
UNITED STATES' CLEAN AIR ACT FIELD CITATION PROGRAM: NEW ENFORCEMENT AUTHORITY TO ADDRESS MINOR VIOLATIONS

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SUMMARY

An overview of a new enforcement tool currently being developed by the U.S. Environmental Protection Agency to address and correct minor violations of the Clean Air Act is presented. Major issues in the implementation of this program are highlighted, and a general summary of the program's potential impact is provided.

1 INTRODUCTION

In an effort to curb a growing threat to the nation's air quality, the U.S. Congress passed the Clean Air Act Amendments (CAAA) of 1990. The Amendments addressed three major areas of concern—acid rain, urban air pollution, and toxic air emissions—and also greatly strengthened the enforcement provisions of the Clean Air Act (the Act).

Prior to the passage of the CAAA, the U.S. Environmental Protection Agency (EPA) enforced Clean Air Act provisions largely through civil or criminal judicial enforcement actions, and through a very limited administrative penalty program for highly specific cases. These enforcement mechanisms limited the range of violations that could be pursued because of the extensive resources required. The 1990 Amendments, however, expanded EPA's enforcement options by authorizing EPA to issue administrative penalty orders of up to \$200,000 and to issue field citations assessing administrative penalties of up to \$5,000 per violation for less serious infractions. Field Citations are notices of violation that assess penalties for minor violations in a manner similar to that of traffic tickets. Field citations may be issued either on-site following an inspection or from an EPA office, and which assess penalties of up to \$5,000 for each violation.

These new enforcement tools will enhance the Agency's ability to enforce the Act by enabling EPA officials to address violations that previously may have been viewed as too minor to warrant attention. Where appropriate, EPA will now be able to respond quickly to a violation by issuing an administrative penalty order or a field citation, rather than commencing a civil judicial enforcement action for penalties. While civil and criminal judicial enforcement actions will remain an important component of EPA's enforcement program, EPA's new administrative authorities enable it to effectively pursue a broader range of violations without the expenditure of resources associated with judicial action.

An important part of the Agency's recently-granted authority for the administrative assessment of civil penalties is the authority to issue field citations, found in Section 113(d)(3) of the Act [42 U.S.C. 7413]. This section authorizes EPA to implement a Federal program through regulations which establish appropriate minor violations and informal hearing procedures. Field citations assessing penalties of up to \$5,000 per day of violation may be issued by EPA officers or employees.

Section 113(d)(3) of the Act also provides that any person to whom a field citation is issued may elect either to pay the proposed penalty or to request a hearing in accordance with procedures specified in the regulations. It further provides that the penalty assessed in the field citation becomes final if a request for a hearing is not made within the time specified in the implementing regulations.

Any person against whom a civil penalty is assessed under the field citation program also has the option to seek review in the appropriate district court.

It is important to note that the statute passed by Congress and signed by the President merely confers authority—it does not establish a field citations program. Rather, in order to take advantage of this new authority and to actually issue field citations, EPA is required to develop implementing regulations consistent with the statute. In keeping with this requirement, EPA is currently developing the regulations necessary to make use of this new Clean Air Act authority.

The Agency's regulatory development process is normally a team effort involving representatives from EPA Regions and a number of Agency offices. These representatives make up the regulatory workgroup which is responsible for the actual drafting of the rule. Although the States and the public are sometimes consulted on an informal basis during this drafting, their input is normally sought only during the formal public comment period. For this particular rulemaking, however, the statute requires that EPA consult with the Attorney General of the U.S. and the States prior to the public comment period. Consequently, the Department of Justice and State and local agencies and have been actively represented at workgroup meetings. In addition, a special sub-workgroup was convened to address the particular concerns of State and local agencies.

The field citation regulation (40 CFR Part 59, currently under development), will enable EPA officers or employees to issue field citations either on-the-spot during a site inspection, or from the office. The provision for office issuance of citations will enable EPA to address reporting violations which are normally detected only in the office where the report is delivered. Even where a violation is discovered in the field, the inspector has the option (and would be encouraged) to return to the office for clarification if there is any doubt regarding the nature of the violation or the appropriate penalty amount.

2 ISSUES IN DESIGNING A FIELD CITATION PROGRAM

Several major issues arose during the development of regulations to implement and design the program.

2.1 Definition of the minor violations subject to field citations

As noted previously, it was Congress' intent that field citations supplement our existing enforcement tools and be issued only for minor violations. The Clean Air Act specifically directs EPA to develop regulations which establish minor violations appropriate for the issuance of field citations. The Agency considered several options for defining minor violations.

2.1.1 Comprehensive lists

One option was to include in the rule a comprehensive list of all possible violations suitable for field citations. This option was rejected as impractical and of limited utility, since almost any violation could be considered minor, depending on the circumstances. For example, failure to submit a semiannual report of excess emissions might be considered minor if it is only a few weeks late and the source has no prior history of enforcement actions. However, that same violation might alternatively be deemed significant if the owners or operators have repeatedly failed to submit reports or if the source is the subject of an ongoing EPA or State investigation.

2.1.2 Categories of requirements

A second option defined minor violations by limiting the program to particular categories of regulatory requirements (e.g., recordkeeping, reporting, labeling, monitoring, workpractice standards, etc.). This option, however, was rejected for the same reason as the first—namely, that any violation

within these broad categories (and even violations outside such categories) could be considered minor, depending on the circumstances.

2.1.3 Factors approach

Given the importance of specific circumstances in characterizing a violation as minor, EPA selected a third option that defines minor violations based on a list of factors to be considered as a whole. The list includes such factors as whether the violation is readily recognizable; the time, effort, and expense required to correct the violation; frequency and duration of the violation; and importance of the violated requirement to the regulatory program.

Typically, a minor violation will involve a clear and straightforward infraction that is uncomplicated both factually and legally, and is of limited frequency or duration and limited environmental impact. Minor violations may include such items as improper labeling; failure to record each control device operating parameter during the compliance period; failure to submit a required notification or report on schedule; or inadequate maintenance of a workpractice standard. Once again, the particular circumstances surrounding the violation would determine whether it should be pursued as minor.

EPA believes that this broad approach to defining minor violations will provide the flexibility necessary for an enforcement program designed to address a wide variety of factual circumstances. This flexibility will be balanced by detailed guidance and training to limit inspector discretion and promote national consistency.

2.2 Hearing procedures: Dispute resolution

Any person to whom a field citation is issued has the right to request a hearing, and the statute requires EPA to develop appropriate hearing procedures. Congress clearly believed that due process rights would be met through informal, expedited hearings, and therefore, did not require that field citation hearings conform to the requirements of the Administrative Procedure Act (APA), 5 U.S.C. §§ 554 or 556. The APA provides a formal and extensive adjudicatory process for more complex cases; however, the field citation program was specifically exempted from these requirements. Instead, the statute specifies only that field citation hearings provide a reasonable opportunity to be heard and to present evidence.

EPA's objective was to provide the most streamlined, straightforward procedures that would satisfy due process requirements for fairness and meet the intent of Congress. A number of options were discussed, each of which had both strengths and drawbacks when applied to the field citation program. In addition, concerns were raised regarding Agency familiarity and experience with the procedures, relative ease of use, and the need for consistency with other similar Agency programs. After protracted discussions, the Agency was unable to strike a balance on these competing concerns, and ultimately decided to propose for comment three distinct alternatives that all would establish fair and reasonable procedures to govern hearings on field citations. These alternatives are: (1) EPA's consolidated, APA penalty assessment procedures under 40 CFR Part 22, with appropriate revisions; (2) EPA's proposed consolidated, non-APA penalty assessment procedures under 40 CFR Part 28, with appropriate revisions; and (3) new, streamlined administrative procedures developed specifically for the field citation program.

2.2.1 Rely upon existing administrative penalty procedures

Under the first Agency proposal, administrative hearings on field citations would be conducted pursuant to the procedures established by EPA's consolidated APA rules of practice for the administrative assessment of civil penalties, 40 CFR Part 22. This is the most formal of the three options proposed, more closely resembling a civil judicial trial. An Administrative Law Judge (ALJ) presides, and the Agency has the burden of proving the violation.

Using Part 22 to govern hearings on field citations would consolidate all of the Clean Air Act administrative penalty hearings under one set of procedures. Additionally, the Agency has used Part 22 for assessing administrative penalties under other environmental statutes since 1980. Consequently, both the regulated community and the Agency have considerable experience with these procedures, thereby simplifying the implementation of the field citation program. On the other hand, these procedures may be more complex than is necessary, considering the small penalty amounts involved, and the fact that the statute specifically exempts this program from any requirement to follow such formal procedures.

2.2.2 Rely upon existing streamlined procedures for administrative penalties

Under the second option considered and proposed by the Agency, hearings on field citations would be conducted pursuant to the procedures in EPA's proposed non-APA consolidated rules of practice for the administrative assessment of penalties, 40 CFR Part 28. The major differences between Part 28 and Part 22 are that Part 28 provides for a Presiding Officer instead of an Administrative Law Judge; imposes page limits on written submissions; and eliminates the right to appeal the decision of the Presiding Officer to the Administrator. As with the Part 22 option, appropriate amendments would be needed to make these procedures applicable to field citations.

Part 28 was proposed to consolidate and harmonize certain EPA procedural rules and guidance for the administrative assessment of civil penalties under various statutes where Congress gave EPA authority to conduct non-APA hearings. The basic hearing requirements for the field citation program are similar in structure to those programs proposed for inclusion under 40 CFR Part 28. Moreover, adding the field citation program to Part 28 would promote a greater potential for non-APA multimedia enforcement actions by providing a common administrative forum. The downside is that if Part 28 procedures were adopted for field citations, two separate procedures for the administrative assessment of civil penalties under the CAA would be required — Parts 28 and 22. Another concern is that Part 28 procedures govern a wide range of statutory provisions, involving civil penalties of up to \$25,000 per violation. This contrasts with the field citation program where penalties would not exceed \$5,000 per violation. Here again, there is concern that perhaps these procedures are more formal than is required for the field citation program. In addition, these procedures have not been promulgated as final regulations; consequently, EPA and the regulated community have little familiarity or experience with their implementation.

2.2.3 New procedures

The third Agency proposal is to develop new procedures that are better suited to the field citation program than either the Part 22 or proposed Part 28 procedures. These new procedures, included as a sub-part under the Part 59 regulation, are more streamlined and informal, allowing the Presiding Officer broad discretion to limit the number of witnesses and the length of written submissions; to determine the appropriate form of testimony; and to schedule a prehearing conference at his or her option. In addition, the respondent is allowed to submit written arguments and evidence in lieu of requesting a hearing. This provision further streamlines the process by allowing the Presiding Officer to make a determination on the administrative record without the delays inherent in conducting a prehearing conference, information exchange, and hearing.

The Agency believes the proposed Part 59 procedures implement Congressional intent for the field citation program, while satisfying procedural due process concerns. The value of these procedures is that they are simple, straightforward, and will lead quickly to a final decision. Quick resolution is important not only for the resources saved, but also because the deterrence effect from this program will come in large part from the issuance of a citation immediately upon, or shortly after, detection of a violation, and where final resolution is accomplished shortly thereafter. Any additional procedures run the risk of significantly increasing the administrative burden and length of field citation

proceedings. This could make the program highly inefficient and a drain on government resources, given the small potential penalties and the limited environmental risks posed by minor violations.

Following the public comment period, one of the proposed options described above will be selected for the final rule. While much attention has been placed on developing appropriate hearing procedures, it is EPA's expectation that, in the great majority of cases, the issuance of a field citation will lead to a quick correction of a clear violation and payment of the assessed penalty, and that there will be no need to pursue the violation further.

2.3 Maximum penalty and cap

The Act requires that civil penalties assessed in a field citation not exceed \$5,000 per day of violation. Consistent with the Act's legislative history and the Agency's longstanding interpretation of "per day of violation," this provision is being interpreted to mean that the maximum \$5,000 penalty applies to each separate violation cited in the field citation. The regulated community, however, has argued that the "per violation" interpretation leaves open the potential for extremely high penalty assessments, and establishes no clear boundaries on the scope of the program. Moreover, they believe that if Congress had intended such high penalty amounts, the field citation program would have been subject to formal APA hearing procedures (as required under the administrative penalty program) to ensure that adequate due process rights are met.

In response to these concerns, the Agency is proposing a ceiling or "cap" on the total penalty that may be assessed for multiple violations cited in a single field citation. The proposal seeks comment on a cap in the range of \$15,000 to \$25,000. This cap will serve to limit the scope of the program, and give the regulated community a clear indication of the maximum penalty assessments that can be expected. Regardless of the dollar amount that is ultimately selected for the penalty cap, it is the Agency's position that large numbers of minor violations are indicative of a more serious underlying compliance problem, and therefore, would not be appropriate for the issuance of field citations.

2.4 State delegation

Except for a few non-delegated standards, the majority of Federal air quality regulations are implemented and enforced by the States. Since the bulk of inspections are carried out by State agencies and the States assume the lead in enforcement actions, they believe that they should be delegated the field citation program as well. While we agree that it would be valuable for the States to have this authority, it is the Agency's position that Congress, by statute, explicitly reserved the authority to issue field citations for EPA personnel only. Nonetheless, the Agency recognizes that close cooperation with State and local agencies is essential to the success of the program. The integral involvement of States will prevent duplication of effort and ensure that field citations are not issued where there is already an ongoing State enforcement action. In addition, information supplied by State and local agencies may be used as the basis for issuing field citations, so it is important that EPA inspectors effectively coordinate with their State and local counterparts.

To this end, a workgroup of State and local agency representatives was convened to discuss implementation of the program. This workgroup will also be involved in the development of the accompanying guidance document and inspector training materials. Although State and local agencies may not be delegated the authority to issue Federal field citations, this rule could serve as an example that might later be replicated in local jurisdictions.

2.5 Program implementation guidance

Other programs within the Agency have used their administrative order and penalty authority in a similar fashion and issued what are referred to as "field citations." For example, the Office of Underground Storage Tanks (OUST) has a similar program whereby field citations are issued on-site

by inspectors for prevalent, clear-cut violations that are relatively easy to correct. The OUST program, however, differs substantially from the air field citation program in that the OUST citations are actually short-term settlement agreements; they do not necessarily carry penalties; and they are not subject to standard hearing procedures. Despite these differences, there are many areas in which the air field citation program can benefit from the experience of OUST, and we will rely on this experience as we prepare to implement our own program.

To accomplish the goals of the air enforcement field citation program, EPA plans to issue guidance addressing a wide variety of implementation issues. This guidance will cover such broad areas as coordination of inspections with State and local agencies; desk issuance versus field issuance of citations; determination of whether a violation is truly minor; and procedures for calculating appropriate penalty amounts. The guidance will also address such issues as how to revoke a field citation, and how field citations will be recorded and tracked. In addition, a comprehensive training program for inspectors will be provided to ensure consistency in the implementation of this new enforcement authority.

2.6 Regulatory schedule

This regulation has been approved by the U.S. Office of Management and Budget, and is expected to be proposed in the Federal Register in March 1994. Promulgation is expected in March 1995, at which time the accompanying guidance will also be issued.

3 CONCLUSION

The field citation program is only one enforcement tool in EPA's broad range of options to maximize compliance with the Clean Air Act. Field citations are intended specifically to address minor compliance problems that have previously been neglected due to limited Agency resources. The opportunity for streamlined, expedited enforcement to address minor violations should save Agency resources, reduce court backlogs, and send a clear enforcement message to violators that even minor violations will not be overlooked. Moreover, this attention to smaller details is expected to result in improved overall compliance rates, as sources will take greater care to ensure that all regulatory requirements are being met. In addition, by stressing the importance of even lesser requirements, sources may be able to detect and correct problems earlier on, thereby reducing the chances that small problems will develop into significant violations.