



# Federal Register

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**Wednesday,  
June 2, 2004**

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**Part V**

## **Environmental Protection Agency**

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**Agency Policy and Guidance: Small Local  
Governments Compliance Assistance  
Policy; Notice**

**ENVIRONMENTAL PROTECTION AGENCY**

[Docket #OECA-2004-001; FRL-7669-2]

**Agency Policy and Guidance: Small Local Governments Compliance Assistance Policy****AGENCY:** Environmental Protection Agency.**ACTION:** Notice.

**SUMMARY:** The U.S. Environmental Protection Agency (EPA) today issues the Small Local Governments Compliance Assistance Policy (the Revised Policy), which revises and supercedes EPA's Policy on Flexible State Enforcement Responses to Small Community Violations (the Prior Policy). EPA issues the Revised Policy to clarify who are the intended recipients of state penalty mitigation benefits under the Prior Policy, and to make those benefits available, in defined circumstances, to local governments with larger resident populations and in response to a wider variety of environmental compliance activities. By establishing parameters within which EPA will generally defer to a state's decision to reduce or waive the normal noncompliance penalty of a unit of small, general-purpose local government, the Revised Policy provides an incentive for small local governments to seek compliance assistance from their states and take the actions necessary to achieve and sustain comprehensive environmental compliance.

**DATES:** This Revised Policy becomes effective on June 2, 2004.

**ADDRESSES:** EPA has established a docket for this action under Docket ID No. OECA-2004-001. All documents in the docket are listed in the EDOCKET index at <http://www.epa.gov/edocket>. Docket materials are available either electronically in EDOCKET or in hard copy at the Office of Environmental Information Docket, EPA/DC, EPA West, Room B102, 1301 Constitution Ave., NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566-1744, and the telephone number for the Office of Environmental Information Docket is (202) 566-1752. In addition to being available in the docket, an electronic copy of the Revised Policy will also be available on the Worldwide Web through the Office of Enforcement and Compliance Assurance Web site at <http://www.epa.gov/compliance/index.html>.

**FOR FURTHER INFORMATION CONTACT:**

Kenneth Harmon, Compliance Assistance and Sector Programs Division, Office of Compliance, Office of Enforcement and Compliance Assurance, Mail Code 2224A, United States Environmental Protection Agency, 1200 Pennsylvania Avenue, Washington, DC 20460; telephone number (202) 564-7049; fax number (202) 564-7083; e-mail address [harmon.kenneth@epa.gov](mailto:harmon.kenneth@epa.gov).

**SUPPLEMENTARY INFORMATION:****I. General Information**

The United States Census Bureau's 2002 Census of Governments indicates that 89 percent of America's 35,933 subcounty units of general-purpose local government have fewer than 10,000 permanent residents. One in five Americans lives in, and receives government services from, one of these small, subcounty general-purpose governments. There are also 671 counties in America that have fewer than 10,000 permanent residents. A unit of local government with a small resident population has a smaller number of taxpayers and rate payers to bear the costs of providing governmental and municipal services. These economies of scale can mean that small local governments are unable to charge their residents the higher per capita rates that would be necessary to deliver the same level of government services that larger local governments can deliver to their residents at a lower per capita cost. With limited financial resources at their disposal, small local governments may have more difficulty than larger local governments attracting and funding the managerial and technical expertise they need to ensure comprehensive compliance with environmental requirements. Small local governments may be reluctant to ask the state for help because a state regulator will normally require the local government to pay a penalty if violations are found. The Revised Policy establishes parameters within which EPA will generally defer to a state's decision to reduce or waive the normal noncompliance penalties for a small local government violator, thereby removing one of a small local government's disincentives to ask for compliance assistance from the state. By encouraging small local governments to assess their compliance with all of the environmental requirements that apply to their governmental operations and to commit to achieving and sustaining comprehensive environment compliance, the Revised Policy potentially reduces health risks for the

56 million Americans who live in small local governments.

**II. Background and History**

In 1995, EPA's Policy on Flexible State Enforcement Responses to Small Community Violations (the Prior Policy), established parameters within which EPA would generally defer to a state's decision to reduce or waive the normal noncompliance penalties of a small community that worked in good faith to correct its environmental violations and achieve comprehensive environmental compliance. By comprehensive compliance, EPA meant compliance with every environmental requirement to which the small community's governmental operations were subject. If a small community could not achieve comprehensive compliance within 180 days of the state's commencement of compliance assistance to the community, the Prior Policy requires that within that same 180 days the community must enter into a written agreement with the state establishing an enforceable schedule for the community to address and correct all of its environmental violations as soon as practicable. A state seeking EPA's deference to its decision to reduce a small community's noncompliance penalties must have had adequate processes for:

- Responding quickly to requests for compliance assistance;
- Selecting communities to participate in the state's compliance assistance program;
- Assessing a community's good faith and compliance status;
- Establishing priorities for addressing noncompliance; and
- Ensuring prompt correction of violations

EPA reserved all of its enforcement authorities, including its discretion to initiate an enforcement action to address any violation or circumstance that may have presented an imminent and substantial endangerment to, had caused or was causing actual serious harm to, or was presenting a serious threat to, public health or the environment. EPA would not defer to a state's decision to reduce or waive the normal noncompliance penalty if, in EPA's judgment, a state's implementation of the Small Communities Policy failed to provide, in a specific case, adequate protection to human health and the environment. EPA would not defer to a state's decision to reduce or waive the normal noncompliance penalty if, in EPA's judgment, a state's implementation of the Small Communities Policy neither required nor resulted in reasonable

progress toward, and achievement of, environmental compliance by a date certain.

In the years since EPA published the Small Communities Policy, few states created programs to implement the policy. Some other states sought to implement the policy, but then found few local governments willing to participate. Contacts with small local government stakeholders and public comments submitted in response to **Federal Register** notices dated January 23, 2002 and October 3, 2004, provided EPA useful suggestions for revisions that could make the policy more useful to states and to small local governments. EPA today incorporates many of those suggestions in the Small Local Governments Compliance Assistance Policy.

### III. Major Changes in the Small Local Governments Compliance Assistance Policy

Although the Small Local Governments Compliance Assistance Policy retains and reaffirms much of the Small Communities Policy, the Small Local Governments Compliance Assistance Policy (the Revised Policy) amends the Small Communities Policy (the Prior Policy) in the following important ways: A. The Revised Policy replaces the term "community" with the term "local government" to describe eligible entities; B. The Revised Policy provides a two-tiered population cap that allows states, in certain circumstances, to reduce or waive the non-compliance penalties of qualifying local governments with up to 10,000 permanent residents; C. States can now reduce or waive the normal noncompliance penalties of small local governments that satisfy the Revised Policy's requirements for developing and implementing an environmental management system for their municipal operations; and D. Although the Prior Policy provided its additional penalty mitigation only for projects that resulted in comprehensive environmental compliance at all of a local government's municipal operations, the Revised Policy permits states, in limited circumstances, to reduce or waive the normal noncompliance penalties of local governments whose projects address comprehensive compliance at a subset of its municipal operations.

Each of these major revisions is discussed in turn.

#### A. Using the Term "Local Government" To Describe Eligible Entities

The Prior Policy applied to "small communities", which EPA defined as

"communities, generally comprised of fewer than 2,500 residents, [that are]:

- Non-profit.
- Governing entities (incorporated or unincorporated).
- That own facilities that supply municipal services.

The Revised Policy replaces the ambiguous term "community" with the more precise and widely-understood term "local government". The Revised Policy further specifies that only organized units of general-purpose local government authorized by a state's constitution and statutes and established to provide general government for a defined area are eligible for a reduction or waiver of the normal noncompliance penalty. This new definition of an eligible entity, intended to focus resources more narrowly, excludes unincorporated communities, units of special-purpose local government, and private entities that provide municipal services under contract.

Please note that states can offer compliance assistance to entities that do not meet the Revised Policy's definition of eligible entity. States can also offer compliance assistance to small local governments in a manner inconsistent with the policy. States cannot, however, expect EPA deference if they reduce or waive the normal noncompliance penalty for entities that ineligible under the Revised Policy or for eligible entities that have not acted within the parameters of the Revised Policy.

#### 1. Why Does the Revised Policy Exclude Unincorporated Communities?

In America, there are 38,967 government-like entities with 10,000 or fewer permanent residents that the states have vested with general authority to govern a defined locality. The states recognize these entities as sufficiently organized to present a legal entity that manages its own governmental affairs in a manner that clearly separates it from the administrative and fiscal control of other governments. EPA sought to focus the benefits of the Revised Policy on these 38,967 small local governments when, in the October 3, 2003 **Federal Register** notice, EPA proposed defining eligible entities as "any unit of general purpose government authorized in a state's constitution and statutes, and established to provide general government for a defined area." Some commenters expressed concern that this definition would bar application of the Revised Policy either to unincorporated communities or to privately owned and operated facilities that provide government services under contract.

These commenters noted that there are small unincorporated communities that provide municipal water and sewer services to their residents, and their compliance problems, like those of small local governments, can often be traced to a lack of technical, managerial, or financial capacity. EPA acknowledges there are many different kinds of entities whose lack of capacity can make compliance challenging, but intends the Revised Policy to direct attention and benefits to addressing the special compliance needs of organized legal entities with general governmental character and substantial autonomy in the management of their administrative and fiscal affairs. Small unincorporated communities usually lack most or all of these characteristics of governmental units. EPA and the states have a number of compliance assistance and enforcement programs and policies in place that address the needs of non-governmental entities. Small unincorporated communities concerned about their compliance with drinking water or waste water requirements can take advantage of media-specific technical assistance supported by EPA's Office of Water, and can consider either consolidating with other nearby systems operated by a unit of local government or restructuring their operations to share the services of certified operators with other regulated entities. Unincorporated communities also have the option of disclosing violations to the regulator, promptly correcting those violations, and having their penalties reduced in a manner consistent with other EPA policies, such as the Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations (the Audit Policy) and the Small Business Compliance Policy (the Small Business Policy). Many states have adopted their own self-disclosure policies similar the Audit Policy and the Small Business Policy. Even in states that have not adopted their own self-disclosure policies, if a regulated entity and a state act in a manner consistent with the Audit Policy or the Small Business Policy, EPA would have little reason to initiate a federal enforcement action to seek additional relief.

#### 2. Why Does the Revised Policy Exclude Units of Special-Purpose Local Government?

The United States Census Bureau recognizes the federal government, state governments, and five basic types of local governments. Three of the five recognized types of local government are designated general-purpose governments, and two are designated special-purpose governments. As the

Census Bureau noted in its 2002 Census of Governments, the three types of general-purpose governments; county, municipal, and township governments; are readily recognized, in part because the distinguishing characteristics of these forms of general-purpose local government are well-established and consistently applied. States establish the two recognized forms of special-purpose governments, school district governments and other units of special-purpose government, through enabling legislation. Units of special-purpose governments exist as separate entities with substantial administrative and fiscal independence from general-purpose local governments. Most special-purpose governments are formed expressly to provide a service, or a limited set of services, without increasing the financial burden on general-purpose governments that may have been unable to meet the fiscal requirements associated with providing those services. Of the 48,558 units of special-purpose local government recognized in the 2002 Census of Government, 13,506 are school district governments. Ninety-one percent of the remaining 35,052 units of special-purpose government perform a single function, most often a function related to natural resources, such as drainage and flood control, irrigation, and soil and water conservation. Other functions include sewerage, fire protection, housing and community development, and other social needs like hospitals and mosquito abatement. The nine percent of special-purpose governments that provide multiple services usually provide services that are closely related, most commonly a combination of drinking water and sewerage services.

The Revised Policy excludes units of special-purpose government from eligibility for two reasons. First, the Revised Policy is intended to promote comprehensive compliance across a broad range of municipal operations. Special-purpose governments, which engage in a limited range of activities, would be better served by a single-medium approach to compliance assistance designed to meet the limited needs of those particular operations. Second, special-purpose governments are usually established specifically to ensure that the resulting governmental entity has the technical, managerial, and financial capacity to discharge its special responsibilities. Special-purpose governments generate the necessary financial capacity either by pooling the resources of several separate units of general-purpose local government located within the service district, or by

designating a service district that includes residents of more than one unit of general-purpose local government within the rate base. To determine a special-purpose government's eligibility to participate on the basis of the populations of the individual contributing local governments would misstate the size of the tax base or rate base that supports the unit of special-purpose government. Doing so also fails to consider that an organization that can meet the needs of the entire population served must necessarily be greater in size and sophistication than a similar organization that provides services only to the population of a single small local government.

### 3. Why Does the Revised Policy Exclude Private Entities That Provide Municipal Services Under Contract?

Private entities that provide municipal services under contract, even those providing municipal services to small populations, represent themselves as having the technical, managerial, and financial capacity for compliant operation at the time they contract to provide service at an agreed-upon rate. These private entities are responsible for complying with all applicable environmental requirements, and should be held accountable if they do not. Providers of municipal services under contract may be able to obtain penalty relief from the state if they disclose their violations and correct them in accordance with the Audit Policy or the Small Business Policy. Either of those policies may be a better option than the Revised Policy for resolving environmental concerns at a single facility that engages in only one operation. Additionally, it may not be appropriate to offer some of the unique aspects of the Revised Policy (*e.g.*, penalty mitigation for violations discovered by the regulator) to private entities that provide services under contract, and some aspects of the Revised Policy may not be applicable to such entities (*e.g.*, the comprehensive environmental compliance evaluations of several different operations; building technical, managerial, and financial capacity; and developing a schedule for addressing all violations in order of risk-based priority).

### *B. Proposed Revisions to the Population Cap*

As noted above, the Prior Policy applied to communities "generally comprised of fewer than 2,500 residents." The Revised Policy establishes a two-tier population cap that extends eligibility to units of local government with populations larger

than 2,500. The Revised Policy also clarifies that population to be counted consists of the permanent residents.

#### 1. Why Two Tiers?

Commenters and stakeholders generally agreed that units of general-purpose local government with 3,300 or fewer permanent residents are unlikely to possess the technical, managerial, or financial capacity to achieve and sustain environmental compliance without assistance from the state. Accordingly, the Revised Policy establishes that level of population as its first-tier population cap. States comprehensive compliance assistance programs may accept as participants units of general-purpose local government with 3,300 or fewer permanent residents without first making a determination that the small local government lacks capacity. If those participating small local governments fulfill their obligations as described in the Revised Policy, states may reduce or waive the small local governments' normal noncompliance penalties.

Because local governments with populations of less than 10,000 often lack the financial capacity to hire professional environmental staff (and local governments with more than 10,000 permanent residents usually do have professional environmental staff), the Revised Policy establishes the level of 10,000 permanent residents as its second-tier population cap. A state comprehensive compliance assistance program can provide the Revised Policy's additional penalty mitigation to a participating unit of general-purpose government with more than 3,300 but no more than 10,000 permanent residents only after the state makes a determination that due to its lack of technical, managerial or financial capacity, the unit of local government is unlikely to achieve and sustain comprehensive environmental compliance without the state's assistance.

Please note that this two-tier population cap establishes outer limits on the size of local governments whose normal noncompliance penalties can be reduced or waived by states. States can establish more stringent criteria for the local governments they accept as participants in their comprehensive environmental compliance assistance programs. States may, for example, choose to admit into their programs only units of general-purpose local government with smaller populations than the Revised Policy would permit, or may elect to examine the technical, managerial, and financial capacity of any candidate local government, not just

those with more than 3,300 permanent residents.

In response to its October 3, 2003 **Federal Register** notice proposing the two-tiered population cap, EPA received a number of comments recommending that the Revised Policy raise the population cap to various higher levels. These commenters correctly asserted that setting the population cap higher would allow more units of local governments to enjoy the Revised Policy's benefits. EPA notes that the Revised Policy is intended to benefit those units of general-purpose local government that most need assistance. Establishing a ceiling of 10,000 permanent residents for participating governments extends the Revised Policy's penalty mitigation benefits to 32,741 units of general-purpose local government—fully 84% of all the units of general-purpose local government in the United States, both county and sub-county. EPA believes a population cap that offers benefits to 84% of America's units of general-purpose local governments is sufficiently expansive.

## 2. How Will a State Assess a Small Local Government's Capacity?

A state that wishes to reduce or waive the normal noncompliance penalty of a local government with between 3,301 and 10,000 permanent residents must have determined that the technical, managerial, and financial capacity of the local government is so limited that the local government is unlikely to achieve and sustain comprehensive environmental compliance without the state's assistance. The Revised Policy recommends that states develop and apply a test of small local government capacity that adopts a number of measures drawn from studies performed by EPA's Boise Environmental Finance Center. In the context of measuring the ability of small local governments to implement the requirements of the Safe Drinking Water Act, the Boise Environmental Finance Center identified a number of factors that influence the technical, managerial, and financial capacity of local governments (see, <http://sspa.boisestate.edu/efc/>). EPA adapted many of these measures for inclusion into the Revised Policy, and recommends that states incorporate these measures as appropriate for their local conditions. A state that provides comprehensive compliance assistance to a small local government with more than 3,300 but no more than 10,000 permanent residents and seeks EPA deference to its decision to reduce or waive the normal noncompliance penalty of that small local government

must have a capacity test in place and consistently apply it.

### C. Fencelining

The term "fencelining" means restricting the scope of comprehensive compliance assistance activities to the boundaries of some subset of the local government's operations or facilities (*i.e.* vehicle fleet maintenance, provision of drinking water, grounds keeping, etc.). While EPA primarily intends the Revised Policy to promote the provision of comprehensive environmental compliance assistance with respect to all of a small local government's operations, the Agency acknowledges that states can lower the cost of providing comprehensive compliance assistance to local governments by providing that assistance with respect to a fencelined subset of the government's operations. For this reason, some commenters believed that the Revised Policy should allow its additional penalty mitigation for fenceline projects. EPA notes that ready approval of fenceline projects could encourage states to reduce costs by engaging in nothing but fenceline projects. Some states might choose to implement the Revised Policy not as a policy to ensure comprehensive compliance with all environmental requirements, but as a single-medium policy to ensure compliance at one type of public utility. EPA notes that ensuring comprehensive compliance at all of a local government's municipal operations demands comparatively fewer resources at a small local government that is likely to offer few services and engage in simpler processes. Accordingly, the Revised Policy, indicates that, with respect to compliance assistance to small local governments that have 3,300 or fewer permanent residents, EPA will generally defer to a state's decision to reduce or waive the normal noncompliance penalty only if the effort produced an enforceable agreement to achieve comprehensive compliance at, or to implement an environmental management system for, all of the small government's municipal operations. Local governments that provide municipal services to larger populations are likely to engage in more complex processes and offer more services than small local governments. In such circumstances, EPA will generally defer to a state's decision to reduce or waive the normal noncompliance penalty for appropriate fenceline projects completed by local governments with between 3,301 and 10,000 permanent residents.

### D. Environmental Management Systems

An environmental management system (EMS) is an individualized internal management system designed, documented, and implemented to identify and manage the environmental impacts of an entity's operations. Developing and implementing an EMS is an effective way for a local government to identify the environmental aspects of its operations and manage its environmental responsibilities for continual improvement. The Revised Policy gives states the option of using penalty mitigation as an incentive to encourage small local governments to adopt an EMS. To ensure that the EMS adopted by a small local government is consistent with standards established by EPA, the Revised Policy describes seventeen EMS elements that must be part of the small local government's EMS if EPA is to defer to the penalty mitigation provided by the state.

The Revised Policy provides a small local government penalty mitigation if it either achieves and sustains comprehensive compliance or develops and implements an EMS. EPA expects that a small local government seeking to achieve and sustain comprehensive compliance will rely on the state or its representative to perform a comprehensive environmental evaluation of all the local government's operations and to identify all of the environmental concerns that will be addressed in the enforceable agreement the small local government will enter into with the state. The EMS option places more responsibility with the small local government. To take advantage of the EMS option, a small local government must, as expeditiously as practicable and in order of risk-based priority, correct all of the violations discovered by the state during its inspection of a subset of the local government's operations. The small local government must also commit to developing and implementing an EMS. In developing an EMS, the small local government is responsible for ensuring performance of a comprehensive analysis of the environmental aspects of all of its operations (or in the case of a local government approved for a fenceline project, all of its operations within the fenceline). If at any point during the development and implementation of its EMS a small local government discovers additional noncompliance, it must disclose these violations to the state as required by laws and regulations or in accordance with EPA's self-disclosure policies. The state and the small local government

may then amend the terms of their agreement under the Revised Policy's EMS option to incorporate a schedule for correction of the newly discovered violations. The state and the small local government may, however, agree to address any noncompliance discovered after the entry of the EMS option agreement in any manner consistent with this Revised Policy and other EPA enforcement policies and guidelines.

EPA first proposed adding an EMS option to the Revised Policy in the October 3 **Federal Register** notice. Commenters on this point acknowledged the value of an EMS, but expressed concern that the cost and complexity of developing and implementing an EMS would prove too burdensome for small local governments. EPA acknowledges that developing and implementing an EMS is a complex undertaking. The Agency will continue to work toward providing small local governments guidance that will simplify and streamline this process. States working with small local governments to develop an EMS should consult the appropriate EPA Regional office to obtain the latest guidance. Another commenter noted that requiring small local governments' EMSs to meet a federal standard introduced a level of complexity that could be avoided if the Revised Policy were to indicate EPA will accept any EMS that has been approved by a state. At this time, however, EPA believes the Revised Policy must provide federal EMS standards to ensure national consistency.

Local governments that wish to develop and implement an EMS should consult the EPA-sponsored Public Entity EMS Resource Center (PEER Center) at [www.peercenter.net](http://www.peercenter.net), and the nearest of its affiliated Local Resource Centers. The PEER Center provides case studies of completed local government EMS projects, process information, and guidance to local governments who wish to develop and implement an EMS. EPA will continue to support efforts to facilitate the development of EMS's by small local governments; will work to ensure state programs have access to EPA EMS tools, services, and funding; and will recommend that local governments that participate in state programs implementing the Revised Policy be given priority access to the Local Resource Centers.

#### IV. Miscellaneous Issues

EPA's October 3, 2003 **Federal Register** notice solicited public comment on alternative strategies for decreasing the resource burdens on states that implement the Revised

Policy; as well as public comments on possible incentives to promote greater participation of small local governments in state programs offering them comprehensive environmental compliance assistance. The comments received reflected general agreement with and support for the options EPA discussed in the **Federal Register** notice. EPA will continue to explore these options. Because states can implement the Revised Policy without EPA-defined strategies for state burden reduction and for small government incentives, EPA will not delay publication of the Revised Policy as it collects information and considers alternatives for moving forward. The **Federal Register** notice also sought public comment on whether or not EPA should develop a Federal policy, similar to the Revised Policy, to apply when EPA itself is implementing a regulatory program and itself provides comprehensive environmental compliance assistance directly to small local governments. EPA received no comments from the public on this point and has no current plans to develop a separate Federal policy.

Dated: May 18, 2004.

**Michael M. Stahl,**

*Director, Office of Compliance.*

#### Small Local Governments Compliance Assistance Policy

##### A. Introduction and Purpose

The Small Local Governments Compliance Assistance Policy promotes comprehensive environmental compliance among small local governments by establishing parameters within which states<sup>1</sup> can reduce or waive the normal noncompliance penalties of small local governments that make use of the state's comprehensive compliance assistance program. Providing conditions and circumstances in which states may reduce or waive normal noncompliance is intended to reassure small local governments that they will not be forced to pay a large penalty if environmental violations are discovered or revealed while they are participating in compliance assistance activities. To be

<sup>1</sup> State means the agency of any state, commonwealth, or territory of the United States that has received EPA's approval to implement environmental laws and regulations. An Indian Tribe can be a state if it has received EPA's approval for treatment as a state. In cases in which a state agrees to apply the policy to a small local government and that state has not been authorized to implement a particular federal program, EPA shall be the state for purposes of that federally implemented program. Regions should consult with OECA's Office of Regulatory Enforcement prior to implementing this policy.

eligible under this policy for reduction or waiver of the normal noncompliance penalty, a small local government must, within specified deadlines, either:

- Identify and correct all of its environmental violations;
- Identify all of its environmental violations and enter into an enforceable commitment to correct all of its environmental violations in a timely fashion; or
- Correct all of its known environmental violations and enter into an enforceable commitment to develop and implement an environmental management system (EMS) to identify the environmental aspects of its operations and ensure continual environmental improvement.

EPA acknowledges that states and small local governments can realize environmental benefits by negotiating, entering into, and implementing enforceable compliance agreements and schedules that require local governments to correct all of their environmental violations expeditiously while allowing the local government to prioritize among competing environmental mandates on the basis of comparative risk.<sup>2</sup> Small local governments can also realize environmental benefits by entering into enforceable agreements to develop and implement an EMS to manage the environmental aspects of their operations. States may provide small local governments an incentive to request compliance assistance by waiving part or all of the normal penalty for a small local government's violations if the criteria of this policy have been met. If a state acts in accordance with this policy and addresses small local government environmental noncompliance with compliance assistance in a way that results in the small local government making reasonable progress toward compliance, EPA generally will not pursue a separate federal civil administrative or judicial action for additional penalties or additional injunctive relief.

This policy does not apply to any criminal conduct by small local governments or their employees.

<sup>2</sup> As described below, EPA does not intend that states and small local governments must prepare a formal comparative risk assessment as part of the small local government environmental compliance assistance process. Information available from EPA's National Center for Environmental Assessment, <http://cfpub.epa.gov/ncea/>, will help states and local governments identify which local environmental problems pose the greatest risk to human health, ecosystem health, and quality of life.

*B. Who is Eligible for Reduction or Waiver of Normal Noncompliance Penalties Under This Policy?*

This policy applies to small local governments that own and operate facilities used to provide municipal services. A local government is defined as an organized unit of general-purpose local government, authorized in a state's constitution and statutes, and established to provide general government to a defined area. A defined area can be a county, municipality, city, town, township, village, or borough. A small local government is a local government that provides municipal services to 3,300 or fewer permanent residents. A local government that supplies municipal services to between 3,301 and 10,000 permanent residents can also qualify for treatment as a small local government if the state determines, in accordance with a capacity test (described below), that the technical, managerial, and financial capacity of the local government is so limited that the local government is unlikely to achieve and sustain comprehensive environmental compliance without the state's assistance.

This policy supersedes the previous version of the policy titled the Policy on Flexible State Enforcement Responses to Small Community Violations, which became effective on November 25, 1995. To the extent this policy may differ from the terms of applicable enforcement response policies (including penalty policies) under media-specific programs, this document supersedes those policies.

*C. How Can a Small Local Government Qualify for Penalty Reduction?*

This policy seeks to encourage small local governments to achieve sustained comprehensive environmental compliance in one of two ways. A small local government can work with the state to identify all of the local government's environmental noncompliance and then enter into a written and enforceable agreement establishing a schedule to correct all of its violations in order of risk-based priority. Alternatively, a small local government can enter into a written and enforceable agreement establishing a schedule to: 1. Correct, as expeditiously as practicable and in order of risk-based priority, all violations discovered by the state during an inspection of some subset of the local government's operations; and 2. develop and implement an EMS for all of its governmental operations. EPA's deference to such an exercise of a state's enforcement discretion in response to a

small local government's violations will be based on an assessment of the adequacy of the process the state establishes and follows in:

- Responding expeditiously to a small local government's request for compliance assistance;
- Determining which local governments with between 3,301 and 10,000 residents qualify for treatment as small local governments;
- Assessing the small local government's good faith and compliance status;
- Establishing priorities for addressing noncompliance; and
- Ensuring either prompt correction of all environmental violations discovered during the state's comprehensive environmental compliance evaluation of all the local government's operations, or prompt correction of all violations discovered during a state inspection of some subset of the local government's operations and prompt development and implementation of an EMS for all of its governmental operations.

A state must document all findings and activities that are necessary to show adherence to the terms of this policy. If the small local government commits to correct its separate violations in order of risk-based priority, the state's records must discuss the rationale for establishing priorities among the violations to be addressed and explain why the compliance agreement and schedule represents the shortest practicable time schedule feasible under the circumstances.

EPA will defer more readily to a state that has previously submitted to the Agency a description of its comprehensive compliance assistance program for small local governments, thereby allowing EPA to familiarize itself with the adequacy of the state's processes.

*D. How Should a State Select Participating Local Governments?*

EPA intends this policy to apply only to small local governments unable to satisfy all applicable environmental mandates without assistance from the state. For the purposes of this policy, local governments with 3,300 or fewer permanent residents are assumed to need the state's compliance assistance and are deemed eligible to participate at the state's discretion. Local governments whose permanent residents number between 3,301 and 10,000 can qualify to receive the benefits of the policy only if the state determines that the technical, managerial, and financial capacity of the local government is so limited that the local government is unlikely to achieve

and sustain comprehensive environmental compliance without the state's assistance. To make this determination, a state must apply a capacity test that measures such indicators as:

- The local government finds it difficult to comply with routine reporting requirements (e.g., in the past year, the local government has submitted less than 90 percent of the monitoring reports required by applicable environmental regulations);
- The local government has no operation and maintenance plan for its utility operations, or has an operation and maintenance plan that is not routinely followed (e.g., maintenance logs are not regularly updated, are incomplete, or are not kept at all);
- The required drinking water sanitary survey has not been scheduled, or the sanitary survey has been performed, but the local government has not addressed all identified significant deficiencies;
- Utility operators are untrained or uncertified, or staffing of certified operators is inadequate to meet the local government's needs;
- Utility systems were installed without state oversight and approval, or began operating without receiving final operational approval from the state;
- Rights essential to the provision of municipal services are not clearly established and documented by contract (e.g., the local government has no contract with the source from which it obtains its drinking water, or for the disposal of its solid waste);
- The local government does not have current and approved by-laws, ordinances, or tariffs in place with respect to each of its public utility operations;
- There is no formal organizational structure for operation and maintenance of the local government's public utilities clearly identifying the owner, the operator, and the staff and their responsibilities;
- Either there are no written job descriptions clearly defining the responsibilities of public utility staff, or the staff is unfamiliar with such documents;
- Staff is untrained or inadequately trained;
- Written policies covering personnel, customer service, and risk management either do not exist or are routinely ignored;
- Lines of communication between public utility staff and agencies or private sector staff that can provide assistance are inadequate or nonexistent;

- The local government does not follow standard accounting principles in the funding of its public utilities, and either has not been audited or was issued an adverse opinion following an audit;

- The local government either does not have an annual budget for operation of a public utility or has an annual budget that is inadequate to meet the demands of operation, maintenance, and environmental compliance;

- Public utility rates do not include all users or have not been recently reviewed to examine operational sustainability and viability;

- A significant percentage of accounts (either payable or receivable) are chronically delinquent;

- Periodic budget reports and balance sheets are either not produced, or, if produced, have not been approved;

- The local government's tax base is inadequate to support needed environmental expenditures; or

- There are demographic factors that present quantifiable negative impacts on the local government's capacity.

The state must document the capacity test it applied and all findings it made to support its determination of incapacity, and maintain that documentation in records accessible for EPA review.

EPA's evaluation of the appropriateness of a state's small local government comprehensive environmental compliance assistance program will depend in part on whether the state uses adequate measures of technical, managerial, and financial capacity to ensure that only those local governments that truly need assistance were assessed noncompliance penalties that were reduced beyond the extent normally allowed by EPA enforcement policies and guidance.

Not less than quarterly, a state should provide EPA with a list of local governments participating in its small local government environmental compliance assistance program to ensure proper state and federal coordination on enforcement activity. In addition to any records related to a finding of a local government's incapacity, a state must keep records of contacts between the state and participating local governments, results of compliance assessments, actions taken by the local government to achieve compliance, any written compliance agreements and schedules, and any assessments of a local government's adherence to the terms of its compliance agreement and schedule should be kept in the state's files accessible for review by EPA.

#### *E. How Should a State Assess a Local Government's Good Faith?*

In considering whether a state has established and is following an adequate process for assessing a small local government's good faith, EPA generally will look at such factors as the participating local government's candor in contacts with state regulators and the local government's efforts to comply with applicable environmental requirements. Measures of a small local government's good faith include:

- Prompt self-disclosure of known violations;
- Attempts to comply or a request for compliance assistance prior to the initiation of an enforcement response;
- Willingness to participate in a comprehensive compliance evaluation;
- Prompt correction of known violations;
- Willingness to remediate harm to public health, welfare, or the environment;
- Readiness to enter into a written and enforceable compliance agreement establishing a schedule to correct all of its violations as expeditiously as practicable in order of risk-based priority, or to enter into a written and enforceable agreement establishing a schedule to correct all known violations as expeditiously as practicable in order of risk-based priority and to develop and implement an EMS for all of its governmental operations; and
- Adherence to the terms of the agreement and to the schedule.

#### *F. What is the Scope of Compliance Evaluation and Assistance a State Should Offer?*

EPA intends this policy to encourage states to offer local governments comprehensive compliance assistance; that is assistance intended to ensure compliance with all environmental statutes and regulations that apply to the small local government's municipal operations. Accordingly, a state's actions under the policy should promote an evaluation, performed by qualified personnel, of the small local government's compliance status with respect to all applicable environmental requirements. EPA acknowledges that a comprehensive evaluation becomes more difficult to perform and requires more state resources as the size of the local government increases and as the local government offers more services to its residents. For this reason, the policy will allow "fenceline" projects at local governments that have between 3,301 and 10,000 permanent residents if the state applies a capacity test consistent with the criteria described in part D of

this policy and determines that the technical, managerial, and financial capacity of the local government is so limited that the local government is unlikely to achieve and sustain comprehensive environmental compliance without the state's assistance. A fenceline project is one that limits its scope to those activities conducted within a subset of the local government's operations.

A state's assessment of a local government's compliance status should include:

- A comprehensive evaluation of compliance with every applicable environmental requirement at all of the small local government's municipal operations (*see*, Profile of Local Government Operations, EPA 310-R-001, <http://www.epa.gov/compliance/resources/publications/assistance/sectors/notebooks/government.html>; or the Local Government Environmental Assistance Network, <http://www.lgean.org>) or, in the case of a local government with between 3,301 and 10,000 permanent residents that qualifies for participation after application of the state's capacity test, a comprehensive evaluation of compliance with every environmental requirement that applies within the fenceline of a defined subset of the local government's operations;
- The local government's current and anticipated future noncompliance with those requirements;
- The comparative risk to public health, welfare, or the environment of each current and anticipated future noncompliance; and
- The local government's compliance options.

In addition, EPA recommends that the process developed by the state include consideration of regionalization and restructuring as compliance alternatives. In the case of fenceline projects, the state should consider if compliance benefits can be achieved by consolidating staff and processes of the designated operations with other governmental operations within the local government. The state's process should also include consideration of the impact of promulgated regulations scheduled to become effective in the future.

This policy is also intended to encourage states to provide participating local governments incentives to develop and implement environmental management systems (EMSs). The EMS aspects of this policy are discussed in part I, below.



### G. How Should a Small Local Government Set Priorities for Addressing Violations?

States seeking EPA's deference should require small local governments to correct any identified violations of environmental regulations as soon as possible, taking into consideration the local government's technical, managerial, and financial capacities, and the state's ability to assist in strengthening those capacities. A small local government should address all of its violations in order of risk-based priority.<sup>3</sup> While information regarding assessment of environmental risks is available from EPA's National Center for Environmental Assessment at <http://www.epa.gov/ncea/ecologic.htm>, the Agency expects that the comparative risk between violations will, in most instances, be apparent. For example, violations presenting a risk of ingestion or inhalation of, or contact exposure to, acute toxins must be a local government's highest priority for remediation and correction. Any identified violation or circumstance that may present an imminent and substantial endangerment to, has caused or is causing actual serious harm to, or presents a serious threat to, public health, welfare, or the environment is to be addressed immediately in a manner that abates the endangerment or harm and reduces the threat. Activities necessary to abate the endangerment or harm and reduce the threat posed by such violations or circumstances are not to be delayed while the state and small local government establish and implement the process for assigning priorities for correcting other violations.

### H. How Can the State Ensure Prompt Correction of Violations?

If the small local government cannot correct all of its violations within 180 days of the state's commencement of compliance assistance to the local government, the state and the local government should, within 180 days of the state's commencement of compliance assistance to the local government, enter into and begin implementing a written and enforceable compliance agreement incorporating a schedule<sup>4</sup> that:

- Establishes a specified period for correcting all outstanding violations in order of risk-based priority;<sup>5</sup>
- Incorporates interim milestones that demonstrate reasonable progress toward compliance;
- Contains provisions to ensure continued compliance with all environmental requirements with which the local government is in compliance at the time the agreement is entered; and
- Incorporates provisions, where they would be applicable to the small local government, to ensure future compliance with any additional already promulgated environmental requirements that will become effective after the agreement is signed.

Consultation with EPA during the drafting of a compliance agreement and schedule and the forwarding of final compliance agreements and schedules to EPA are recommended to ensure appropriate coordination between the state and EPA.

#### I. What is Required of a Small Local Government That Elects To Address Its Noncompliance by Developing and Implementing an Environmental Management System?

Small local governments that learn of environmental violations as a result of the state's inspection of some subset of the small local government's operations may address their noncompliance by entering into a written and enforceable agreement establishing a schedule to: (1) Correct the violations discovered by the state; and (2) develop and implement an environmental management system for all of its governmental operations. Local governments with between 3,301 and 10,000 permanent residents that the state has determined eligible to participate under the policy on a fenceline basis, may develop and implement an EMS for operations within the designated fenceline. The local government must enter into such an agreement with the state not later than 180 days after the state notifies the local government of the violations discovered during the inspection. The local government must either correct those violations within the same 180 days or include, as part of the EMS agreement it enters into with the state, a written and enforceable agreement that establishes a schedule to correct the

violations in accordance with the usual terms of this policy.

As part of its schedule, the EMS agreement will include a deadline, not later than one year after entry into the agreement, for the local government's submission to the state of its EMS manual (*see* element 9, below), and a commitment to ensure the performance of an EMS audit not less than one year and not more than three years after the submission of its EMS manual (*see* element 16, below). The EMS manual must contain policies, procedures, and standards explaining and showing how the small local government's EMS conforms to and will accomplish these essential elements of an EMS:

1. *Environmental policy*—The local government must develop a statement of its commitment to environmental excellence and use this statement as a framework for planning and action.

2. *Environmental aspects*—The local government must identify which of its activities, products, and services have impacts on the environment and what those impacts are.

3. *Legal and other requirements*—The local government must identify the environmental laws and regulations that apply to its operations.

4. *Objectives and targets*—The local government must establish goals for its operations that are consistent with its environmental policy, that will eliminate the gap between the local government's current procedures and an accepted EMS framework, and that will reduce the environmental impacts of its operations.

5. *Environmental management program*—The local government must plan specific actions that will achieve its objectives and targets.

6. *Structure and responsibility*—The local government will establish roles and responsibilities for staff and management to implement the environmental management system, and provide adequate resources.

7. *Training, awareness and competence*—The local government will have a plan to ensure its employees are trained and capable of carrying out their environmental responsibilities.

8. *Communication*—The local government will establish a process for internal and external communications on environmental management issues.

9. *EMS documentation*—The local government will maintain information both on its environmental management system and necessary for its operation. As part of this effort, the local government prepare an EMS manual that contains the policies, procedures, and standards explaining and showing how the local government's EMS

<sup>3</sup> EPA does not intend that local governments should be permitted to delay addressing low-risk violations that can be easily and quickly corrected without impeding progress on long-term compliance efforts undertaken to address high-risk violations.

<sup>4</sup> The agreement entered into by the local government and the state may not unilaterally alter or supersede a local government's obligations under existing federal administrative orders or federal judicial consent decrees.

<sup>5</sup> States may allow weighing of unique local concerns and characteristics, but the process should be sufficiently standardized and objective that an impartial third person using the same process and the same facts would not reach significantly different results. Public notification and public participation are an important part of the priority setting process.

conforms to and will accomplish the essential EMS elements. In accordance with the schedule established by its EMS agreement, and in no event later than one year after entering into the EMS agreement, the local government will submit a copy of its EMS manual to the state as proof that the local government has developed an EMS.

10. *Document control*—The local government will establish a system to ensure effective management of documents related to the EMS and to environmental activities.

11. *Operational control*—The local government will establish a system to identify, plan, and manage its operations consistent with its objectives and targets.

12. *Emergency preparedness and response*—The local government will identify potential emergencies with environmental impacts and develop procedures for preventing them and for responding to them if unprevented.

13. *Monitoring and measurement*—The local government will monitor key EMS activities and track performance. One periodic measure will be an assessment of compliance with legal requirements.

14. *Nonconformance and corrective and preventative action*—The local government will identify and correct deviations from its EMS, and take actions to prevent their recurrence.

15. *Records*—The local government will maintain and manage records of EMS performance.

16. *EMS audit*—Not less than one year, and not more than three years after the local government submits its EMS manual to the state, the state, or an independent third party approved by the state, will conduct an EMS audit to confirm that a local government has been and is continuing to implement its EMS.

17. *Management review*—The local government must provide for periodic review of its EMS by local government management, with the goal of continual improvement of both the system and environmental performance.

A fuller explanation of these 17 essential elements and of the EMS process can be found in Environmental Management Systems: An Implementation Guide for Small and Medium-Sized Organizations (EPA Document Number EPA 832-B-01-001; available electronically at <http://www.epa.gov/owm/iso14001/ems2001final.pdf>). Additional guidance and information regarding how to obtain assistance from a local EMS resource

center can be found at <http://www.peercenter.net>.

During the development and implementation of its EMS, the small local government may discover violations that were unknown to it at the time of its entry into the EMS agreement with the state. Such violations must be disclosed to the state as required by regulations or in accordance with EPA self-disclosure policies. The small local government and the state may agree to modify the terms of the agreement and schedule to incorporate correction of these violations. The small local government and the state may also consider discovery of additional violations a separate event that can be resolved in any manner consistent with the terms of this policy and EPA enforcement policies and guidelines. An assessment of whether or not the local government has corrected all discovered violations as expeditiously as practicable in order of risk-based priority should be part of the EMS audit.

#### *J. What Are the Limits on EPA Deference?*

EPA reserves all of its enforcement authorities. EPA will generally defer to a state's exercise of its enforcement discretion in accordance with this policy, except that EPA may require immediate with respect to any violation or circumstance that may present an imminent and substantial endangerment to, has caused or is causing actual serious harm to, or presents a serious threat to, public health, welfare, or the environment.<sup>6</sup>

The Small Local Governments Compliance Assistance Policy does not apply if, in EPA's judgment:

- a state's small local government environmental compliance assistance program process fails to satisfy the adequacy criteria stated above; or
- a state's application of its small local government environmental compliance assistance program process fails, in a specific case, to provide adequate protection to public health and the environment because it neither

<sup>6</sup> EPA will regard as a matter of national significance any violation or circumstance that may present an imminent and substantial endangerment to, has caused or is causing actual serious harm to, or presents a serious threat to, public health, welfare, or the environment that is left unaddressed by a small local government participating in a state environmental compliance assistance program. Such circumstances require consultation with or the concurrence of, as appropriate, the Assistant Administrator for Enforcement and Compliance Assurance or his or her delegatee before initiation of an EPA enforcement response.

requires nor results in reasonable progress toward either achievement of environmental compliance or implementation of an adequate EMS by a date certain.

Where EPA determines that this policy does not apply, and where EPA elects to exercise its enforcement discretion, other EPA enforcement policies remain applicable. The state's and EPA's options in these circumstances include discretion to take or not take formal enforcement action in light of factual, equitable, or local government capacity considerations with respect to violations that had been identified during compliance assistance and were not corrected. Neither the state's actions in providing, nor in failing to provide, compliance assistance shall constitute a legal defense in any enforcement action. However, a local government's good faith efforts to correct violations during compliance assistance may be considered a mitigating factor in determining the appropriate enforcement response or penalty in subsequent enforcement actions.

Nothing in this policy is intended to release a state from any obligations to supply EPA with required routinely collected and reported information. As described above, states should provide EPA with lists of participating small local governments and copies of final compliance agreements and schedules. States should also give EPA immediate notice upon discovery of a violation or circumstance that may present an imminent and substantial endangerment to, has caused or is causing actual serious harm to, or presents serious threats to, public health, welfare, or the environment.

This policy has no effect on the existing authority of citizens to initiate a legal action against a local government alleging environmental violations.

This policy sets forth factors for consideration that will guide the Agency in its exercise of enforcement discretion. It states the Agency's views as to how the Agency intends to allocate and structure enforcement resources. The policy is not final agency action, and is intended as guidance only. This policy is not intended for use in pleading, or at hearing or trial. It does not create any rights, duties, obligations, or defenses, implied or otherwise, in any third parties.

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