

provided a partial exemption from reporting of processing and use information for chemical substances of low current interest, and continued the current exemption from reporting for polymers, microorganisms, and naturally occurring chemical substances. These changes modify requirements for information collected in calendar year 2005 and submitted in 2006 and thereafter. The public meeting may be of interest to persons currently reporting under the IUR and to manufacturers of inorganic chemical substances.

The public meeting will include a series of presentations by representatives of EPA on the instructions for reporting for the 2006 partial updating of the TSCA chemical inventory database. Presentation topics will include reporting requirements, instructions for completing the reporting form, how to assert confidentiality claims, and how to submit completed reports to EPA. After each presentation, persons attending the public meeting will be invited to comment on the clarity, completeness, and usefulness of the instructions. Comments may also be submitted in writing following the public meeting; comments should be submitted within 30 days after the meeting to receive timely attention. The purpose of the public meeting is to receive input for improving the instructions; subsequent meetings are planned for 2004 to provide training to persons who must report in 2006 under the IUR.

Persons planning to attend the public meeting are encouraged to register with the technical contact person identified under **FOR FURTHER INFORMATION CONTACT**. Persons registering for the meeting will receive by e-mail a copy of the draft instructions prior to the meeting. Prior registration is not required to attend the focus group meeting. There is no charge for attending this public meeting.

List of Subjects

Environmental protection, chemicals, reporting and recordkeeping requirements.

Dated: September 25, 2003.

Margaret Schneider,

Acting Director, Office of Pollution Prevention and Toxics.

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ENVIRONMENTAL PROTECTION AGENCY

[FRL-7565-1]

Agency Policy and Guidance: Draft Small Local Governments Compliance Assistance Policy

AGENCY: Environmental Protection Agency.

ACTION: Request for public comment.

SUMMARY: The U.S. Environmental Protection Agency (EPA) today seeks public comment on proposed revisions to its 1995 *Policy on Flexible State Enforcement Responses to Small Communities Policy* (the *Small Communities Policy*). The *Small Communities Policy* encourages states to enhance protection of public health and the environment by providing comprehensive environmental compliance assistance to the 72% of American communities that are home to 2,500 or fewer permanent residents. If the actions of the state to provide compliance assistance and the actions of the small community to achieve compliance stay within the parameters of the *Small Communities Policy*, EPA will generally defer to the state's decision to reduce or waive the noncompliance penalty that EPA guidance would normally require the state to assess for the small community's violations. During the course of the compliance assistance, the small community must work in good faith with the state to: (1) Evaluate the small community's compliance status and identify all of its environmental violations; (2) develop a priority-based schedule for the small community to achieve compliance with all applicable environmental requirements as soon as practicable; and (3) build the technical, managerial, and financial capacity the small community needs to achieve and sustain comprehensive environmental compliance. The central tenets of the *Small Communities Policy* are:

1. Good faith efforts; 2. enforceable commitments; and 3. comprehensive compliance with all environmental requirements.

The 1995 *Small Communities Policy* can be downloaded from the Internet at <http://www.epa.gov/compliance/resources/policies/incentives/smallcommunity/scpolicy.pdf>.

EPA now proposes a number of revisions intended to extend the scope of the *Small Communities Policy*. The policy will be retitled the *Small Local Governments Compliance Assistance Policy* to clarify EPA's intent that the policy benefit units of local government.

To make the benefits of the *Small Local Governments Compliance Assistance Policy* available to a greater number of small local governments, EPA proposes to:

1. Defer to states' decisions to reduce or waive the normal noncompliance penalties of local governments with 3,300 or fewer permanent residents—if the actions of the state to provide compliance assistance and the actions of the local government to achieve compliance are consistent with the parameters established by the *Small Local Governments Compliance Assistance Policy*.

2. Defer to states' decisions to reduce or waive the normal noncompliance penalties of local governments with between 3,301 and 10,000 permanent residents—if a state has followed guidelines in the *Small Local Governments Compliance Assistance Policy* to determine 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; and if the actions of the state to provide compliance assistance and the actions of the local government to achieve compliance are consistent with the parameters established by the policy.

To make the benefits of the *Small Local Governments Compliance Assistance Policy* available in a wider range of circumstances, EPA proposes to defer to states' decisions to reduce or waive the normal noncompliance penalties for eligible local governments that enter into an enforceable agreement to: 1. correct known violations; and 2. develop and implement Environmental Management Systems for their governmental operations. EPA also proposes to defer to states' decisions to reduce or waive the normal noncompliance penalties for eligible local governments with between 3,301 and 10,000 permanent residents that enter into enforceable agreements either to achieve comprehensive environmental compliance or to develop and implement environmental management systems within the "fenceline" of a subset of their government operations.

EPA also seeks public comment on whether and how the Agency could implement a policy similar to the *Small Local Governments Compliance Assistance Policy* for its compliance assistance and enforcement activities where EPA directly implements a program, where EPA retains primary enforcement authority, or where EPA takes action after consulting with a State

that has primacy or has been authorized to implement a Federal program.

DATES: The Agency requests comments on today's proposal. Comments must be received or post-marked by midnight January 2, 2004. Comments received after this date may not be considered in decision making on the proposed policy.

ADDRESSES: Send written comments (in triplicate, if possible) to: the Docket Clerk, U.S. Environmental Protection Agency Enforcement and Compliance Docket and Information Center, Mail Code: 2201T, Docket Number EC-P-2001-003, U.S. Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20004. Please use a font size no smaller than 12. Comments may also be sent electronically to docket.oeca@epa.gov, or faxed to (202) 566-1511. Attach electronic comments as an ASCII (text) file, and avoid the use of special characters and any form of encryption. Be sure to include the docket number EC-P-2001-003 on your document. In person, deliver comments to the Enforcement and Compliance Docket and Information Center, U.S. Environmental Protection Agency, 1200 Pennsylvania Ave., NW., EPA West, Room B133, Washington, DC 20004.

FOR FURTHER INFORMATION CONTACT: Kenneth Harmon, telephone (202) 564-7049; e-mail harmon.kenneth@epa.gov.

SUPPLEMENTARY INFORMATION:

I. Background and History

EPA's enforcement response policies generally provide for initiation of an enforcement action and assessment of standard penalties (which can be adjusted downward on the basis of the violator's inability to pay) if a local government entity is discovered to have violated environmental regulations. In 1994, EPA began informal discussions with the States of Oregon and Idaho, later joined by the State of Nebraska, centered on those States' planned use of enforcement discretion with respect to small community violators. These States noted that small communities may have more difficulty complying with environmental regulations than larger communities do. Small communities that lack personnel trained in environmental management may be unaware of environmental requirements. Once informed of their environmental noncompliance, small communities may not know how to correct their problems. Because small communities have a smaller tax base and a smaller pool of ratepayers, their residents often must pay higher per household costs for environmental

compliance. Oregon, Idaho, and Nebraska sought assurances that EPA would defer to a State's exercise of enforcement discretion to reduce or waive the normal noncompliance penalty where a State determines that a small community violator is working diligently in good faith to identify and correct its noncompliance.

In 1995, EPA responded by issuing the *Policy on Flexible State Enforcement Responses to Small Community Violations* ("the *Small Communities Policy*"). The *Small Communities Policy* established parameters within which EPA encourages States to provide incentives for small communities to seek State assistance in identifying their environmental problems, developing a priority-based schedule for returning to full comprehensive environmental compliance, and building the technical, managerial, and financial capacity needed to achieve and sustain compliance.

II. Overview of the Small Communities Policy

EPA's 1995 *Small Communities Policy* gives States¹ considerable freedom to tailor small community environmental compliance assistance practices or programs that meet specific local needs. EPA's deference on penalty reductions and waivers under the *Small Communities Policy* is generally restricted to agreements States enter into with communities with no more than 2,500 permanent residents. These communities must be working diligently in good faith to achieve and sustain *comprehensive* environmental compliance, *i.e.*, compliance with every environmental requirement to which their government operations are subject. If a small community cannot achieve comprehensive compliance within 180 days of the State's commencement of compliance assistance to the community, within that same 180 days, the community must enter into a written and enforceable agreement with the State that establishes a schedule for addressing and correcting all of its environmental violations as soon as practicable. A State that seeks EPA's deference to its decision to reduce a small community's noncompliance penalties must have 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

The Agency reserves all of its enforcement authorities, including its discretion to initiate an enforcement action to address 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 or the environment.

Deference under the *Small Communities Policy* is not warranted if, in EPA's judgment, a State's program to reduce or waive small communities' noncompliance penalties in exchange for comprehensive environmental compliance fails to satisfy the conditions of the *Small Communities Policy*. Neither is deference under the *Small Communities Policy* warranted if, in EPA's judgment, a State's application of its program to reduce or waive small communities' noncompliance penalties in exchange for comprehensive environmental compliance fails to provide, in a specific case, adequate protection to human health and the environment because that application neither requires nor results in reasonable progress toward, and achievement of, environmental compliance by a date certain.

III. Differences Among the Self-Disclosure Policies

In addition to the *Small Communities Policy*, EPA has issued *Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations* (the *Audit Policy*) and the *Small Business Compliance Policy* (the *Small Business Policy*), both of which were last revised in April of 2000. These policies provide penalty relief to regulated entities who, upon discovering their violations, promptly disclose them to EPA and promptly return to compliance. Although the *Small Communities Policy* is often grouped with the *Audit Policy* and the *Small Business Policy* under the shared term "self-disclosure policies," it differs in significant ways. The *Audit Policy* and the *Small Business Policy* apply only to violations discovered outside the scope of a compliance assessment required by statute or regulation. The *Small Communities Policy* can apply to a violation no matter how discovered. It can apply to violations discovered

¹ "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.

outside the scope of required compliance assessments as well as to violations discovered during required compliance assessments and to violations discovered by the regulator during the course of an inspection. While the *Audit Policy* and the *Small Business Policy* do not provide penalty relief for repeat violations, the *Small Communities Policy* allows application of the policy to communities with a history of noncompliance if the State determines that the community has been acting in good faith and to the best of its ability to address violations and achieve compliance. The *Audit Policy* and the *Small Business Policy* generally allow disclosing violators no more than 60 days and 90 days, respectively, to correct their violations (the *Small Business Policy* will allow 180 days for corrections if the violator first submits a written schedule, and up to 360 days for corrections if the violator will correct the violations by putting pollution prevention measures in place). The *Small Communities Policy* gives communities up to 180 days to correct violations without a written agreement and schedule, but, if a community cannot achieve compliance within 180 days, the policy permits the community to enter into a written and enforceable agreement with the State establishing a schedule for the community to address all of its violations as expeditiously as practicable in order of risk-based priority. Also, the *Audit Policy* and the *Small Business Policy* do not require, as the *Small Communities Policy* does, that noncompliers evaluate their compliance with all applicable regulatory requirements. This significant difference between the *Small Communities Policy* and the other self-disclosure policies is the best illustration that the *Small Communities Policy* has a different purpose. The *Audit Policy* and the *Small Business Policy* are intended to provide incentives for regulated entities to conduct self-audits and disclose the violations they discover. The *Small Communities Policy* is intended to encourage States to conduct comprehensive evaluations of their small communities' compliance with every environmental requirement that applies to the community's governmental operations, and then work with communities to help them build the technical, managerial, and financial capacity they need to achieve and sustain comprehensive environmental compliance.

IV. The January 23, 2002 Federal Register Notice

Although State comprehensive environmental compliance assistance

programs have provided compliance assistance to more than 250 small communities since EPA issued the *Small Communities Policy*, most of that activity took place in just two States. In discussions with small community and State stakeholders questioning why so few States had implemented the policy, EPA learned that many stakeholders find aspects of the policy problematic. Some stakeholders believe that the *Small Communities Policy's* population cap of 2,500 is too low. Many States point out that EPA has not provided funding for States to establish programs offering comprehensive environmental compliance assistance to small communities. Many small communities do not see how participating in a State's comprehensive compliance assistance program would benefit them. These and other perceived shortcomings of the policy were seen as impediments to its more wide-spread implementation among the States.

On January 23, 2002, EPA published a **Federal Register** notice (67 FR 3185) requesting public comment on possible revisions to various aspects of the *Small Communities Policy*. The **Federal Register** notice sought comment on: (1) Raising the policy's population cap to allow participation of larger (but still small) communities; (2) allowing comprehensive environmental compliance assistance projects confined within the "fenceline" of one of a community's operations; (3) reducing the resource burdens associated with establishing and participating in comprehensive environmental compliance assistance programs; and (4) enhancing incentives for both States and small local governments to participate in such programs. The **Federal Register** notice also discussed the relationship between actions undertaken in accordance with the *Small Communities Policy* and actions undertaken as part of an environmental management system (EMS). EPA noted that if a small local government receiving comprehensive environmental compliance assistance from the State were to develop and implement an EMS as part of its strategy to address its noncompliance, the local government should incorporate its EMS activities into the written and enforceable agreement and the schedule required by the policy. Finally, EPA requested comment on more general aspects of the *Small Communities Policy*, including the policy's definition of community, the time frames for disclosure and correction of violations, and the types of violations to which the *Small Communities Policy* would apply.

EPA received comments from ten respondents. A summary of these

comments and the comments themselves are available from EPA's Enforcement and Compliance Docket and Information Center (EDIC) in the EPA Docket Center (EPA/DC), EPA West Room B102, 1301 Constitution Avenue, NW., Washington, DC. The EPA Docket Center 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 Reading Room is (202) 566-1744, and the telephone number of the EDIC is (202) 566-1514. An electronic version of the public docket is available through EPA Dockets (EDOCKET) at <http://www.epa.gov/edocket>. Use EDOCKET to submit or view public comments, access the index listing of the contents of the public docket, and to access those documents in the public docket that are available electronically. Once in the system, select "search," then type in the docket ID number identified above.

V. The Role of the EPA Inspector in Providing Compliance Assistance During Inspections

On June 25, 2003, EPA issued a national policy titled: *The Role of the EPA Inspector in Providing Compliance Assistance During Inspections (Inspector Policy)*. EPA's *Inspector Policy* concerns the actions of EPA inspectors, not State inspectors, conducting compliance inspections, but it can provide useful guidance for States. The *Inspector Policy* encourages EPA inspectors' current practice of providing compliance assistance during on-site compliance inspections, and clarifies what compliance assistance is appropriate in such circumstances. The *Inspector Policy* can be accessed at www.epa.gov/Compliance/resources/policies/monitoring/inspection/inspectorrole.pdf.

VI. Proposed Changes to the Small Communities Policy

EPA today proposes replacing the term "community" with the term "local government" as derived from U.S. Census Bureau definitions. This change, which clarifies EPA's intent to focus compliance assistance on small governmental entities, is also reflected in the title of the revised policy: the *Small Local Governments Compliance Assistance Policy*. EPA also proposes three major changes to the *Small Communities Policy*, one related to the cap on the population of participating local governments, one allowing projects of restricted scope in some circumstances, and one encouraging local governments to develop and implement EMS. These changes are intended to make it easier for more local

governments to get needed compliance assistance from their States, and to promote more effective management of environmental responsibilities by local governments.

The following sections discuss the revised term used to describe entities eligible for participation under the policy, proposed revisions to the population cap and to the requirement of comprehensive assistance at all of a local government's operations, and the proposed addition of an EMS option.

A. Entities Eligible To Receive all Benefits

The 1995 *Small Communities 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.

EPA now proposes to minimize possible confusion by replacing the term "community" with the term "local government", thereby designating familiar, legally-defined entities as those entities eligible to receive benefits under the policy. Although EPA originally adopted a broad definition of eligible entities to provide States flexibility to develop compliance assistance programs that addressed the State's particular needs, in the seven years the policy has been in force, EPA has seen no evidence that States wish to offer comprehensive environmental compliance assistance to communities that are not traditional units of local government. EPA's proposal derives its definition of "local government" from United States Census Bureau definitions (see, www.census.gov/geo/www/tiger/glossary.html#glossary) related to "governmental unit". As used by the policy, the term "local government" can mean any organized unit of government authorized in a State's constitution and statutes, and established to provide general government for a defined area. This includes governments designated as a county, parish (in Louisiana), municipality, borough, city, village, town, township, or plantation (in Maine).

EPA acknowledges that this definition differs from "local government" as defined in Section 2 of the Homeland Security Act of 2002 (Pub. L. 107-296). For the purposes of that Act, Congress defined 'local government' as:

(A) A county, municipality, city, town, township, local public authority, school district, special district, intrastate district, council of

governments (regardless of whether the council of governments is incorporated as a nonprofit corporation under State law), regional or interstate government entity, or agency or instrumentality of a local government;

(B) An Indian tribe or authorized tribal organization, or in Alaska a Native village or Alaska Regional Native Corporation; and

(C) A rural community, unincorporated town or village, or other public entity.

For the *Small Local Governments Compliance Assistance Policy* EPA proposes a more restrictive definition because it is the Agency's intention to focus the benefits of the policy on small units of general purpose local government. It is EPA's belief that special districts and governmental entities comprised of more than one participating governmental unit are created specifically for the purpose of ensuring that the resulting governmental unit has the technical, managerial, and financial capacity to discharge its responsibilities. EPA also believes single-medium compliance assistance programs or compliance assistance efforts designed for that specific sector of the regulated community can best meet the needs of governmental entities created for the purpose of delivering one type of service (not general services) to the public.

EPA invites public comment on this proposed change to the definition of entities eligible to receive the full benefits of the *Small Local Governments Compliance Assistance Policy*, particularly to the extent the policy would now not apply either to unincorporated entities that provide municipal services, or to district government entities authorized by State statute to provide, not general services, but to perform a specific function (e.g., school, water, or power districts).

B. Proposed Revisions to the Population Cap

EPA's January 23, 2002 **Federal Register** notice sought comment on two specific questions related to the population cap: (1) Should the policy raise its current cap to allow participation of communities with more than 2,500 residents? and (2) should the population cap be replaced by a test of a community's capacity to address its environmental responsibilities?

Nine of the ten commenters addressed the population cap. All nine favored giving State programs flexibility to admit communities with more than 2,500 permanent residents. Four commenters supported raising the population cap to 10,000, both to be

consistent with some of the population-dependent provisions of the Safe Drinking Water Act (in which public water systems that serve more than 10,000 users are labeled "large") and because the commenters believe communities with populations of up to 10,000 often provide essential public services to a customer base too small to fund a full-time professional environmental staff. Three commenters indicated that while a population of 2,500 could serve as a reliable rule of thumb for determining which communities need compliance assistance, they recommended that States be given discretion to justify application of the policy to larger communities if those larger communities can be shown also to need compliance assistance.

None of the eight respondents who offered comments on capacity tests supported determining a community's eligibility for compliance assistance solely on the basis of a capacity test. Three commenters rejected capacity tests outright, as they believe small local governments lack the expertise and resources needed to gather the information that would be required by such tests, and States lack the resources needed to evaluate the large number of small local governments potentially eligible for assistance. Five commenters asserted that States should have the flexibility to use a capacity test as a means of determining if a community whose population exceeds the population cap should nonetheless be eligible for participation.

After considering these comments, EPA decided to propose a hybrid approach. The proposed revised policy establishes a two-tiered population cap. EPA will defer to the States' acceptance into their programs of local governments with up to 3,300 permanent residents without analysis demonstrating a lack of technical, managerial, or financial capacity on the part of the local government. The proposed revised policy also provides that States can apply a capacity test to justify the participation of a local government with more than 3,300 but no more than 10,000 permanent residents. As a practical matter, such an upper limit is necessary if EPA wishes to focus comprehensive compliance assistance resources on small local governments who most need it while encouraging larger municipalities to use their greater technical, managerial, and financial capacity to assume more responsibility for ensuring their environmental compliance. In proposing these population levels for the population cap and the upper population limit, EPA

acknowledges the desirability of consistency with the definition of small local government in environmental statutes (most notably regulations implementing the Safe Drinking Water Act, in which public water systems serving 3,300 and fewer users are labeled “small”) and in the recent Public Health Security and Bioterrorism Preparedness and Response Act of 2002 (Pub. L. 107–188) (which, in its amendments to the Safe Drinking Water Act, reaffirmed 3,300 as the population level below which public water systems were exempt from some requirements). EPA also acknowledges that States, in implementing the *Small Local Governments Compliance Assistance Policy* are free to adopt a more stringent population cap if they believe lower population levels are more appropriate for their local circumstances. If, for example, a State believes population levels of 2,500 without a demonstration of incapacity and up to 5,000 with a demonstration of incapacity are more appropriate to its local circumstances, the State can establish those levels for its program. A State may choose to evaluate the capacity of requiring all potential participating local governments, or choose not to conduct any capacity tests and simply limit participation in its program to local governments no larger than 3,300 permanent residents. A State also has the option of providing comprehensive environmental compliance assistance to local governments without regard to their populations, but if the State reduces or waives the normal noncompliance penalties of local governments with more than 10,000 permanent residents, EPA may find it appropriate to initiate its own enforcement action to recover additional remedies.

EPA’s proposed revised policy recommends that States adopt a number of listed capacity measures the Agency has 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 proposed revised policy, and recommends that States incorporate these measures as appropriate for their local conditions. A State that has provided 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. EPA requests comment on the recommended measures presented in the proposed revised policy.

C. Fencelining

Restricting the scope of activities to the boundaries of some subset of operations or facilities is called “fencelining”. In its January 23, 2002, **Federal Register** notice, EPA asked if, as a cost saving measure, the *Small Local Governments Compliance Assistance Policy* should countenance “fenceline” projects. That is, should the policy apply if the State and small local government designate one of the local government’s operations (*i.e.* vehicle fleet maintenance, provision of drinking water, grounds keeping, *etc.*), evaluate the local government’s compliance with every environmental requirement that applies within the fenceline of that operation, and develop and implement a plan that addresses every environmental concern within that fenceline?

Nine commenters addressed this point. Four commenters advised against allowing fenceline projects. Fencelining need not be incorporated into the policy, three of these four commenters asserted, because most States already offer statute-specific compliance assistance with respect to individual local government operations. These commenters suggested that allowing fencelining would abandon the policy’s primary purpose—helping small local governments achieve and sustain *comprehensive* environmental compliance. Fencelining, they feared, would perpetuate a focus on operations with known or suspected violations while leaving other potentially more serious noncompliance at other operations undiscovered and unaddressed.

Three other commenters believed fencelining’s probable focus on known compliance concerns could be used to direct limited compliance assistance resources to where they are most needed. These commenters, however, advised limiting fencelining in some way. They suggested including restrictions to ensure that the policy did not become a compliance assistance program for one type of operation only, allowing fencelining only at operations EPA determines to be of particular concern, or allowing fencelining only at

larger local governments where conducting comprehensive evaluations of all operations would be a prohibitive drain on available resources.

EPA does primarily intend the policy to promote the provision of comprehensive environmental compliance assistance to small local governments. The Agency, however, acknowledges that fencelining can help States limit the cost of providing comprehensive compliance assistance to a local government that engages in a wide range of operations. EPA also notes there is no compelling reason to limit the scope of a fenceline to just one of a local government’s operations. A State and a participating local government may have the capacity and the desire to undertake a comprehensive compliance assistance project incorporating more than one, but less than all, of the local government’s operations.

After reviewing the comments, EPA proposes to defer to States’ decisions to reduce or waive the normal noncompliance penalties for fenceline projects involving only local governments with between 3,301 and 10,000 permanent residents. With respect to compliance assistance to small governments with 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 all of the small government’s operations.

EPA seeks comment on whether this approach strikes an appropriate balance between the Agency’s goal of encouraging States to provide truly comprehensive environmental compliance assistance to small local governments, and the Agency’s goal of encouraging States to provide some form of comprehensive environmental compliance assistance to local governments with between 3,301 and 10,000 permanent residents. In developing this proposal, EPA considered that its *Audit Policy* and *Small Business Policy* currently provide fenceline-based penalty reductions and waivers to violators (including local governments) that voluntarily discover, promptly disclose, and expeditiously correct environmental noncompliance.

If the *Small Communities Policy* were revised to support fenceline projects for some local governments, it would still differ from the *Audit Policy* and the *Small Business Policy* in some important ways:

- Application of the *Small Communities Policy* is not limited to

those violations that are voluntarily discovered.

- Projects under the *Small Communities Policy* must result in an assessment of the local government's compliance with all applicable environmental requirements, even if the project is confined within the fenceline of a subset of the local government's operations.

- The *Small Communities Policy* gives local governments the flexibility to prioritize among their violations and develop a schedule to address all of their noncompliance as expeditiously as practicable in order of risk-based priority.

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. EPA noted the similarities between the goals of the *Small Communities Policy* and the goals of an EMS in its January 23, 2002, **Federal Register** notice. Both the policy and an EMS establish a mechanism for moving a small local government toward sustained environmental compliance. In the **Federal Register** notice, the Agency noted that the primary difference between the two is the policy's focus on discovering and addressing all of a local government's environmental noncompliance and an EMS's focus on implementing a system that provides for a local government's ongoing management of all its environmental responsibilities. EPA indicated in the **Federal Register** notice that if a small local government receiving comprehensive environmental compliance assistance from the State were to develop and implement an EMS as part of its strategy to address its noncompliance, the local government should incorporate its EMS activities into the written and enforceable agreement and the schedule required by the policy.

All commenters on this point acknowledged the value of an EMS, but urged that development and implementation of an EMS, and the associated resource demands, not be made a condition of EPA deference.

After considering the comments, EPA's has decided the policy, while not making EMSs mandatory, should

provide local governments an incentive to develop and implement an environmental management system. Accordingly, the proposed revisions to the *Small Communities Policy* create an EMS option that will be available to small local governments that learn of environmental noncompliance as a result of a State's inspection of some subset of the small local government's operations. The revised policy would apply to small local governments that address their environmental noncompliance by entering into a written and enforceable agreement with the State establishing a schedule for the local government to: (1) Correct, as expeditiously as practicable in order of risk-based priority, the violations the State discovered during the inspection; and (2) develop and implement an environmental management system for all of its governmental operations. Local governments with populations between 3,301 and 10,000 that the State has determined eligible to participate under the policy may develop and implement an EMS applicable within a fenceline that incorporates the operation at which the violations were discovered. Not later than 180 days after the State notifies the local government of the violations discovered during the inspection, the local government must enter into an enforceable agreement that establishes a schedule for correcting the violations, and for developing and implementing an EMS for its governmental operations. If the local government corrects the violations before the 180 days have passed, the written and enforceable agreement it enters into with the State can contain only provisions related to developing and implementing its EMS. In accordance with the schedule established by the EMS agreement, but in no event later than one year after entering into the EMS agreement with the State, a local government would demonstrate it has developed an EMS by producing and submitting to the State an EMS manual documenting how it will accomplish the essential elements of an environmental management system. 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, would conduct an EMS audit to confirm that a local government has been implementing, and is continuing to implement, its EMS. This process is discussed more fully in part J of the policy.

EPA proposes the EMS option as an alternative to the process established by the prior *Small Communities Policy*.

That policy encourages small local governments to ask the State to perform a comprehensive environmental evaluation of *all* the local government's operations, 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, and correct all of its violations in accordance with that schedule.

The EMS option would establish a process in which the small local government would, 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. In committing to develop and implement an EMS, the *small local government* would be responsible for ensuring performance of the 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 policy's EMS option to incorporate a schedule for correction of the newly discovered violations. The State and the small local government may, however, choose to address any noncompliance discovered after the entry of the EMS option agreement in any manner consistent with this policy and other EPA enforcement policies and guidelines.

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, 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 environmental management system. 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 policy be given priority access to the Local Resource Centers.

As this option was not described in the January 23, 2002, **Federal Register** notice, EPA seeks public comment on this point.

VII. Miscellaneous Issues

In its January 23, 2002, **Federal Register** notice, EPA solicited comments on a number of other issues, including possible ways (such as fencelining) to reduce the States' burden of developing and implementing a comprehensive environmental compliance assistance program for small local governments, incentives for States and local governments to participate in such programs, the relationship between the policy and environmental management systems, and if a separate compliance assistance policy is needed for Tribal governments. With the exception of comments related to fencelining, the comments EPA received on these issues did not indicate a need for substantive revisions to the policy in these areas.

A. Burden on States

In addition to fencelining, EPA specifically asked for comment on four other possible ways to reduce a State's burden of developing and implementing a comprehensive environmental compliance assistance program: In-kind contributions from EPA; shifting costs to communities; tiering; and streamlining.

The commenters supported development and dissemination of in-kind contributions (*i.e.* compliance assistance materials, tools, and services that help implement a comprehensive environmental compliance assistance program) by EPA. Commenters advised against shifting costs to small local governments by requiring local governments to evaluate their own compliance status and devise a strategy to achieve and sustain environmental compliance as a prerequisite to receiving compliance assistance from the State. Commenters favored tiering, the provision of different levels of service to different classes of local governments, as a way to focus intensive compliance assistance where it is most needed. Streamlining drew little comment except from those commenters who pointed out that different branches of Federal government should always attempt to coordinate related mandates to the maximum extent possible.

Commenters' support for in-kind contributions from EPA was tempered by their belief that such contributions would be of limited value, as State environmental standards often differ from Federal regulations in some details, and federally-produced materials would not provide

information on State contacts. Shifting costs to small local governments drew negative comment. Respondents asserted that this approach, by requiring small local governments to identify their environmental responsibilities and develop a plan to address their environmental concerns before requesting assistance from the State, would be antithetical to the policy's goal of providing compliance assistance to small local governments unable to understand and address their environmental responsibilities. Respondents also questioned the reliability of compliance evaluations performed by untrained individuals—even if conducted with checklists and guidance materials provided for that purpose.

EPA generally agrees with these comments. While the Agency's in-kind assistance may not be able to meet every need of States and local governments, EPA believes, in most instances, States will need to make only minor modifications to incorporate essential State details the Federal materials may lack. For this reason, EPA will continue its efforts to make its compliance assistance materials as useful as possible, and to facilitate dissemination of the assistance to local governments. EPA also agrees that requiring small local governments to identify compliance concerns and a strategy for addressing them as a prerequisite of participation in a State's comprehensive compliance assistance program could effectively bar entry of the very local governments the policy was intended to reach. We acknowledge, however, that States with limited available resources can always establish eligibility criteria intended to restrict the number of qualifying applicants. One option would be for a State to establish tiers of service that allow the local governments defined as small to participate without first identifying a compliance concern while requiring larger, more capable local governments to make such a showing as part of an application process.

In an attempt to promote streamlining, EPA has been an active participant in the U.S. Small Business Administration's E-Government project. E-Government is joining Federal agencies together to develop and pilot an on-line, interactive one-stop compliance assistance information source for businesses and local governments. Users will enter the system and complete a profile that describes their operations. E-Government will then generate links to compliance assistance resources available from the various Federal

agencies that regulate the user's activities.

Because EPA believes flexibility will allow Federal and State agencies to make best use of in-kind contributions from EPA, strategies for shifting costs to local governments, tiering levels of service, and streamlining among related government mandates, the proposed revised policy does not require states to take specific actions in these areas. EPA welcomes comments on this approach.

B. Incentives for Participation

EPA's January 23, 2002, **Federal Register** notice described potential benefits of a comprehensive environmental compliance assistance program for States and small local governments. Benefits to an implementing State include more complete and accurate assessments of the environmental compliance status of its small local governments, measurements of progress toward reducing risks to the health of its citizens and the environment, and improved ability to plan and budget for future environmental and infrastructure needs. EPA also discussed options for recognizing States for their efforts to provide comprehensive environmental compliance assistance to small local governments, providing priority access to EPA compliance assistance tools and services, and the likelihood of EPA funding for pilot projects.

All comments EPA received in response focused on Federal grants, which the commenters perceived as the only effective incentive for States to implement the policy.

To provide an incentive for local government participation, the *Small Communities Policy* contemplates that States will reduce or waive the normal noncompliance penalties for local governments that participate in their comprehensive environmental compliance assistance programs. Seven years of limited participation by local governments has shown this to be an ineffective incentive. In the January 23, 2002, **Federal Register** notice, EPA noted that achieving and sustaining comprehensive environmental compliance created other benefits for local governments. A participating local government can expect to identify all its environmental compliance concerns; develop a plan for achieving and sustaining environmental compliance; learn how to build the technical, managerial, and financial capacity necessary to meet its compliance goals; gain assurance it is keeping its residents safe from environmental risks; and plan and budget for the future operations confident they will not face surprise

costs from unforeseen environmental problems. Other benefits to participating communities may include recognition from EPA or their states, priority access to EPA compliance assistance tools and services, or priority access to EPA-funded compliance grants. There are also indications that local governments that undertake a comprehensive environmental compliance evaluation and implement a program to ensure sustained compliance can improve their bond ratings and reduce their insurance premiums. Commenters generally approved of these incentives and stressed the importance of public recognition both as a means of rewarding local governments for their efforts to achieve and sustain comprehensive environmental compliance and as a way to promote interest among other local governments.

To the extent yearly budgets allow, EPA's Office of Compliance will provide pilot grants to a limited number of States to help offset the resource demands of establishing a program to provide comprehensive environmental compliance assistance to small local governments. EPA will continue to work to provide and enhance other incentives for States. EPA will also continue to develop and expand the various local government incentives discussed above. As more tools and services are developed, and as funding for local government recognition becomes available, EPA will work to ensure coordination with State compliance assistance programs.

C. Application of the Policy to Tribes

EPA received no comments on whether or not the policy should create a distinction between States and Tribes that have received EPA approval for treatment as States. As a result, the proposed revised policy leaves the policy's effects on Tribal governments unchanged.

VIII. Other Comments

Commenters also suggested that the policy extend eligibility to non-governmental water systems that supply drinking water to a population equivalent to the population of a small local government, and to governmental organizations owned by a consortium of local governments that individually meet the policy's definition of small local government, but whose aggregated populations would exceed the policy's population cap. EPA does not propose making either of these suggested changes. Non-governmental water systems, even those serving small populations, represent themselves as having the technical, managerial, and

financial capacity for compliant operation at the time they contract to offer service at an agreed-upon rate. Noncomplying non-governmental water systems can obtain penalty relief if they disclose and correct violations in accordance with the *Audit Policy* or the *Small Business Policy*. Either of those policies may be a better option than the *Small Local Governments Compliance Assistance Policy* for resolving environmental concerns at a single facility that engages in only one operation. Additionally, unique aspects of the *Small Local Governments Compliance Assistance Policy* may not be appropriate (e.g., including violations discovered by the regulator) or applicable (e.g., performing comprehensive environmental compliance evaluations of several operations; building technical, managerial, and financial capacity; and developing a schedule for addressing all violations in order of risk-based priority) to non-governmental water systems.

With respect to governmental organizations owned by a consortium of small local governments, EPA notes that small local governments pool their resources in this fashion to ensure the resulting organization will have the technical, managerial, and financial capacity needed to perform its intended functions. Determining the organization's eligibility on the basis of the populations of the individual local governments misstates the size of the tax base and rate base that support the organization. It 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 that of a similar organization that provides services only to a single small local government.

A common sentiment among commenters was a conviction that EPA should maintain the policy's considerable flexibility. Commenters thought it important that the policy establish outer bounds within which States have latitude to design a comprehensive environmental compliance assistance program tailored to the particular needs of their small local governments. In many respects, the proposed revised policy provides States more flexibility than the 1995 policy. Local governments with populations of up to 3,300 are defined as "small" and receive all of the policy's benefits without first demonstrating need. Local governments with populations between 3,301 and 10,000 can also receive all of the policy's benefits if a State's consistently applied capacity test determines that the local

government lacks the technical, managerial, or financial capacity to achieve compliance without the State's assistance. In addition, these larger communities can participate on a "fenceline" basis to reduce the resource demands on both the State and the local government. The proposed revisions also increase flexibility by providing the EMS option to States and small local governments that wish to pursue this alternative. One way in which the proposed revision may arguably have decreased the States' flexibility under the policy is in replacing the former term "small community" with the term "local government".

IX. Possible EPA Implementation of a Federal Policy Similar to the *Small Local Governments Compliance Assistance Policy*

EPA takes the lead in providing compliance assistance to small local governments and initiating enforcement responses to their violations when the Agency is responsible for directly implementing a program, where EPA has primary enforcement authority within a jurisdiction, or where EPA takes action after consulting with the primacy or authorized State. EPA could develop a Federal policy similar to the *Small Local Governments Compliance Assistance Policy* as a tool EPA Regions could elect to use, at their discretion, in appropriate circumstances. If EPA were to adopt a similar policy, the Agency would reserve the right to determine the circumstances in which such a Federal policy would apply to the violations of small local governments. For example, EPA could choose to implement the policy only when, consistent with the Agency's priority-setting process, the Agency decides to deploy compliance assurance and enforcement resources to address small local government noncompliance that is a significant contributor to impaired waters, as part of a geographic initiative, or as part of an integrated strategy. Although EPA did not raise this issue in its January 23, 2002, **Federal Register** notice, internal Agency discussions identified the issue as one for possible clarification. EPA now seeks comment on whether and how the Agency could implement a Federal policy similar to the proposed *Small Local Governments Compliance Assistance Policy* in its compliance assistance and enforcement activities.

Dated: September 23, 2003.

Michael M. Stahl,

Director, Office of Compliance.

Small Local Governments Compliance Assistance Policy

A. Introduction and Purpose

The *Small Local Governments Compliance Assistance Policy* is intended to promote comprehensive environmental compliance among small local governments by providing incentives for them to make use of State compliance assistance programs, environmental audits, environmental management systems (EMS), or to participate in any activities that may increase small local governments' understanding of their environmental requirements and how to comply with those requirements. The policy accomplishes this by authorizing States¹ to reduce or waive, in certain circumstances, the civil penalty EPA guidance would normally require States to assess for the small local government's environmental violations, and to use enforcement discretion to provide compliance incentives for small local governments. 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.² 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

¹ This policy will also apply to the actions of territories and to the actions of Native American Tribes where conditions have been met for EPA to treat the Tribe as a State.

² 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 Ecological Assessment at www.epa.gov/ncea/ecologic.htm will help States and local governments identify which local environmental problems pose the greatest risk to human health, ecosystem health, and quality of life.

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.

B. Background

This policy implements section 223 of the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996.

C. Who Is Eligible for Compliance Assistance Under This Policy?

This policy applies to State comprehensive environmental compliance assistance activity related to facilities owned and operated by small local governments. A local government is defined as an organized unit of local government, authorized in a State's constitution and statutes, and established to provide general government to a county, municipality, city, town, township, village, or borough. A small local government is a local government that provides public services to 3,300 or fewer permanent residents. A local government that supplies public 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 (as 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.

D. 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, all violations discovered by the State during an inspection of some subset of the local government's operations in order of risk-based priority; 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.

E. 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. Local governments whose permanent residents number between 3,301 and 10,000 can qualify to receive the benefits of the policy 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.*, the local government has submitted less than 90 percent of the required drinking water monitoring reports in the past year);
- 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 public 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 or waived 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.

F. 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.

G. 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. 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 with between 3,301 and 10,000 permanent residents if the State applies a capacity test consistent with the criteria described in part E 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, www.epa.gov/compliance/resources/publications/assistance/sectors/notebooks/government.html; or the Local Government Environmental Assistance Network, www.lgean.org) or, in the case of local governments 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 applicable environmental requirement 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 J, below.

H. 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.³ While information regarding assessment of environmental risks is available from EPA’s National Center for Ecological Assessment at 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.

I. 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

³ 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.

implementing a written and enforceable compliance agreement incorporating a schedule⁴ that:

- Establishes a specified period for correcting all outstanding violations in order of risk-based priority;⁵

- 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.

J. 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

⁴ Neither a State nor a local government may unilaterally alter or supersede a local government’s obligations under existing Federal administrative orders or federal judicial consent decrees.

⁵ 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 importation part of the priority setting process.

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 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 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 www.epa.gov/OW-OWM.html/iso14001/ems2001final.pdf). Additional guidance

and information regarding how to obtain assistance from a local EMS resource center can be found at 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 terms of the agreement and schedule to incorporate correction of these violations. The small local government and the State may also to 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.

K. 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.⁶

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

⁶ 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.

[FR Doc. 03-25137 Filed 10-2-03; 8:45 am]

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ENVIRONMENTAL PROTECTION AGENCY

[FRL-7568-4]

Proposed Administrative Order on Consent Issued Pursuant to Sections 7003(a) and 3013(a) of the Resource Conservation and Recovery Act, In Re: the Former Medallie Art Facility, Danbury, CT

AGENCY: Environmental Protection Agency.

ACTION: Notice of proposed administrative settlement and request for public comment.

SUMMARY: In accordance with Section 7003(d) of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. 6901-6987, notice is hereby given of a proposed administrative order on consent for remediation of the former Medallie Art facility located in Danbury, Connecticut. The settling party is the Fairway Asset Management II, L.L.C. (Respondent), 52 Deer Hill Avenue, P.O. Box 1242 Danbury, CT 06813. The U.S. Environmental Protection Agency—Region I (EPA) is proposing to enter into this administrative order on consent to address claims under the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. 6901 *et seq.*, as amended by the Hazardous and Solid Waste Amendments of 1984. Notice is being published to inform the public of the proposed settlement and of the opportunity to comment. This settlement, embodied in a RCRA Administrative Order on Consent ("AOC"), requires Respondent to adequately monitor contaminated groundwater on-site; propose an interim remedy to control or abate the spread of contamination; close a contaminated impoundment on-site; implement a groundwater recovery system; and monitor its effectiveness. The proposed order will be issued pursuant to Sections 7003(a) and 3013(a) of the Resource Conservation and Recovery Act, 42 U.S.C. 6973(a) and 6934(a).

For thirty (30) days following the date of publication of this notice, the EPA will receive written comments relating to the settlement. The EPA will consider all comments received and may modify or withdraw its consent to the settlement if comments received disclose facts or considerations which indicate that the settlement is inappropriate, improper, or inadequate.

DATES: Comments must be submitted on or before November 3, 2003.

ADDRESSES: The proposed settlement and administrative record is available for public inspection at the Danbury

Public Library, 170 Main Street, Danbury, CT 06810, (203) 797-4505; and at the EPA Records Center, 1 Congress Street, Boston, MA 02114-2023. Please call the EPA Records Center at (617) 918-1440 to schedule an appointment. A copy of the proposed settlement may be obtained from Kristin Balzano, U.S. Environmental Protection Agency, Region I, 1 Congress Street, Suite 1100 (SES), Boston, MA 02114-2023 (Telephone Number: 617-918-1772). Comments should reference the former Medallie Art facility in Danbury, Connecticut, EPA Docket No. RCRA 01-2002-0030 and should be addressed to Kristin Balzano, U.S. Environmental Protection Agency, Region I, 1 Congress Street, Suite 1100 (SES), Boston, MA 02114-2023.

The EPA's response to any comments received will be available for public inspection at the EPA Records Center, 1 Congress Street, Boston, MA 02114-2023, Telephone Number: (617) 918-1440.

FOR FURTHER INFORMATION CONTACT: Joshua Secunda, U.S. Environmental Protection Agency, Region I, 1 Congress Street, Suite 1100 (SEL), Boston, MA 02114-2023, Telephone Number: (617) 918-1736.

SUPPLEMENTARY INFORMATION: In accordance with the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. 6901 *et seq.*, notice is hereby given of a proposed administrative order on consent pursuant to Sections 7003(a) and 3013(a) of RCRA, 42 U.S.C. 6973(a) and 6934(a) concerning the former Medallie Art facility in Danbury, CT. The settlement was approved by EPA Region I, subject to review by the public pursuant to this Notice. EPA will receive written comments relating to this settlement for thirty (30) days from the date of publication of this Notice.

Dated: September 23, 2003.

Susan Studlien,

Acting Director, Office of Site Remediation and Restoration, EPA—Region I.

[FR Doc. 03-25138 Filed 10-2-03; 8:45 am]

BILLING CODE 6560-50-P

FEDERAL COMMUNICATIONS COMMISSION

Notice of Public Information Collection(s) Being Reviewed by the Federal Communications Commission

September 23, 2003.

SUMMARY: The Federal Communications Commission, as part of its continuing effort to reduce paperwork burden invites the general public and other