

MEMORANDUM

SUBJECT: Requirement for State Administrative Penalty Authority Under the Safe Drinking-Water Amendments of 1996

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TO: Water Division Directors
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One of the new provisions to the Safe Drinking Water Act Amendments of 1996 includes an administrative penalty requirement for States. To obtain and/or retain primacy for the public water system supervision (PWSS) program, section 1413(a)(6) requires that States have such authority and reads as follows:

"(6) has adopted authority for administrative penalties (unless the constitution of the State prohibits the adoption of the authority) in a maximum amount-

- (A) in the case of a system serving a population of more than 10,000, that is not less than \$ 1,000 per day per violation; and
- (B) in the case of any other system, that is adequate to ensure compliance, (as determined by the State);

except that a State may establish a maximum limitation on the total amount of administrative penalties that may be imposed on a public water system per violation."

A number of issues have arisen on the interpretation of this section, particularly as you and your staffs have worked with your States to evaluate their existing authority or to draft legislation which would provide them the requisite authority. EPA is currently working on revising the primacy rule to include this new statutory requirement. However, Regions need not and should not wait for regulatory revisions to begin working with your States on this issue. The guidance attached to this memorandum sets out EPA's interpretation of this new provision and responds to many of the questions which have

been raised by staff members over the last few months. The guidance also lays out the process EPA intends to follow in order to insure that State primacy programs are updated as required.

You must work with your States to ensure that their programs meet the new statutory requirements. This includes verifying their existing authority by reviewing the State laws and/or regulations, determining if the authority meets the new SDWA requirements, and, if the State lacks authority or if the authority does not meet the new requirements, developing a plan with your States to get the requisite authority. When verifying a State's existing penalty authority, it is likely to be necessary to request from the State Attorney General an interpretation of the State laws and/or regulations.

We will be discussing the status of your State programs with you over the next several months. Should you have any questions on this guidance, please contact Betsy Devlin, Associate Director of the Water Enforcement Division in OECA at (202) 564-4054 or Connie Bosma, Chief, Regulatory Implementation Branch in OGWDW at (202) 260-5526.

Attachment

cc: ORC Water Branch Chiefs
ORC PWSS Contacts
Drinking Water Branch Chiefs
Drinking Water Enforcement Coordinators

**GUIDANCE ON THE REQUIREMENT
FOR STATE ADMINISTRATIVE PENALTY AUTHORITY
IN SECTION 1413(a)(6) OF THE SDWA AMENDMENTS OF 1996**

I. Background/New Statutory Provision

A. New Statutory Provision -- Section 1413(a)(6)

The Safe Drinking Water Act Amendments of 1996 added a new paragraph to the primacy requirements. Section 1413(a)(6) requires that States have administrative Penalty authority in order to obtain and/or retain primacy. The new paragraph reads as follows:

"(6) has adopted authority for administrative penalties (unless the constitution of the State prohibits the adoption of the authority) in a maximum amount-

- (A) in the case of a system serving a population of more than 10,000, that is not less than \$1,000 per day per violation; and
- (B) in the case of any other system, that is adequate to ensure compliance (as determined by the State);

except that a State may establish a maximum limitation on the total amount of administrative penalties that may be imposed on a public water system per violation."

B. Current Information on State Administrative Penalty Authorities

According to the most recent compilation on State administrative order and administrative penalty authorities, of the 56 States and territories:

- 33 States/territories have some administrative penalty authority
- 21 States/territories do not have administrative penalty authority
- 2 Nonprimacy States/territories (Wyoming, District of Columbia)

Of the 21 States/territories which do not have administrative penalty authority, 18 have AO authority; therefore, only 3 do not have any type of administrative authority.

From this compilation, it is not possible to tell if the administrative penalty authority of the 33 States/territories which have the authority is sufficient to satisfy the requirements of the SDWA amendments.

A list of States/territories in each of the categories listed above is contained in Appendix 1 to this guidance. Regions should verify that this list is accurate and call HQ (Betsy Devlin) with updates to this list or an indication that the list is accurate. This task should be completed by **September 15, 1997**. Please note that this is not an analysis of State authority to determine compliance with the new SDWA requirements; it is merely an indication of whether the State has administrative penalty authority.

II. Issues

A. Overview

The issues raised so far fall into two broad categories: interpretation of the new statutory provision in 1413(a)(6) and implementation of that provision

A number of questions have been raised on the interpretation of this new provision:

- (1) What does "in a maximum amount ... that is not less than \$1,000 per day per violation" mean?
- (2) What does "adequate to ensure compliance" mean?
- (3) What does the provision that a State may establish a maximum limitation on the total amount of administrative penalties which may be imposed on a public water system per violation mean?

In addition, questions have been raised on the implementation of the provision how long do States have to obtain the requisite authority, what process is envisioned for revising/approving revisions to primacy programs, and what is EPA's official position towards States which cannot or will not obtain the authority.

This guidance document set outs an interpretation of the statutory provisions and provides guidance for the Regions on how to proceed in reviewing both existing State authorities and proposed legislation where States need to obtain new authority.

B. Interpretation of Section 1413(a)(6)

1. Important Parts to the New Provision

-To obtain or retain primacy for the PWSS program, a State must have authority for administrative penalties, unless the constitution of the State prohibits the adoption of the authority.

-Depending on the size of the population being served by the PWS, the penalty authority must be "in a maximum amount" or "adequate to ensure compliance."

-A State may establish a "maximum limitation on the total amount of administrative penalties that may be imposed on a public water system per violation."

2. Points of Clarification

There are, two Points which need to be made clear, but on which there is no debate:

- (a) Administrative Penalty authority means, a penalty that is:
 - (1) assessed by an officer or agent of an administrative agency, i.e., a part of the executive branch of the State government; and
 - (2) legally owing without a separate judicial action.

Of course, if a duly assessed administrative penalty is not paid, then a judicial action may be needed to collect the penalty. This means that the State Attorney General can be asked to bring an action for enforcement of a penalty order.

- (b) Administrative penalty authority is required for primacy unless the State constitution prohibits it; that is, prohibits an officer of an executive agency from assessing any penalty or alternatively requires a judicial action for the assessment of all penalties. Most State constitutions do not have such a bar. If a State asserts that its constitution prohibits administrative penalties, the Region must obtain a statement from the State Attorney General affirming this interpretation and a copy of the relevant provision of the State constitution.

3. Responses to Three Specific Questions Raised

- (a) **Question: What is EPA's interpretation of the requirement that States have administrative penalty authority "in a maximum amount - in the case of a system serving a population of more than 10,000, that is not less than \$1,000 per day per violation?"**

The confusion in this provision revolves around the terms "maximum amount" that is "not less than." There is, however, a sensible reading of this provision which is both consistent with the statutory language and its legislative history. The report on Senate Bill (SB) 1316 says, in explaining this provision, that States are to have the authority to assess administrative penalties of at least \$1,000 per day per violation for large systems. The language in the House Bill and in the final version of the SDWA amendments is identical to that in SB 1316, and there is no additional explanation of this language. Therefore, the explanation provided with SB 1316 is a helpful indicator of Congressional intent.

EPA therefore interprets this provision to require that States must have the **authority** to impose a penalty of at least \$1,000 **per day per violation** for systems serving a population greater than 10,000 individuals. However, States are not obligated to assess this minimum amount for every penalty imposed on systems serving a population of more than 10,000 individuals.

The \$1,000 per day per violation is a statutory minimum.(that is, States must be able to assess at least that amount); if a State has the authority to assess only less than \$ 1,000 per day per violation,

then the State law must be amended in order to retain primacy, unless the State constitution prohibits this. Please note, however, that a State may have the authority to assess 'larger amounts of administrative penalties.

A final note: The wording "per day per violation" is critical. If a State has authority for administrative penalties up to a specific dollar amount (in total, or as per day, or per violation), but the authority is not expressed as an amount "per day per violation," then the authority is not sufficient.

Determining whether a State law conforms to the statutory requirement can be a challenging task as many States will not use the same language as the SDWA. In these instances, a statement from the State Attorney General and a penalty policy from the State are likely to assist in making such a determination.

(b) Question: What does "adequate to ensure compliance" mean?

The SDWA amendments say that for "any other system," that is, one serving a population of 10,000 individuals or less, the administrative penalty must be "adequate to ensure compliance" as determined by the State.

This provision is designed to give the States flexibility in dealing with the smaller systems. The provision in part recognizes that some of the smaller systems may have difficulty complying with the requirements of the SDWA and the regulations and do not have the financial capability to pay a large penalty. Moreover, with some of the small and very small systems, a modest penalty can serve as a great deterrent. In addition, assessing modest penalties often requires less burdensome hearing procedures and thus can be more efficient. At the same time, however, it must be remembered that a good proportion of the small systems are, in fact, profit making businesses and therefore should not be permitted to gain an economic advantage through their noncompliance with the law.

Taking these factors into consideration, as well as many others, States must determine, for systems serving a population of 10,000 individuals or less, a level or levels of administrative penalties which will, in their opinion, ensure compliance. States need to include in their primacy approval packages an explanation of why their chosen level of administrative penalty authority is appropriate to ensure compliance. The level of penalties for small systems can be the same as that for the larger systems.

(c) Question: What does the provision that a State may establish a maximum limitation on the total amount of administrative penalties that may be imposed on a public water system per violation mean?

This provision means, in short, that a State **may** establish an administrative penalty cap, similar to those imposed on EPA in Section 309 of the Clean Water Act. For example, Section 309(g)(2)(B) of the Clean Water Act states that "The amount of a class II civil penalty under paragraph (1) may not

exceed \$10,000 per day for each day during which the violation continues; except that the maximum amount of any class II civil penalty under this subparagraph shall not exceed \$125,000."

There are two important points:

(a) States are not required to establish a cap. Many may elect to do so, but it is voluntary.

(b) If States establish a cap, **the cap is not on the total administrative penalty which may be imposed on the system; but on the total which may be imposed on the system per violation.**" Thus, a State could obtain authority for administrative penalties of \$1,000 per day per violation, not to exceed \$25,000 for each violation. If a PWS had, for example, 3 maximum contaminant level violations which lasted a month each, the system could be assessed an administrative penalty of \$75,000. (This would be calculated as follows: The PWS had 3 violations. At 1,000 per day x 30 days for each violation, the system could be assessed \$90,000, if there were no cap. However, the State has established a cap of \$25,000 for each violation; therefore, the PWS could only be assessed the maximum for each violation -- $\$25,000 \times 3 = \$75,000$).

C. Implementation

The issues on implementation of this provision revolve around when States are required to have administrative penalty authority and the process EPA will use to review and approve revisions to State primacy programs.

1. Effective Date

The amendments to the SDWA state that "except as otherwise specified in this Act or in the amendments made by this Act, this Act and the amendments made by this Act shall take effect on the date of enactment of this Act." There is no other date specified in the amendments; therefore, this provision was effective on the date of enactment, August 6, 1996. However, it is reasonable to grant States time to change laws/regulations to comply with the new requirements.

The question then arises of how long should States have to change their laws and regulations. The current regulations for revising approved primacy programs (40 CFR 142.12), provide that a State has eighteen months from the time a new federal regulation is promulgated to submit a primacy revision application. The SDWA amendments extend this time period to two years. While these regulations do not **currently** apply to the primacy revisions necessary to meet the new statutory requirements, EPA believes that allowing a two year time period for adoption of these changes by primacy States is appropriate. As a result, Regions should work with their States to have them submit primacy revision packages for approval within two years. EPA strongly encourages States not to wait for the deadline, but to be working now to obtain the needed authority and/or submit the required materials as discussed in the following sections of this document.

EPA is in the process of revising the primacy regulations in 40 CFR Part 142 to reflect this new statutory requirement. Once this regulation is effective (hopefully some time in the fall of 1997), then the process and timeframes provided in the regulations for primacy revision approval (and program withdrawal) will apply to program revisions needed for the administrative penalty authority. Therefore, the remainder of this document deals with the process which EPA intends to follow once the revised regulations are effective.

If or when it becomes clear that a State is not going to obtain needed authority or the State is not acting in good faith to obtain the authority, EPA will seek to begin the formal primacy withdrawal process. There are serious consequences if a State loses primacy, including the loss of State Revolving Fund (SRF) monies.

w. Process

Regions must review State laws and regulations to determine whether the State has administrative penalty authority which meets the requirements of the SDWA. This is very likely to include requesting a State Attorney General (AG) to provide the Region with an interpretation of the State's authority. The AG's statement will be needed particularly in cases where the State laws or regulations use different language than the SDWA. In addition, Regions need to request from the States their rationale for determining that the penalty authority for systems serving a population of 10,000 individuals or less is "adequate to ensure compliance." Regions should also request an explanation from the States on how they plan to use their penalty authority (that is, a penalty policy). While this is not a requirement, we believe that it will be particularly useful in evaluating State programs.

Regions should review existing State laws and regulations and coordinate one response to Betsy Devlin by **October 15, 1997**. By this date the Regions should determine into which of the four categories listed below each State program falls:

- (a) States Which Currently Have Administrative Penalty Authority Which Meets the Statutory Requirements and is Part of the Approved Primacy Program;
- (b) States Which Currently Have Administrative Penalty Authority Which Meets the Statutory Requirements but is Not Part of the Approved Primacy Program;
- (c) States Which Currently Do Not Have Administrative Penalty Authority or Where Some Changes to the Authorities Are Needed to Meet the New SDWA Requirements; or
- (d) States Which Currently Do Not Have Administrative Penalty Authority and Where the State Constitution Prohibits Such Authority.

Each of these situations requires slightly different procedures; however, in all cases, before a Region makes a determination and informs a State that its laws and/or regulations, do or do not meet SDWA requirements, the Regions must consult with Headquarters. This consultation is necessary

because of the need to insure consistency throughout the country. Details on the process for consultation, including specific contacts in OGWDW, OECA, and OGC will be forthcoming.

(a) States Which Currently Have Administrative Penalty Authority Which Meets the Statutory Requirements and Is Part of the Approved Primacy Program.

If, after reviewing State laws, regulations, and explanation of the chosen level of penalties for the systems serving 10,000 individuals or less, an Attorney General's statement where needed, and the State's penalty policy, the Region determines that the State administrative penalty provisions meet the new statutory requirements and that these provisions have already been approved either in an initial primacy approval package or in a program revision application, the Region, after consultation with headquarters as noted above, should write a letter to the State confirming this fact. The letter should also indicate when EPA approved the program. No formal process under 40 CFR Part 142 is required to approve the program.

(b) States Which Currently Have Administrative Penalty Authority Which Meets the Statutory Requirements but is Not Part of the Approved Primacy Program.

If the Region determines, based on its review of State laws, regulations, an explanation of the chosen level of penalties for the systems serving 10,000 or fewer individuals, an Attorney General's statement, and the State's penalty policy that the State administrative penalty provisions meet the new SDWA requirements, but they have never been formally incorporated into the primacy program, the Region and State should follow the process for program revisions in 40 CFR 142.12.

As noted above, Regions must consult with headquarters before determining that the State administrative penalty authority meets the new SDWA requirements.

(c) States Which Currently Do Not Have Administrative Penalty Authority or Where Some Changes to the Authorities Are Needed to Meet the New SDWA 9 Requirements.

When a Region determines that a State does not have adequate administrative penalty authority, the Region should consult with HQ and then write a letter to the State primacy agency informing them of the deficiency and offering assistance as appropriate to obtain the needed authority. The Region should negotiate with the State an agreement on a schedule for obtaining the authority and should closely monitor the State's progress.

Once the authority is in place, the Regions and States will use the procedures in 40 CFR 142.12 as noted above to formally revise the State primacy program. Regions should consult with HQ as they are working with States to draft legislation to insure that the new legislation will meet the statutory requirements.

If or when it becomes clear that the State will not adopt administrative penalty authority which meets the new statutory requirements, the Region, with consultation of HQ, should initiate the withdrawal process under 40 CFR 142.17. Please remember that the initiation of the withdrawal process is a letter to the State, to which the State has 30 days to respond. However, EPA intends to withdraw programs if States do not obtain the authority required by the SDWA.

(d) States Which Currently Do Not have Administrative Penalty Authority and Where the State Constitution Prohibits Such Authority.

When a Region determines that a State does not have adequate administrative penalty authority, the Region should consult with HQ and then write a letter to the State primacy agency informing them of the deficiency and offering assistance as appropriate to obtain the needed authority. If the State responds with the affirmation that the State constitution prohibits such administrative penalties, the Region must request a copy of the relevant provision of the State constitution as well as an Attorney General's statement confirming that interpretation.

The Region should then write a letter to the State saying that since the State constitution prohibits administrative penalties, the State does not have to have that authority to retain primacy.

We hope that this guidance is helpful to you in working on these issues. Additional guidance will be issued on consultation with headquarters. Moreover, we will keep you informed of the status of the revisions to the primacy regulation. Should you have any questions, please do not hesitate to contact Connie Bosma at (202) 260-5526 or Betsy Devlin at (202) 5644054.

Appendix I

**SUMMARY OF INFORMATION ON STATE ADMINISTRATIVE
PENALTY ORDER AUTHORITIES**

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Overview

According to the most recent compilation on State administrative order and administrative penalty authorities:

- 33 States/territories have some administrative penalty authority
- 21 States/territories do not have administrative penalty authority
- 2 Nonprimacy States/territories (Wyoming, District of Columbia)

Of the 21 States/territories which do not have administrative penalty authority, 18 have AO authority; therefore, only 3 do not have any type of administrative authority.

From this compilation, it is not possible to tell if the administrative penalty authority of the 33 States/territories is adequate to meet the statutory requirements.

States with Some Administrative Penalty Authority - 33

Alabama	Mississippi	Commonwealth/No. Mariana Islands
Arizona	Montana	Puerto Rico
Arkansas	Nebraska	Guam
California	Nevada	
Connecticut	New Jersey	
Florida	New York	
Georgia	North Carolina	
Hawaii	Oklahoma	
Idaho	Oregon	
Illinois	Pennsylvania	
Iowa	Rhode Island	
Kansas	South Carolina	
Kentucky	Tennessee	
Louisiana	Vermont	
Massachusetts	Washington	

Appendix

**SUMMARY OF INFORMATION ON STATE ADMINISTRATIVE
PENALTY ORDER AUTHORITIES**

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**States Without Administrative Penalty Authority but With Some Administrative Order
Authority -- 18**

Alaska	Ohio
Colorado	South Dakota
Delaware	Texas
Indiana	Utah
Maine	Virginia
Maryland	West Virginia
Michigan	Wisconsin
Minnesota	American Samoa
North Dakota	
New Mexico	

States Without Administrative Order Authority - 3

Missouri	Virgin Islands
New Hampshire	

Nonprimacy Areas- 2

District of Columbia
Wyoming