

# ENVIRONMENTAL PROTECTION AGENCY

## 40 CFR Part 135

[FRL-6121-6]

RIN 2020-AA35

### Safe Drinking Water Public Water System Program; Citizen Collection Action; Notice of Complaint Seeking Review of Penalty Order

**AGENCY:** Environmental Protection Agency.

**ACTION:** Proposed rule.

**SUMMARY:** The Safe Drinking Water Act Amendments of 1996 ("1996 Amendments") amended Section 1449 of the Safe Drinking Water Act (SDWA) to authorize any person to bring suit to collect for the United States an outstanding penalty assessed by the Administrator that a federal agency has failed to pay for at least eighteen months. The Amendments also require as a precondition to the collection action that the citizen plaintiff shall give sixty days' notice of its complaint to the Attorney General and the federal agency, and that the Administrator shall prescribe the manner of such notice by regulation.

EPA is today proposing regulations governing the manner in which parties in citizen suits must provide such sixty day notice under this new provision.

The 1996 Amendments also amended Section 1447 of the SDWA to authorize any interested person to obtain review of an administrative penalty order issued under that section of the law by filing a complaint with either the United States District Court for the District of Columbia or the United States District Court for the district in which the violation is alleged to have occurred within the thirty day period beginning on the date the penalty order becomes final, and by requiring such a person to simultaneously send a copy of the complaint by certified mail to the Administrator and to the Attorney General.

EPA is also today proposing regulations governing the manner in which such a petitioner must provide copies of such a complaint.

**DATES:** Comments on the proposed rule must be received by October 23, 1998.

**ADDRESSES:** Send comments to: David Drelich (2243A), Water Enforcement Division, Office of Enforcement and Compliance Assurance, U.S. Environmental Protection Agency, 401 M Street, S.W. Washington, D.C. 20460. Persons may, upon reasonable notice, inspect all comments and the record of

this rulemaking at Room 3124A, Ariel Rios Building, 12th and Pennsylvania Avenue, N.W. during normal Agency working hours.

**FOR FURTHER INFORMATION CONTACT:** David Drelich at (202) 564-2949, or at the address provided above.

**SUPPLEMENTARY INFORMATION:** Section 1449 of the Safe Drinking Water Act (SDWA or the Act) (42 U.S.C. 300j-8) authorizes any person on his own behalf to commence a civil action against any federal agency that fails to pay an administrative penalty by eighteen months after the effective date of such an administrative penalty order issued under the Act by the Administrator. No such action may be commenced under this citizen suit provision prior to 60 days after the citizen plaintiff has given notice to the Attorney General and the federal agency of the intent to file the collection action.

Specifically, Congress amended SDWA Section 1449(a), 42 U.S.C. 300j-8(a), by adding to it a paragraph (a)(3) that reads:

"(3) for the collection of a penalty by the United States Government (and associated costs and interest) against any Federal agency that fails, by the date that is 18 months after the effective date of a final order to pay a penalty assessed by the Administrator under section 300j-8 of this title [sic],<sup>1</sup> to pay the penalty."

Congress also amended Section 1449(b) of the Act, 42 U.S.C. 300j-8(b), by striking the period at the end of paragraph (2) and inserting ";" or" and by adding the following new paragraph (3):

"under subsection (a)(3) prior to 60 days after the plaintiff has given notice of such action to the Attorney General and to the Federal agency."

Section 1449(b) provides that notice must be given in the manner prescribed by the Administrator. As a result, EPA is today proposing to amend 40 CFR part 135 to spell out how notice is to be given for such citizen collection actions, as well as for other citizen suits

<sup>1</sup>Since "section 300j-8 of this title" is self-referential and has no collateral relevance to administrative enforcement against Federal agencies, EPA understands this reference to be a typographical error, intended instead to refer to section 300j-6 of title 42 (Section 1447 of the Act), which includes the pertinent provision relating to the Agency's imposition of an administrative civil penalty against a Federal agency. 3 C. Sands, Sutherlands Statutes and Statutory Construction § 60.01-.05 (4th ed. 1973)(all words of a law are to be read to have an effect). A predecessor cross-reference in the earlier Committee Print of the Conference Report of the 1996 SDWA Amendments was unhelpful; it referred to a different, unrelated provision that EPA also understands to have been a typographical error. That reference was to Section 1429(b) of the Act, which relates to the State Groundwater Protection Grants program.

authorized under the SDWA. See amended Section 1449(b). Pursuant to this statutory duty, even though the citizen suit notice requirement of Section 1449(b)(3) is self implementing, the Environmental Protection Agency (EPA or the Agency) is proposing to amend 40 CFR part 135 in order to clarify the statutory requirement and to ensure that the amendment will be implemented consistently. Procedures for those other types of citizen suits are set forth at 40 CFR part 135, subpart B, and were first published at 54 FR 20771 (May 12, 1989). One purpose of this proposed rulemaking is to propose notice procedures that will be consistent with 40 CFR part 135, subpart B.

Today's proposed rule is straightforward. Citizen plaintiffs are required to send copies of sixty day notices to the Attorney General of the United States and to the officer of the federal agency who is already in receipt of the unpaid administrative penalty order.

Penalties and interest paid as a result of a citizen suit collection action accrue to the United States Treasury pursuant to the Miscellaneous Receipts Act, 31 U.S.C. 3302. Payment of a penalty elsewhere would violate the Anti-Deficiency Act, 31 U.S.C. 1512. This limitation does not affect payment of associated costs (such as court costs and attorneys' fees).

Section 1447 of the Act authorizes any interested person to obtain review of an administrative penalty order issued under that section of the law by filing a complaint with either the United States District Court for the District of Columbia or the United States District Court for the district in which the violation is alleged to have occurred within the thirty day period beginning on the date the penalty order becomes final, and by requiring such a person to simultaneously send a copy of the complaint by certified mail to the Administrator and to the Attorney General.

The Conference Report, Section 129(a), amended SDWA Section 1447 in relevant part as follows:

Section 1447 (42 U.S.C. 300j-6) is amended by striking subsection \* \* \* (b) and inserting the following:

\* \* \* \* \*

"(4) PUBLIC REVIEW. —

"(A) IN GENERAL. —Any interested person may obtain review of an administrative penalty order issued under this subsection. The review may be obtained in the United States District Court for the District of Columbia or in the United States District Court for the district in which the violation is alleged to have occurred by the filing of a complaint with the court within

the 30-day period beginning on the date the penalty order becomes final. The person filing the complaint shall simultaneously send a copy of the complaint by certified mail to the Administrator and the Attorney General."

Consequently, and even though this provision of law is self implementing, the Agency is also proposing to amend 40 CFR Part 135 in order to clarify the statutory requirement and to ensure that the amendment will be implemented consistently. One purpose of this rulemaking is to propose complaint service procedures that are consistent both with Section 1447 of the SDWA and the procedures set forth in subpart A of part 135 (concerning complaint service under the Clean Water Act). Today's proposal is simply stated: Petitioners for judicial review of a Section 1447 administrative penalty order are to send copies of the complaint to the appropriate federal officials by certified mail on the same day that they are sent to, or filed with, the appropriate district court.

#### Paperwork Reduction Act

EPA has not prepared an information collection request under the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*) for the reporting requirements contained in this rule. EPA has received very few notices of citizens suits under the SDWA annually. The public reporting burden for individuals complying with this rule is estimated to average one hour or less. If the number of notices under SDWA section 1449(b)(3) or complaints under SDWA section 1447(b) received by the United States substantially increases in succeeding years, EPA will prepare and solicit comment on an information collection request for today's rule, in accordance with 5 CFR 1320.14. In the meantime, any comments on the estimate of burden or any other aspect of the information collection requirements contained in this rule, including suggestions to reduce the burden, should be sent to: Chief, Information Policy Branch (PM-223), U.S. Environmental Protection Agency, 401 M Street, S.W., Washington, D.C. 20460 or Director, Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, D.C. 20503.

#### Regulatory Impact Analysis

The Administrator has determined that this is a minor regulation under the terms of E.O. 12291 and does not require a regulatory impact analysis.

#### Other Administrative Requirements

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this proposed

action is not a "significant regulatory action" and is therefore not subject to review by the Office of Management and Budget. In addition, the proposal would not impose any enforceable duty or contain any unfunded mandate as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4), or require prior consultation with State officials as specified by Executive Order 12875 (58 FR 58093, October 28, 1993), or involve special consideration of environmental justice related issues as required by Executive Order 12898 (59 FR 7629, February 16, 1994). Further, today's proposal would not raise any environmental safety or health issue for children as described in Executive Order 13045 (Children's Health Protection).

Under the Regulatory Flexibility Act (RFA), 5 U.S.C. 601 *et seq.*, as amended by SBREFA, whenever EPA is required by section 553 of the Administrative Procedure Act or any other law to publish a general notice of rulemaking for any proposed rule, EPA generally must prepare an initial regulatory flexibility analysis describing the impact of the rule on small entities. Under section 605(b) of the RFA, however, if EPA certifies that the proposed rule will not have a significant economic impact on a substantial number of small entities, EPA is not required to prepare the analysis.

The changes to citizen suit procedures proposed today affect only federal facilities, and therefore will have no impact on small entities if EPA adopts them. Consequently, pursuant to section 605(b) of the RFA, the Administrator certifies that this proposed rule, if promulgated, will not have a significant impact on a substantial number of small entities.

This proposed regulation has been reviewed by the Office of Management and Budget.

#### List of Subjects in 40 CFR Part 135

Environmental protection, Administrative practice and procedure, water pollution control.

Dated: August 24, 1998.

**Carol M. Browner,**  
Administrator.

It is proposed that part 135 of title 40, chapter I of the Code of Federal Regulations be amended as follows:

#### PART 135—[AMENDED]

1. The authority citation for part 135 is revised to read as follows:

**Authority:** Subpart A issued under sec. 504, Pub. L. 100-4; 101 Stat. 7 (33 U.S.C. 1365). Subpart B issued under sec. 129, Pub.

L. 104-182; 110 Stat. 1613 (42 U.S.C. 300j-8).

2. Section 135.10 is amended, by designating the existing text as paragraph (a); by adding paragraphs (b) and (c); and, by revising in newly designated paragraph (a) the phrase "The purpose of this subpart" to read "One purpose of this subpart", to read as follows:

#### § 135.10 Purpose.

\* \* \* \* \*

(b) Section 1449 of the Act authorizes any person, upon no less than sixty days notice, to commence a civil action for the collection of a penalty by the United States Government (and associated costs and interest) against any federal agency that fails, by a date that is 18 months after the effective date of a final order to pay a penalty assessed by the Administrator under the Act, to pay the penalty. No citizen suit may be commenced under this provision prior to both 18 months after the effective date of a final order to a federal agency to pay a penalty assessed by the Administrator under the Act and sixty days' written notice of such action to both the Attorney General and the federal agency owing the assessed penalty. One purpose of this subpart is to prescribe procedures for giving such notice.

(c) Section 1447 of the Act authorizes any interested person to obtain judicial review of an administrative penalty order issued under that section in the United States District Court for the District of Columbia or in the United States District Court for the district in which the violation is alleged to have occurred by filing a complaint with the court within the thirty day period beginning on the date the penalty order becomes final, and requires such person to simultaneously send a copy of the complaint by certified mail to the Administrator and the Attorney General. One purpose of this subpart is to prescribe procedures for the service of copies of such a complaint upon the Administrator and the Attorney General.

3. Section 135.11 is amended by redesignating paragraph (c) as paragraph (d) and adding a new paragraph (c) to read as follows:

#### § 135.11 Service of notice.

\* \* \* \* \*

(c) Service of notice of intent to file suit pursuant to section 1449(a)(3) of the Act shall be accomplished by certified mail, return receipt requested, addressed to, or by personal service upon, all federal agency officials named by the Administrator as responsible in their official capacity for the payment of

the uncollected penalty order, if any, and the chief executive officer of such agency, and by sending a copy of the notice by certified mail to the Attorney General of the United States.

\* \* \* \* \*

4. Section 135.12 is amended by redesignating paragraph (c) as paragraph (d) and adding a new paragraph (c) to read as follows:

**§ 135.12 Contents of notice.**

\* \* \* \* \*

(c) *Collection action.* Notice regarding an alleged failure of a federal agency to have paid an administrative penalty, by a date that is 18 months after the effective date of a final order by the Administrator assessing such a penalty under the Act, shall include a copy of the final EPA order assessing the penalty, shall state the date that is 18 months following the effective date of

such order, and shall state the full name, address and telephone number of the person giving notice.

\* \* \* \* \*

5. Section 135.13 is amended by revising the phrase "section 1449(a)(1) or (a)(2)" to read "section 1449(a) of the Act" and by adding the following sentence after the first sentence:

Notice may be given under section 1449(b) at any time after the effective date of a final order by EPA assessing a penalty against a federal agency, if the penalty has not been paid. \* \* \*

**§ 135.13 Timing of notice.**

\* \* \* \* \*

6. A new § 135.14 is added to read as follows:

**§ 135.14 Service of Complaint Seeking Review of Penalty Order**

(a) An interested person filing a complaint seeking review of an

administrative penalty order issued pursuant to section 1447(b)(4) of the Act shall by certified mail send a copy of such complaint to the Administrator of the Environmental Protection Agency, the Regional Administrator of the EPA Region in which the violations are alleged to have occurred, and the Attorney General of the United States.

(b) Such petitioner shall by certified mail send a copy of the complaint on the same date on which the plaintiff files the complaint with the court.

(c) In addition to complying with the service requirements of this subsection, such petitioner shall serve the complaint on the appropriate officials of the United States in accordance with relevant Federal law and court rules affecting service on defendants.

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