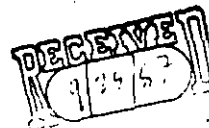




UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

SEP 21 1987



OFFICE OF
ENFORCEMENT AND
COMPLIANCE MONITORING

MEMORANDUM

SUBJECT: Guidance on the Use of Stipulated Penalties in Hazardous Waste Consent Decrees

FROM: Thomas L. Adams, Jr. *Thomas L. Adams Jr.*
Assistant Administrator

TO: Regional Administrators, Regions I-X
Regional Counsels, Regions I-X
Waste Management Division Directors, Regions I-X

I have attached the final guidance addressing the use of stipulated penalties in civil judicial settlements under CERCLA and RCRA Section 7003. This document reflects comments which were received from the Office of Waste Programs Enforcement (OWPE), the Department of Justice (DOJ), and various Regional offices.

This guidance does not apply to administrative orders, such as RI/FS orders. In addition, to complement this guidance, the Agency is considering additional guidance to provide positive incentives for defendants to expedite completion of work under consent decrees.

I appreciate your assistance in the preparation of this guidance.

Attachment

cc: J. Winston Porter, Assistant Administrator for Solid Waste and Emergency Response
Gene A. Lucero, Director, Office of Waste Programs Enforcement
Roger J. Marzulla, Acting Assistant Attorney General, Land and Natural Resources Division, Department of Justice
David T. Buente, Chief, Environmental Enforcement Section, U.S. Department of Justice

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GUIDANCE ON THE USE OF STIPULATED PENALTIES
IN
HAZARDOUS WASTE CONSENT DECREES

SEP 21 1987

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Office of Enforcement and Compliance Monitoring
1987

I. INTRODUCTION

This document provides guidance on the use of stipulated penalties in hazardous waste judicial consent decrees. Stipulated penalties are fixed sums of money that a defendant agrees to pay for violating the terms of a decree. Such penalties are an effective enforcement tool for encouraging compliance with a consent decree.

This guidance applies to consent decrees under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. § 9601 et seq., as amended, and Section 7003 of the Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. § 6973, supplements existing guidance^{1/} issued by the United States Environmental Protection Agency (EPA), and incorporates recent Agency experiences in negotiating and overseeing consent decrees. The Agency strongly encourages the use of stipulated penalty provisions in consent decrees. It also supports the use of contempt penalties, statutory penalties and injunctive relief as additional sanctions for the violation of consent decrees.

^{1/} See "Drafting Consent Decrees in Hazardous Waste Imminent Hazard Cases" (Office of Enforcement and Compliance Monitoring (OECM), Office of Solid Waste and Emergency Response (OSWER), May 1, 1985), "Guidance for Drafting Judicial Consent Decrees" (OECM, October 19, 1983), "Division of Penalties with State and Local Governments" (OECM, October 30, 1985), "Remittance of Fines and Civil Penalties" (OECM, April 15, 1985) and the Superfund Amendments and Reauthorization Act of 1986.

While the concept of stipulated penalties also has relevance for administrative orders, distinctions between such orders and consent decrees may necessitate some differences in precise application. Guidance on use of stipulated penalties in administrative orders will be provided separately.

II. GUIDANCE

A. Use of Stipulated Penalties

1. General Rule

In the past, it has been OECM policy to include stipulated penalties in most consent decrees. See "Guidance for Drafting Judicial Consent Decrees" at 22. Moreover, the Superfund Amendments and Reauthorization Act of 1986 (SARA) requires that consent decrees which provide for remedial action^{2/} contain stipulated penalties. Section 121(e)(2) of SARA provides that:

...Each consent decree shall also contain stipulated penalties for violations of the decree in an amount not to exceed \$25,000 per day, which may be enforced by either the President or the State. Such stipulated penalties shall not be construed to impair or affect the authority of the court to order compliance with the specific terms of any such decree. (Emphasis added).

However, Section 121 does not explicitly require that every requirement of a consent decree have a stipulated penalty attached to it.

^{2/} Although Section 121 deals with "remedial" actions, it is recommended that stipulated penalties be included in consent decrees for removals as well.

Section 122(1) also permits additional penalty sanctions for violations of the requirements of a consent decree. Section 122(1) of SARA provides as follows:

(1) CIVIL PENALTIES - A potentially responsible party which is a party to an administrative order or consent decree entered pursuant to an agreement under this section or section 120 (relating to Federal facilities) or which is a party to an agreement under section 120 and which fails or refuses to comply with any term or condition of the order, decree or other agreement shall be subject to a civil penalty in accordance with section 109.

Thus, in the context of a CERCLA consent decree with mandated stipulated penalties, both the stipulated penalties contained in the consent decree and the Section 122(1) penalties may be assessed for violations of the terms of the decree. However, in limited circumstances, where the stipulated daily penalty amounts are sufficiently high to effectively deter noncompliance with the decree, the Agency may consider waiving Section 122(1) penalties. Such penalties nonetheless may be sought for any violations to which no stipulated penalty attaches.

Stipulated penalties are seldom applicable to noncompliance with every requirement of a decree. Most often they are applicable to compliance schedules, performance standards, and reporting requirements. The types of violations for which stipulated penalties should be required will necessarily depend on the value the Agency places on the activity to be performed and the importance of timely performance.

Even consent decrees which primarily involve a "cash out" (i.e., where the defendant pays a fixed sum of money to absolve himself of his remedial obligations) warrant the inclusion of stipulated penalties. For example, if a defendant agrees to pay his cash out share in installments, stipulated penalties should be used to penalize late payments. If a case arises in which the defendant must perform certain tasks in addition to cashing out (such as providing site access or security), stipulated penalties should be imposed to ensure that the defendant performs those tasks.

2. When Penalties May Be Excused Or Delayed

Usually stipulated penalties should begin to accrue after the date on which complete performance of a particular task is due. Stipulated penalties will not necessarily accrue, or the accrual of such penalties may be stayed or waived, however, during designated periods or by the occurrence of certain events.

a. Force Majeure Event^{3/}

One of the most common reasons for the noncollection of stipulated penalties is the occurrence of a force majeure event. A force majeure event is one which is beyond the control of the defendant and provides the defendant with an affirmative

^{3/} Model force majeure language is forthcoming as an appendix hereto.

defense to a charge of noncompliance. Since penalties do not accrue during this period, the definition of a force majeure event should be narrowly drawn and the burden placed on the defendant to show that a force majeure event has occurred. In any event, neither increased costs nor financial difficulty should constitute a force majeure event.

b. Dispute Resolution Period

To avoid creating incentives to dispute consent decree obligations, stipulated penalties generally should accrue for any nonperformance occurring during the period of dispute. However, for limited types of disputes, EPA may agree to waive the accrual of penalties during the dispute resolution period. For example, consent decrees often permit the Agency to require that additional work be performed beyond that specifically provided for in the work plan. Where the defendants become aware of substantial "mid-course corrections" after the decree is signed, it may be appropriate to forego stipulated penalties during any legitimate dispute related to the additional work sought by EPA.

Stipulated penalties will not be collected if the defendant wins the dispute. In addition, in appropriate circumstances the Agency may use its discretion not to collect stipulated penalties, in whole or in part, which have accrued during the dispute resolution period.

c. Period of Correction by Defendant

A stipulated penalties provision may indicate that penalties will accrue until the violation is corrected by the defendant. To minimize uncertainties and foster timely and full compliance, such a statement should specify that penalties will accrue through the last day of correction, as determined by the Agency, rather than cease to accrue on the day the defendant begins to correct the violation.

d. Missed Interim Deadlines

Some decrees provide that penalties for interim deadline violations will not be sought if the defendant meets the final completion date. Since in many instances the final deadline is the most important, the penalties for violations of interim milestones may be waived in some cases. It should be clear to the defendant, however, that if the final deadline is missed, the penalties for interim deadline violations will be sought in addition to those which would accrue after the final deadline. The "Guidance for Drafting Judicial Consent Decrees" notes that interim deadline penalties may be collected up front and placed into an escrow account, to be returned to the defendant in the event the final compliance deadline is met. Id. at 24.

e. Grace Period

Some prior decrees provided for a fixed period immediately following notification of a violation in which the defendant was given the opportunity to explain his noncompliance and/or

correct it and during which stipulated penalties would not accrue. The length of such grace periods has ranged from 3 to 30 days. However, by requiring that every consent decree contain stipulated penalties, Congress has endorsed a strong preference for strict compliance with the terms of a decree. While the Agency does not endorse the use of grace periods, if a violation is expeditiously resolved the Agency may use its discretion not to seek stipulated penalties.

B. Amount of Stipulated Penalties

1. General Rule

Since stipulated penalties are intended to ensure compliance, they should be sufficient to provide economic incentives to the defendant to comply with the terms of the consent decree in a timely fashion. The penalty should not be set so low that the defendant would prefer to pay the penalty rather than perform the required activity.^{4/} Therefore, stipulated penalties should generally be set at a level designed to exceed the amount of the estimated savings due to delay. In setting the amount, the Agency should also take into consideration the gravity of the violation and the degree of harm or danger to the public or environment which might result from the violation.

^{4/} Actual performance is required regardless of the payment of penalties. The Agency reserves the right to seek injunctive relief, modify the decree, or seek other remedies in such instances.

Each stipulated penalties provision should state a fixed amount per day to be imposed. This "sum certain" puts the defendant on notice of the potential extent of his obligation before a violation occurs.^{5/} The "undetermined amount" approach (i.e., "defendant shall pay up to \$5000/day") should not be used since it makes the amount of the penalty subject to further resolution. The "undetermined amount" may destroy the economy of using stipulated penalties since the parties must then resolve the ultimate amount.

2. Escalating Penalty

Consent decrees should provide that the per diem amount of the penalty will increase with incremental increases in the period of noncompliance. For example, a fixed penalty of \$5,000 per day might increase to \$10,000 per day after the 15th day of noncompliance, and \$15,000 per day after the 30th day. Escalating penalties will give the defendant added incentive to come into compliance, and it is recommended that they be used as a general rule.

^{5/} To the extent that EPA reserves its rights to seek penalties under SARA § 109 or civil contempt orders, however, the "sum certain" argument is really only an indication of the minimum amount for which a consent decree violator may be liable.

3. Sharing Penalties with the State^{6/}

Generally, civil penalties may be shared with a State if the State has actively participated in the litigation, actively sought such penalties, and State law provides independent authority for the State to seek civil penalties.^{7/} In addition,

[t]he penalties should be divided in a proposed consent decree based on the level of participation and the penalty assessment authority of the state or locality....[T]he division should reflect a fair apportionment based on the technical and legal contributions of the participants, within the limits of each participant's statutory entitlement to penalties.

"Division of Penalties with State and Local Governments" at 3. Any agreement to share penalties with a State must be described in the consent decree. "Division of Penalties with State and Local Governments" at 2.

C. Collection of Stipulated Penalties

1. General Rule

Since Agency policy encourages aggressive post-settlement enforcement, it is essential to the integrity of the enforcement program that stipulated penalties be collected. Every

^{6/} Note that Section 121(e)(2) of SARA gives States the authority to enforce the stipulated penalties section of consent decrees.

^{7/} Penalty division is a matter for discussion only between the governmental parties, and it is inappropriate for the defendant to participate in such discussions. "Division of Penalties with State and Local Governments" (OECM, October 30, 1985) at 3.

effort shall be made to collect stipulated penalties both to deter future noncompliance by defendants and to maintain the Agency's enforcement credibility. The Agency thus will not hesitate to initiate judicial actions to enforce the stipulated penalties provision of consent decrees.

2. Procedure for Collecting Penalties

Forfeiture is the best method of collecting penalties and should be provided for in the decree. Under this procedure, upon notice of a violation^{8/} the defendant will have a stated number of days to pay the penalty or to move the issue into dispute resolution.

Consent decrees should not contain a limitations period for demanding stipulated penalties which results in the waiver of penalties that are not demanded within a specified period of time.

3. Payment of Penalties

The stipulated penalties section should indicate to whom monies are payable. This is particularly important for actions brought under CERCLA, since the "Superfund" is partially replenished by monies paid under that statute. Although monies collected pursuant to RCRA generally are paid to the "Treasurer of the United States," stipulated penalties collected pursuant

^{8/} Penalties should begin to accrue on the day on which the violation actually occurs and not when the Agency later discovers it or gives notice to the defendant.

to CERCLA violations are to be made payable to the "Hazardous Substances Superfund."^{9/} All penalties should be paid by certified check, contain the complete address of the defendant, include the site identification number if there is one, and reference the case name and civil action number.

D. Use of Other Remedies

Collection of stipulated penalties is not the sole remedy for violations of a decree. There may be times when the Agency will seek additional remedies, such as the court's equitable contempt powers or the collection of additional penalties under SARA or other applicable authorities. See, e.g., SARA § 109. Thus, to preserve the Agency's rights, each section on stipulated penalties should state that these penalties are "in addition to, and not in lieu of" the Agency's right to other sanctions for violations of the decree.^{10/}

^{9/} This is supported by the guidance memorandum on "Remittance of Fines and Civil Penalties" (OECM, April 15, 1985) which indicates that "all Superfund billings" should go into a lockbox bank specifically designated for Superfund monies. In addition, since Section 107(c)(3) of CERCLA directs that punitive damages go into the Superfund, our view is that CERCLA stipulated penalties should be deposited there as well.

The address for the CERCLA lockbox is:

EPA - Superfund
P.O. Box 371003M
Pittsburgh, PA 15251

^{10/} Subject, of course, to any waiver of Section 122(1) penalties (see discussion at p. 3).

E. Purpose and Use of This Guidance

This guidance and any internal procedures adopted for its implementation are intended solely as guidance for employees of the United States Environmental Protection Agency. They do not constitute rulemaking by the Agency and may not be relied upon to create a right or a benefit, substantive or procedural, enforceable at law or in equity, by any person. The Agency may take action at variance with this guidance or its internal implementing procedures.

APPENDIX

MODEL STIPULATED PENALTIES PROVISIONS^{11/}

. STIPULATED PENALTIES

1. Defendant shall pay stipulated penalties in the amounts set forth in paragraph 9 to the United States [and/or the State of] for failure to comply with [sections of] this Consent Decree, unless excused under paragraph ("Force Majeure"). Compliance by Defendant shall include completion of an activity under this decree or a plan approved under this decree or any matter under this decree in an acceptable manner and within the specified time schedules in and approved under this Decree. [If Defendant fails to meet [specified] interim deadlines, but meets the final completion date for the work to be performed herein, the penalties for missed interim deadlines are excused]. Any modifications of the time for performance pursuant to section ("Modifications") shall be in writing.

2. All penalties begin to accrue on the day that complete performance is due or a violation occurs, and continue to accrue through the final day of correction of the noncompliance. Nothing herein shall prevent the simultaneous accrual of separate penalties for separate violations of this Decree.

3. Following Plaintiff's determination that Defendant has failed to comply with the requirements of this Decree, Plaintiff shall give Defendant written notification of the same and describe the noncompliance. Said notice shall also indicate the amount of penalties due.

4. All penalties owed to the United States [or State] under this section shall be payable within 30 days of receipt of the notification of noncompliance, unless defendant invokes the dispute resolution procedures under section . Penalties shall accrue from the date of violation regardless of whether EPA [or the State] has notified Defendant of a violation. Interest shall begin to accrue on the unpaid balance at the end of the 30-day period. Such penalties shall be paid by certified check to ["Treasurer of the United States" for RCRA penalties, or "Treasurer of the State of X", or to the "Hazardous Substances Superfund" for CERCLA penalties] and shall contain Defendant's complete and correct address, the site name, [the site spill identifier number (SSID)], and the civil action number. All

^{11/} Bracketed provisions are optional.

checks shall be mailed to [the appropriate Federal lockbox bank or State postal address].

5. Neither the filing of a petition to resolve a dispute nor the payment of penalties shall alter in any way Defendant's obligation to complete the performance required hereunder.

6. Defendant may dispute Plaintiff's right to the stated amount of penalties by invoking the dispute resolution procedures under section ___ herein. [Penalties shall accrue but need not be paid during the dispute resolution period. If the District Court becomes involved in the resolution of the dispute, the period of dispute shall end upon the rendering of a decision by the District Court regardless of whether any party appeals such decision]. If Defendant does not prevail upon resolution, Plaintiff has the right to collect all penalties which accrued prior to and during the period of dispute. [In the event of an appeal, such penalties shall be placed into an escrow account until a decision has been rendered by the final court of appeal]. If Defendant prevails upon resolution, no penalties shall be payable.

7. No penalties shall accrue for violations of this Decree caused by events beyond the control of Defendant as identified in Section ___ herein ("Force Majeure")^{12/}. Defendant has the burden of proving force majeure or compliance with this Decree.

8. If Defendant fails to pay stipulated penalties, Plaintiff may institute proceedings to collect the penalties. However, nothing in this section shall be construed as prohibiting, altering, or in any way limiting the ability of Plaintiff to seek any other remedies or sanctions available by virtue of Defendant's violation of this Decree or of the statutes and regulations upon which it is based.

9. The following stipulated penalties shall be payable per violation per day to the United States [and/or State] for any noncompliance identified in subparagraph 1 above^{13/}:

^{12/} With the exception of stipulated penalties clauses in consent decrees providing solely for cash payments, most decrees will include force majeure clauses.

^{13/} Please note that the penalty amounts set out above are only examples, and the amounts may vary with each individual case.

<u>Amount/Day</u>	<u>Period of Noncompliance</u>
\$ 5,000	1st thru 14th day
\$10,000	15th thru 30th day
\$15,000	31st day and beyond]

10. No payments made under this section shall be tax deductible.

11. This section shall remain in full force and effect for the term of this Decree.