the Act, 33 U.S.C. §1319(g)(3).

This statement should satisfy the requirement of 40 C.F.R. §22.14(a)(5) that "Each complaint for the assessment of a civil penalty shall include . . . [a] statement explaining the reasoning behind the proposed penalty." The Agency staff which drafts the administrative complaint in fact should consider the statutory penalty factors. This consideration satisfies the requirements of §309(g)(3) of the Act, in case the respondent defaults and the requested Class II penalty becomes an assessment.[3] In this context, EPA will best preserve its negotiation and litigation position by pleading for a civil penalty based on the statutory penalty factors and resolving all discretion in favor of the highest defensible penalty amounts. The facts supporting the reasoning -- but not itemized arithmetic calculations -- underlying the requested penalty (e.g., facts showing extent and history of violations, environmental impact, economic benefit, or good faith) should be incorporated in the case file which becomes part of the administrative record. These materials will form the basis for EPA penalty arguments before an Agency judge if the matter is litigated[4] and will form part of the necessary administrative record to support the assessment of the proposed civil penalty if the respondent defaults and the proposed penalty becomes final through operation of law.

In the event that an administrative judge in a Class II proceeding requires under 40 C.F.R. §22.14(a)(5) more information from EPA than the recitation of the statutory penalty factors, Agency enforcement personnel should provide those elements of the

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[3] Under the present default procedures for Class II penalties (see 40 C.F.R. §22.17), the administrative complaint can become an assessable order without the intercession of an administrative law judge.

[4] The materials are not directly applicable, however, to settlement negotiations, which are governed by the methodology of the CWA penalty policy. See discussion below.

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case file which support the penalty pleading based upon the statutory factors in §309(g)(3).[5]

This analysis to support EPA's administrative penalty pleading based on the statutory penalty assessment factors should not be derived by applying the Clean Water Act penalty policy, which EPA uses specifically for determining appropriate penalty settlement amounts for NPDES cases. Unlike other Agency enforcement programs, such as FIFRA or TSCA, which operate under penalty policies that control Agency administrative pleading practices, the NPDES program's penalty policy does not encompass how to plead administrative penalty complaints. The Agency's settlement position, although based on concepts similar to the Agency's or a district court's assessment criteria, almost always will differ from (and presumably will be less than) the figure or formulation requested in a complaint. These two calculations we make in an administrative case serve entirely different purposes, and should not be confused.

Negotiating Civil Penalty Settlements

The February 11, 1986, Clean Water Act penalty policy, as amended for administrative penalty cases in the August 18, 1987 guidance, governs Agency negotiators in settling both administrative and judicial NPDES enforcement cases. The principles of the policy and its use are well known, and we will not repeat them here. We believe this policy has succeeded both in raising Agency penalty settlements consistent with the policy and goals of deterrence and providing incentives for quick correction of violations, and in achieving a greater national consistency. Agency negotiators should continue using this policy in all NPDES settlements. Similarly, Agency negotiators should continue to use approved bottom-line settlement amounts in wetlands cases.

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[5] If the request comes at the outset of the administrative enforcement action, before the parties have exchanged information or even before the respondent has answered the complaint, Agency prosecutors often will not possess complete information on some relevant issues. Such an incomplete information base is usual and normally sufficient for pleading and charging purposes, but may be of limited use to an administrative judge making decisions during contested litigation. Under these circumstances, enforcement staff should consider whether it is advantageous to EPA to urge the judge to delay the inquiry until a later stage in the litigation when all available information can be considered. See discussion below on Litigating Penalties.

Litigating Civil Penalties

When EPA or DOJ attorneys provide written or oral arguments to a federal District Court judge or an administrative judge on the issue of an appropriate civil penalty, they are not governed by the calculation methodology of the 1986 Clean Water Act penalty policy or the 1987 addendum. The 1986 policy itself notes:

> In those cases which proceed to trial, the government should seek a penalty higher than that for which the government was willing to settle, reflecting considerations such as continuing noncompliance and the extra burden placed upon the government by protracted litigation.

CWA Penalty Policy at p.2. It is inherent to the concept of settlement *negotiations* that respondents will risk a higher civil penalty in the event settlement talks fall through. Without this leverage, defendants or respondents will not have strong incentive to settle on terms acceptable to the government under the penalty policy. Agency negotiators then would either have to agree to civil penalties lower than those presently being attained, or spend a lot more time litigating cases that are currently being settled. In order to promote settlements, it is necessary to restrict the scope of the penalty policy and its specific calculation methodology to settlements alone.

Government litigators are to argue for the highest civil penalty appropriate under the law, considering the applicable statutory factors,[6] our ability to prove the allegations in the

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[6] These are, for judicial actions,

> "the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require."

CWA § 309(d). The virtually identical statutory factors in administrative enforcement proceedings are

> "the nature, circumstances, extent and gravity of the violation, or violations, and, with respect to the violator, ability to pay, any prior history of such violations, the degree of culpability, economic benefit

complaint, and whatever financial burdens may be placed upon the government by continuing litigation.[7]

Government litigators must provide legal arguments and may introduce testimony or other evidence supporting facts related to the application of statutory penalty criteria to a violator's conduct to advance EPA's claims for civil penalties. We should draw on favorable civil penalty precedents, such as Chesapeake Bay Foundation v. Gwaltney of Smithfield, 611 F. Supp. 1542 (E.D.Va. 1985), aff., 791 F.2d 304 (4th Cir. 1986), rev. on other grounds and remanded, 108 S.Ct. 376 (1987) (for the total amount assessed), Sierra Club v. Simkins Industries, Inc. 617 F.Supp. 1120 (D.Md. 1985), aff., 847 F.2d 1109 (4th Cir. 1988) or United States v. Cumberland Farms of Connecticut, Inc., 647 F. Supp. 1166 (D.Mass. 1986), aff., 826 F.2d 1151 (1st Cir. 1987)(§404 case in which defendant was assessed a civil penalty of $150,000 and required to pay an additional $390,000 if restoration of wetlands not carried out). See also Attachments A and B. We strongly advise you to adopt the approach used in the attached Regional materials -- recommend a total penalty amount, after discussion of the appropriate statutory factors,[8] but do not provide specific amounts (other than for economic benefit, where applicable) for each factor. Attachments A and B. The penalty we recommend should be one supportable by the evidence and available legal arguments, but also one that resolves any penalty discretion or factual ambiguity in terms most favorable to the United States or the Environmental Protection Agency. The amount that we recommend to a judge should in all instances be more than we were proposing in settlement negotiations. In administrative penalty cases in which there is a significant record of violations, it is likely that the facts of a case will often justify EPA seeking the maximum penalty authorized by the Act -- either $25,000 or $125,000 -- assuming also that EPA requested that maximum assessment in its administrative complaint. An important distinction to note here is that in pursuing a Clean Water Act civil penalty in litigation, the government should support its claim through application of the statutory penalty factors rather than the Agency's civil penalty policy

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or savings (if any) resulting from the violation, and such other matters as justice may require."

CWA §309(g)(3).

[7] At this point in an enforcement case, such financial costs will typically be minimal.

[8] The judges in our enforcement cases need this information to support their decisions imposing civil penalties under the Water Quality Act amendments.

methodology. Indeed, government litigators shall not argue before a judge or neutral decisionmaker for a civil penalty based upon the specific methodology set out in the CWA penalty policy, nor should they offer evidence, including expert testimony, as to how specific CWA penalty policy gravity component calculations apply to a given case.

The analysis of the economic benefit accruing to the violator remains the same (after accounting for a potentially longer period of noncompliance if settlement is not reached), and is to be considered according to the terms of §309(d) and (g) of the Act, so the BEN program may and should be used in litigating penalties.[9] The existence and extent of economic benefit is a factual matter which may be objectively measured in dollar terms. Therefore, to support the United States' figure on economic benefit government litigators may introduce a witness expert in the application of financial analysis as used in the BEN program.

The penalty policy's settlement gravity analysis, however, must be abandoned in favor of a more stringent, statutorily-grounded approach if penalties in a case are litigated. Specifically, the government should then offer into evidence facts that are related to the gravity-oriented statutory criteria, such as the magnitude and duration of the violations, the actions available to the defendant to have avoided or mitigated the violations, or any environmental damage. The government should argue as an advocate that the presence of these facts warrant assessment of a civil penalty of a given amount.[10]

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[9] Although the application of BEN to the facts of violation will remain the same in settlement or litigation, government prosecutors may well take a more stringent position in litigation than settlement regarding, for example, days in violation. This tactical shift may influence the economic benefit analysis by changing material inputs into the computer program. We do not address here special issues that may arise over how to apply the BEN program to a given set of facts.

The BEN program generally does not apply to wetlands cases under §404 of the Act.

[10] This amount should correspond to the penalty requested in the administrative or judicial complaint, adjusted to reflect any new information received since the filing of the case (keeping in mind that the government cannot argue for penalties higher than initially requested), and should always be significantly greater than the bottom-line penalty derived from application of the CWA penalty policy.

The results of our gravity analysis of the Clean Water Act penalty policy, although applicable in NPDES settlement discussions, are irrelevant to our litigation approach and should never be introduced into evidence by the United States or advanced as representing Agency litigation penalty policy. This is the case because the penalty policy quantifies gravity calculations in a way which takes into account government resources and priorities relevant to deciding whether to litigate or settle a case.

If the defendant in a judicial case attempts to depose EPA personnel on the gravity calculations for settlement purposes under the CWA penalty policy, either in the case at hand or other cases, this should be vigorously opposed by government counsel under Rule 26(b) as not "being reasonably calculated to lead to the discovery of admissible evidence." If the defendant in a judicial case attempts to introduce the CWA Penalty Policy into evidence, this should be opposed as irrelevant.[11] In administrative litigation in which formal rules of evidence may not apply, EPA prosecutors should resist the respondent's introduction of the policy as irrelevant and potentially misleading.

40 C.F.R. §22.27(b)'s mandate that administrative law judges "consider any penalty guidelines issued under the Act" when assessing a penalty does not apply in Clean Water Act cases, because there are no applicable guidelines.[12] The February 1986 NPDES settlement policy, as amended, does not and cannot govern or even apply to the decision which an adjudicator must make to resolve an administrative or judicial claim for civil penalties. If it did, the policy most likely would be designed to quantify penalties differently so as to produce acceptable amounts to achieve through litigation, rather than settlement. Furthermore, if the settlement policy governed adjudications respondents could have too little incentive to settle with Agency negotiators and administrative judges would face much lengthier dockets. EPA litigators should make this point to any administrative judge who misconstrues the scope of the NPDES penalty policy.

Attachments

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[11] Tactically, exceptions may apply here. But in no case should government prosecutors represent to the Court that the CWA penalty policy binds the Court, the hearing officer, or the United States in litigating civil penalties.

[12] The Agency has not issued §404 program penalty guidelines applicable to administrative judges.