



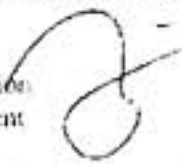
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

NOV 23 2005

MEMORANDUM

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSISTANCE

TO: Regional Councils, Regions I - X
Regional NPDES Enforcement Branch Chiefs, Regions I - X

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

RE: Internet Publication of Notice of Proposed Penalties under Sections 309(g) and 311(b)(6) of the Clean Water Act and Section 1423(c) of the Safe Drinking Water Act

The purpose of this memo is to explain why using the Internet to provide notice of Clean Water Act and Safe Drinking Water Act administrative penalties is in the public's interest and to set forth recommended procedures for providing Internet notice. This memo was prepared in consultation with the Office of General Counsel.

Both the Clean Water Act and the Safe Drinking Water Act authorize the U.S. Environmental Protection Agency (EPA) to assess administrative penalties for specified violations of the Act. See Sections 309(g) and 311(b)(6) of the Clean Water Act (CWA), 33 U.S.C. § 1319(g) and 33 U.S.C. § 1321(b)(6) and Section 1423(c) of the Safe Drinking Water Act (SDWA), 42 U.S.C. § 300f-2(c). These provisions require EPA to provide public notice of any civil penalty order before issuing any such order. Recently, Regional Offices have asked whether EPA may use the Internet as the primary means of providing notice to the public for these enforcement actions. We have concluded that the Agency may for the reasons discussed below.

By statute, the EPA Administrator is required to provide notice and reasonable opportunity to comment on a proposed CWA or SDWA civil penalty prior to the issuance of such order. 33 U.S.C. § 1319(g)(4)(A); 42 U.S.C. § 300f-2(c)(3)(B). For such administrative actions, EPA's *Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties*, 40 CFR Part 22, require notice to the public "by a method *reasonably calculated* to provide notice." (Emphasis supplied). 40 C.F.R. § 22.45(b)(2). Typically, notice is provided through publication in newspapers of general circulation. However, the Internet may provide a more effective and efficient means to provide such notice.

Using the Agency's Internet site to provide notice of proposed actions makes the notice available to the public during the entirety of the comment period rather than on the one day that the notice is published in the local newspaper. The Internet provides a cost effective means of

providing access to a larger number of notices, in one place, for a longer period of time.

Additionally, while the Agency tries to provide notice to those most likely to be affected by an action by publishing notice in local newspapers, in using the Internet, the Agency can reach a broader audience. This will enable those interested persons beyond the finite distribution areas of local newspapers to be made aware of pending agency actions.

The Part 22 rules and the Clean Water Act do not define what methods of notice are "reasonable." Courts have recognized that the Internet may be one method reasonably calculated to provide public notice. Thus, for example in discussing service of process by e-mail, the Ninth Circuit has recently described in broad language a court's authority to adapt its procedures to meet technological advances as follows:

"In proper circumstances, this broad constitutional principle [i.e., that the selected method of service must be reasonably calculated to provide notice and an opportunity to respond] unshackles the federal courts from anachronistic methods of service and permits them entry into the technological renaissance." *Rio Properties, Inc. v. Rio International Interlink*, 284 F.3d 1007, 1017 (9th Cir. 2002)

Given the wide accessibility of the Internet among the population, the Office of Enforcement and Compliance Assurance has concluded that publication through such means is reasonably calculated to apprise the public of such proposed orders. Thus, Internet notice would meet the requirements of the CWA and SDWA and EPA's regulations.

The Office of Civil Enforcement intends to prepare for publication in the Federal Register a notice that will describe our conclusion that Internet notice is reasonably calculated to provide notice to the public of a proposed administrative penalty order under the CWA and the SDWA. In addition, to ensure wide public acceptance of public notice provided through the Internet, the Notice will describe recommended procedures for doing so. These recommendations are designed with two objectives in mind: making the public aware that notice is available on a Region's website and providing easy access to the notices. We suggest consideration of the following practices for web based notices:

The Region's homepage should include a link entitled "Public Notices Under Sections 309(g) and 311(b)(6) of the Clean Water Act and Section 1423(c) of the Safe Drinking Water Act." (Public Notice).

- The "Public Notice" web page should provide a link to the actual notices as well as the docket number, the date the notice is posted, the Respondent's name, the state where they are located, and the proposed penalty.

- The notice should be accessible from the "Public Notice" web page as a PDF file which includes all the information required under 40 CFR 22.45(b)(2).

- The "Public Notice" web page should list the actions which are being noticed in chronological order.

- The "Public Notice" web page may list notices for which the agency is currently accepting comment more prominently than those which have expired. However, public notices should remain on the website for a reasonable time once the comment period has expired.

The web page should also include a link to download Adobe Acrobat with easily understood instructions for doing so.

We recognize that not all members of the public may have ready access to the Internet, however due to the general availability of the Internet through schools, work and libraries, we believe that Internet notice will likely reach a larger audience than has the past practice of publishing a notice in a newspaper provided that the above practices are followed. Because there may be circumstances in which the lack of access to computers in low income communities may raise environmental justice issue, Regions may consider providing supplemental notice. In particular instances where the Regions find that additional notice may be helpful, newspaper notice, press release or other forms of communication may supplement the Internet notice.

Should you have any questions regarding this matter, please contact Kelly Kaczka Branner (202 564 9933) in the OCE's Water Enforcement Division.

cc Steve Neugeboren
Carol Ann Sciliano
Barbara Pace