

Administrative Penalty Procedures.

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AGENCY: Environmental Protection Agency (EPA).

DOC TYPE: Rules and Regulations

CFR: 40 CFR Part 22

NUMBER: FRL-3464-2

ACTION: Interim final rule

SUMMARY: EPA is today promulgating an interim final rule establishing procedures for the administrative assessment of civil penalties under (1) section 109 of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. 9601 *et seq.*, as amended by the Superfund Amendments and Reauthorization Act (SARA) of 1986, Pub. L. No. 99-499, for violations of provisions specified in section 109 of CERCLA, including failing to report releases of hazardous substances, and (2) section 325 of the Emergency Planning and Community Right-To-Know Act (EPCRA), 42 U.S.C. 11001 *et seq.*, for violations of provisions specified in section 325 of EPCRA. The rule provides that the administrative assessment of CERCLA section 109 penalties and EPCRA section 325 penalties will be governed by EPA's Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and by supplemental rules relating specifically to penalty assessments under section 109 of CERCLA and section 325 of EPCRA. EPA is taking this action in response to amendments to CERCLA made by SARA, which authorize the President to assess administrative penalties for certain violations of CERCLA and which authorize the Administrator of EPA to assess administrative penalties for violations of EPCRA. The authority granted to assess administrative penalties was effective upon the date of enactment of SARA, which was October 17, 1986.

DATES: Comments on this interim final rule must be submitted on or before July 17, 1989. This interim final rule is effective on May 16, 1989, and governs all proceedings for the administrative assessment of a civil penalty under section 109 of CERCLA or section 325 of EPCRA for which an administrative complaint is filed after May 16, 1989. EPA will use this rule as guidance for conducting these proceedings prior to the date it becomes effective on an interim final basis.

ADDRESSES: Persons may mail comments on this interim final rule to Sandra Connors, Office of Enforcement and Compliance Monitoring, Hazardous Waste Division (LE-134S), Room 3219L, U.S. Environmental Protection Agency, 401 M Street SW., Washington, DC 20460. Persons may inspect comments at that address.

FOR FURTHER INFORMATION CONTACT: Sandra Connors, Office of Enforcement and Compliance Monitoring, Hazardous Waste Division (LE-134S), U.S. Environmental Protection Agency, 401 M Street SW., Washington, DC 20460, 202-382-3110.

SUPPLEMENTARY INFORMATION:

Statutory Background

On October 17, 1986, the Superfund Amendments and Reauthorization Act (SARA) of 1986, Pub. L. No. 99-499, was enacted. Title I of SARA amended the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. 9601 *et seq.*, by

revising section 109, 42 U.S.C. 9609, which authorizes the President to assess administrative penalties for violations of specified provisions of CERCLA. Title III of SARA is the Emergency Planning and Community Right-to-Know Act of 1986 (EPCRA). Section 325(b) of EPCRA, 42 U.S.C. 11045(b), authorizes the Administrator of EPA to assess administrative penalties for violations of emergency notification under section 304 of EPCRA. Section 325(c) of EPCRA authorizes the Administrator of EPA to assess administrative penalties for reporting violations under sections 311, 312, 313, 322 or 323 of EPCRA. Section 325(d) of EPCRA authorizes the Administrator of EPA to assess administrative penalties for frivolous trade secret claims made in violation of section 322 of EPCRA.

Section 109 and section 325(b) established two "classes" of administrative penalties, which differ with respect to allowable procedure and maximum assessment. The provisions for Class I penalties allow for a maximum penalty of \$25,000 per violation and the Respondent must be provided notice and an opportunity for hearing. The provisions for Class II penalties authorize a maximum penalty of \$25,000 per day for each day during which the violation continues and a maximum penalty of \$75,000 per day for each day during which the violation continues for a second or subsequent violation and are explicitly made subject to the requirements of the Administrative Procedure Act (APA), 5 U.S.C. 554, 556. Class II proceedings are similar to administrative adjudicatory proceedings employed by the Agency under other environmental statutes, which are subject to section 554 of the APA.

Sections 325 (c) and (d) of EPCRA are silent as to the type of administrative hearing procedures to be employed for the assessment of penalties under these sections. Section 325(c)(1) authorizes a maximum penalty of \$25,000 per day for each day during which the violation continues and section 325(c)(2) authorizes a maximum of \$10,000 per day for each day during which the violation continues. The penalties under section 325(c) may be assessed on a daily basis. Section 325(d) of EPCRA authorizes a penalty of \$25,000 per frivolous trade secret claim.

Under section 109(a) of CERCLA, a Class I penalty requires only notice and opportunity for hearing. A Class II penalty under section 109(b) of CERCLA may be assessed by the President through an order issued after opportunity for a hearing on the record in accordance with section 554 of the Administrative Procedure Act (APA), 5 U.S.C. 554. The authority to assess penalties under CERCLA section 109 has been delegated to EPA (see Executive Order 12580 of January 23, 1987, 52 FR 2923 (January 29, 1987)).

Class I and Class II civil penalties under section 109 may be assessed for (1) a violation of the emergency release notification requirements of section 103 (a) or (b); (2) a violation of section 103(d)(2) (relating to recordkeeping); (3) a violation of the requirements of section 108, the regulations issued under section 108, or with any denial or detention order under section 108 (relating to financial responsibility); (4) a violation of an order under section 122(d)(3) (relating to settlement agreements for action under section 104(b)); or (5) any failure or refusal referred to in section 122(l) (relating to violations of administrative orders, consent decrees, or agreements with federal facilities under section 120).

Under section 325(b)(2) of EPCRA, a Class II penalty is assessed and collected by the Administrator in the same manner, and subject to the same provisions, as in the case of civil penalties assessed and collected under section 16 of the Toxic Substances Control Act, 15 U.S.C. 2615. Those penalties are assessed by an order issued after opportunity for a hearing on the record in accordance with section 554 of the APA. A Class I penalty under section 325(b)(1) of EPCRA requires only notice and opportunity for a hearing.

Under section 325(c)(4) of EPCRA, the Administrator may assess by administrative order any civil penalty for which a person is liable under section 325(c). Under section 325(c)(1), a penalty of not more than \$25,000 for each violation may be assessed for violations of the right-to-know reporting requirements under sections 312 or 313 of EPCRA. Under section 325(c)(2), a penalty of not more than \$10,000 for each violation may be assessed for violations of section 311 or 323(b) requirements or for failure to furnish information under section 322(a)(2). For purposes of section 325(c), each day a violation continues constitutes a separate violation. Under section 325(d) of EPCRA, the Administrator may assess by administrative order a penalty of \$25,000 per frivolous trade secret claim made under section 322(d)(4).

Both sections 109 and 325 authorize EPA to issue subpoenas to obtain the attendance and testimony of witnesses and the production of documents. A person subject to an order assessing a Class II penalty under section 109 may seek judicial review of the order with the appropriate United States Court of Appeals. A person subject to an order assessing a Class I penalty under section 109 or a penalty under section 325 may seek judicial review of the order with the appropriate United States District Court.

Description of Final Rule

This interim final rule applies formal APA hearing procedures at this time to all EPA administrative penalty authorities under CERCLA section 109 and EPCRA section 325. The Agency is currently considering developing procedures for assessing Class I penalties that would be less formal than the Part 22 procedures and that would apply to penalties under section 109(b)(1) of CERCLA, section 325(b)(1) of EPCRA, section 325(d) of EPCRA, and to certain civil penalties under section 325(c) of EPCRA.

EPA promulgated Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and Revocation or Suspension of Permits at 40 CFR Part 22. Those rules govern the administrative assessment of penalties under other statutes administered by EPA subject to the adjudicatory hearing requirements of the APA or for which EPA has determined such procedures are appropriate. The Consolidated Rules are designed to provide a common set of procedural rules for certain of EPA's administrative penalty programs, in order to reduce paperwork, inconsistency, and the burden on the regulated community. See 45 FR 24360 (April 9, 1980).

Under the Consolidated Rules of Practice, EPA will assess CERCLA section 109 penalties and EPCRA section 325 penalties by an order issued after opportunity for a hearing on the record. EPA has concluded that the Consolidated Rules should be followed, on an interim final basis, as

the procedural framework to assess penalties under section 109 of CERCLA and section 325 of EPCRA. Accordingly, this interim final rule provides that the Consolidated Rules will govern adjudicatory proceedings for the assessment of civil administrative penalties under section 109 of CERCLA and section 325 of EPCRA.

In addition, as part of today's rulemaking, EPA is promulgating, on an interim final basis, supplements to the Consolidated Rules which apply to CERCLA section 109 and EPCRA section 325 penalty procedures. The supplemental rule is necessary because of requirements specific to provisions of the two statutes. The supplemental rules codify subpoena requirements and the procedures for seeking judicial review of penalty assessments, and describe certain procedures for payment and collection of penalties assessed.

EPA requests comments on any of the above matters.

Interim Final Rule

EPA is issuing the rule on an interim final basis pursuant to 5 U.S.C. 553(b) (A) and (B), which allows the issuance of rules without prior notice and comment where the rules concern agency practice or procedure or where the Agency finds for good cause that prior notice and comment is unnecessary. Both of these criteria are met by these rules. The statutes specifically identify the type of hearing to be accorded for assessment of Class II penalties, *i.e.* formal adjudications under section 554 of the APA. Although other sections are silent as to the type of procedures or specifically authorize a less formal set of procedures, the Agency has elected to apply the formal adjudications requirements to all penalty actions at this time. EPA has long-established regulations implementing section 554 hearings for civil penalty assessment under several other environmental statutes. The regulations, codified at 40 CFR Part 22, were promulgated after notice and opportunity to comment. Because the statute leaves little discretion with respect to the type of procedure to be afforded for Class II violations and this rule makes well-established rules providing full adjudicatory procedures applicable to all penalty proceedings under section 109 of CERCLA and section 325 of EPCRA, EPA believes that notice and comment on this rule is "unnecessary" under section 553 of the APA.

Furthermore, use of the Consolidated Rules on an interim basis will facilitate EPA beginning prompt implementation of the administrative penalty authority, using uniform procedures while satisfying the procedural and substantive requirements established by CERCLA and EPCRA. EPA is, however, making this rule "interim final" in order to allow an opportunity for public comment and a revision of the final rule as necessary in the future based on public comments.

The interim final rule is effective upon publication in the Federal Register. The Consolidated Rules of Practice will govern proceedings for the assessment of administrative penalties under section 109 of CERCLA and section 325 of EPCRA for which a complaint is filed after that date. The proposed interim final rule will be used by EPA as guidance prior to that date.

Regulatory Flexibility Act

Pursuant to the Regulatory Flexibility Act, 5 U.S.C. 601 through 612, whenever an agency is required to publish a general notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment, a regulatory flexibility analysis which describes the impact of the rule on small entities (i.e., small businesses, small organizations, and small governmental jurisdictions). The Administrator may certify, however, that the rule will not have a significant economic impact on a substantial number of small entities. In such circumstances, a regulatory flexibility analysis is not required.

The expected impact of the rule on small entities is negligible. The rule codifies already existing statutory provisions and is procedural. Thus, it does not impose additional regulatory requirements on small entities.

Accordingly, I hereby certify that these regulations will not have a significant impact on a substantial number of small entities. These regulations, therefore, do not require a regulatory flexibility analysis.

Executive Order No. 12291

Under Executive Order 12291, the Agency must judge whether a regulation is "major" and thus subject to the requirement to prepare a Regulatory Impact Analysis. The notice published today is not major because the rule will not result in an effect on the economy of \$100 million or more, will not result in increased costs or prices, will not have significant adverse effects on competition, employment, investment, productivity, and innovation, and will not significantly disrupt domestic or export markets. Therefore, the Agency has not prepared a Regulatory Impact Analysis under the Executive Order.

This regulation was submitted to the Office of Management and Budget (OMB) for review as required by Executive Order No. 12291.

Paperwork Reduction Act

These interim final rules do not contain any information collection requirements subject to OMB review under the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 *et seq.*).

List of Subjects in 40 CFR Part 22

Administrative practice and procedures, Environmental protection, Extremely hazardous substances, Hazardous chemicals, Hazardous substances, Hazardous wastes, Penalties, Superfund, Title III of SARA.

Dated: May 8, 1989.

William K. Reilly,
Administrator.

For the reasons set out in the preamble, and under authority of section 109 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. 9609,

and section 325 of the Emergency Planning and Community Right-to-Know Act of 1986 (EPCRA), 42 U.S.C. 11045, and Executive Order 12580, Title 40 of the Code of Federal Regulations is amended on an interim basis effective on May 16, 1989 as follows:

PART 22 - [AMENDED]

1. The Authority citation for Part 22 is revised to read as follows:

Authority: 15 U.S.C. sec. 2615; 42 U.S.C. secs. 7545 and 7601; 7 U.S.C. secs. 136(1) and (m); 33 U.S.C. secs. 1319, 1415 and 1418; 42 U.S.C. secs. 6912, 6928, and 6991(e); 42 U.S.C. sec. 9609; 42 U.S.C. sec. 11045.

2. Section 22.01 is amended by revising paragraph (a)(6) and by adding paragraphs (a)(7) and (a)(8) to read as follows:

Sec. 22.01 Scope of these rules.

(a) • • •

(6) The assessment of any Class II penalty under section 309(g) of the Clean Water Act (33 U.S.C. 1319(g));

(7) The assessment of any administrative penalty under section 109 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended (42 U.S.C. 9609);

(8) The assessment of any administrative penalty under section 325 of the Emergency Planning and Community Right-To-Know Act of 1986 (EPCRA) (42 U.S.C. 11045).

3. Add a new Sec. 22.39, to read as follows:

Sec. 22.39 Supplemental rules of practice governing the administrative assessment of administrative penalties under section 109 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended.

(a) *Scope of these Supplemental rules.* These Supplemental rules of practice shall govern, in conjunction with the preceding Consolidated Rules of Practice (40 CFR Part 22), administrative proceedings for the assessment of any civil penalty under section 109 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended (42 U.S.C. 9609). Where inconsistencies exist between these Supplemental rules and the Consolidated Rules (Secs. 22.01 through 22.32), these Supplemental rules shall apply.

(b) *Subpoenas.* (1) The attendance and testimony of witnesses or the production of relevant papers, books, and documents may be required by subpoena. The Presiding Officer may grant a request for a subpoena upon a showing of (i) the grounds and necessity therefor, and (ii) the materiality and relevancy of the evidence to be adduced. Requests for the production of documents shall describe the evidence sought as specifically as practicable.

(2) Subpoenas shall be served in accordance with Sec. 22.05(b)(1) of the Consolidated Rules of Practice.

(3) Witnesses summoned before the Presiding Officer shall be paid the same fees and mileage that are paid witnesses in the courts of the United States. Fees shall be paid by the party at whose instance the witness appears. Where a witness appears pursuant to a request initiated by the Presiding Officer, fees shall be paid by the Agency.

(c) *Judicial review.* Any person who requested a hearing with respect to a Class II civil penalty under section 109 of CERCLA and who is the recipient of a final order assessing a civil penalty may file a petition for judicial review of such order with the United States Court of Appeals for the District of Columbia or for any other circuit in which such person resides or transacts business. Any person who requested a hearing with respect to a Class I civil penalty under section 109 of CERCLA and who is the recipient of a final order assessing the civil penalty may file a petition for judicial review of such order with the appropriate district court of the United States. All petitions must be filed within 30 days of the date the order making the assessment was issued.

(d) *Payment of civil penalty assessed.* Payment of civil penalties finally assessed by the Regional Administrator shall be made by forwarding a cashier's check, payable to the "EPA, Hazardous Substances Superfund," in the amount assessed, and noting the case title and docket number, to the appropriate regional Superfund Lockbox Depository. Notice of payment must be sent by Respondent to the Hearing Clerk for inclusion as part of the administrative record for the proceeding in which the civil penalty was assessed. Interest on overdue payments shall be collected pursuant to the Debt Collection Act, 37 U.S.C. 3717.

4. Add a new Sec. 22.40, to read as follows:

Sec. 22.40 Supplemental rules of practice governing the administrative assessment of administrative penalties under section 325 of the Emergency Planning and Community Right-To-Know Act of 1986 (EPCRA).

(a) *Scope of these Supplemental Rules.* These Supplemental rules of practice shall govern, in conjunction with the preceding Consolidated Rules of Practice (40 CFR Part 22), administrative proceedings for the assessment of any civil penalty under section 325 for violations of the Emergency Planning and Community Right-To-Know Act of 1986 (EPCRA). Where inconsistencies exist between these Supplemental rules and the Consolidated Rules, (Secs. 22.01 through 22.32) these Supplemental rules shall apply.

(b) *Subpoenas.* (1) The attendance and testimony of witnesses or the production of relevant papers, books, and documents may be required by subpoena. The Presiding Officer may grant a request for a subpoena upon a showing of (i) the grounds and necessity therefore, and (ii) the materiality and relevancy of the evidence to be adduced. Requests for the production of documents shall describe the evidence sought as specifically as practicable.

(2) Subpoenas shall be served in accordance with Sec. 22.05(b)(1) of the Consolidated Rules of Practice.

(3) Witnesses summoned before the Presiding Officer shall be paid the same fees and mileage that are paid witnesses in the courts of the United States. Fees shall be paid by the party at whose instance the witness appears. Where a witness appears pursuant to request initiated by the Presiding Officer, fees shall be paid by the Agency.

(c) *Judicial review.* Any person against whom a civil penalty is assessed may seek judicial review in the appropriate district court of the United States by filing a notice of appeal and by simultaneously sending a copy of such notice by certified mail to the Administrator. The notice must be filed within 30 days of the date the order making such assessment was issued. The Administrator shall promptly file in such court a certified copy of the record upon which such violation was found or such penalty imposed.

(d) *Procedures for collection of civil penalty.* If any person fails to pay an assessment of a civil penalty after it has become a final and unappealable order or after the appropriate court has entered final judgment in favor of the United States, the Administrator may request the Attorney General of the United States to institute a civil action in an appropriate district court of the United States to collect the penalty, and such court shall have jurisdiction to hear and decide any such action. In hearing such action, the court shall have authority to review the violation and the assessment of the civil penalty on the record. Interest on overdue payments shall be collected pursuant to the Debt Collection Act, 37 U.S.C. 3717.

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