

ENVIRONMENTAL PROTECTION AGENCY**40 CFR Part 142**

[FRL-6121-7]

Public Water System Program; Removal of Obsolete Rule

AGENCY: Environmental Protection Agency.

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is today amending its regulations to remove from the Code of Federal Regulations (CFR) rules pertaining to the issuance of proposed administrative compliance orders pursuant to Section 1414(g)(2) of the Safe Drinking Water Act, as amended in 1986 (1986 Act). Enactment of the Safe Drinking Water Act Amendments of 1996 (1996 Act) eliminated the statutory requirement in the 1986 Act that administrative compliance orders against violators of the Public Water Systems program be issued only after proposal and subsequent opportunity for public hearing.

EFFECTIVE DATE: This final rule takes effect on September 8, 1998. In accordance with 40 CFR 23.7, this regulation will be considered final Agency action for purposes of judicial review at 1:00 p.m. eastern time on September 8, 1998.

FOR FURTHER INFORMATION CONTACT: David Drelich (2243A), Water Enforcement Division, Office of Enforcement and Compliance Assurance, 401 M Street SW., Washington, DC 20460, (202) 564-2949.

SUPPLEMENTARY INFORMATION:**I. Background**

The 1986 Act amended Section 1414 of the Safe Drinking Water Act (SDWA) to provide for the issuance of administrative compliance orders against violators of the regulations implementing the public water supply system (PWSS) program:

(g) Administrative order requiring compliance; notice and hearing * * *

(2) An order issued under this subsection shall not take effect *until after notice and opportunity for public hearing and*, in the case of a State having primary enforcement responsibility for public water systems in that State, until after the Administrator has provided the State with an opportunity to confer with the Administrator regarding the *proposed* order. A copy of any order *proposed to be issued* under this subsection shall be sent to the appropriate State agency of the State involved if the State has primary enforcement responsibility for public water systems in that State. Any order issued under

this subsection shall state with reasonable specificity the nature of the violation. In any case in which an order under this subsection is issued to a corporation, a copy of such order shall be issued to appropriate corporate officers. [Emphasis supplied.]

Section 1414(g)(2) of 1986 Act; 42 U.S.C. 300g-3(g)(2) (1995). The emphasized language in the citation above was repealed by the 1996 Act. Safe Drinking Water Act, as amended 1996; Sec. 113(a)(3)(B), Pub. L. 104-182; 110 Stat. 1613 (42 U.S.C. 300g-3(g)(2)) (1996). The repeal has the effect of eliminating the requirement for the issuance of a proposed PWSS compliance order, as well as the notice and opportunity for a public hearing on the proposal.

The hearings described in the regulations being deleted today were promulgated as 40 CFR Part 142 Subpart J on January 30, 1991. See 56 FR 3755. The procedures being deleted today are information-gathering rather than adjudicatory in nature. This was noted in the proposed rulemaking for the regulations: "The procedures proposed for section 1414(g)(2) compliance orders provide an opportunity for informal, information-gathering, nonadjudicatory hearings prior to the issuance of the orders." 54 FR 29517 (July 12, 1989). Because PWS compliance orders do not result in the deprivation of any constitutionally protected interest, see generally *Mathews v. Eldridge*, 424 U.S. 319 (1976) and Preamble to 40 CFR Part 142, Subpart J (1991), the opportunity for hearings on the proposed orders was not constitutionally mandated.

EPA has issued numerous proposed administrative compliance orders in this program, and has received relatively few requests for public hearings. It is unaware of any such hearings now pending. If the deletion of Subpart J occurs during the pendency of such an information-gathering hearing, EPA has the discretion to go forward with the hearing, although it would no longer be mandated by law.

One provision of Subpart J being deleted today, 40 CFR 142.208, provides that any penalty sought by the Administrator pursuant to Section 1414(g)(3)(B) of the SDWA (relating to penalty complaints for violations of PWS administrative compliance orders) shall be assessed pursuant to the procedures set forth at 40 CFR part 22. This provision is consistent with the statutory instructions in an unamended sentence of Section 1414(g)(3)(B), which provided that such an administrative penalty was to be assessed "after notice and opportunity for a hearing on the record in accordance with section 554 of Title 5." 42 U.S.C. 300g-3(g)(3)(B). Part

22 establishes procedures consistent with the requirements set forth by the Administrative Procedure Act, 5 U.S.C. 551 *et seq.* (APA). Section 1414(g)(3)(B) of the SDWA, as amended by the 1996 Act, however, now states

In a case in which a civil penalty sought by the Administrator under this paragraph [§ 1414(g)] does not exceed \$5,000, the penalty shall be assessed by the Administrator after notice and opportunity for a public hearing (unless the person against whom the penalty is assessed requests a hearing on the record in accordance with section 554 of title 5, United States Code). In a case in which a civil penalty sought by the Administrator under this paragraph exceeds \$5,000, but does not exceed \$25,000, the penalty shall be assessed by the Administrator after notice and opportunity for a hearing on the record in accordance with section 554 of title 5, United States Code.

The Agency has proposed to amend 40 CFR part 22 to implement this new provision of law in permanent form. See 63 FR 9464 (February 25, 1998). Consequently, Section 142.208 is being deleted. In the interim period between the deletion of this section and a final promulgation of conforming amendments to 40 CFR part 22, EPA will continue to use the part 22 procedures as guidance when on the record hearings are required by the terms of Section 1414(g)(3)(B), and will provide interim guidance on what procedures EPA shall follow in instances of non-APA adjudicatory hearings.

II. Good Cause Exemption from Notice-and-Comment Rulemaking Procedures

The Administrative Procedure Act general requires agencies to provide prior notice and opportunity for public comment before issuing a final rule. 5 U.S.C. 553(b). Rules are exempt from this requirement if the issuing agency finds for good cause that notice and comment are unnecessary. 5 U.S.C. 553(b)(3)(B).

EPA has determined that providing prior notice and opportunity for comment on the deletion of these rules from the CFR is unnecessary. The statutory requirement underlying the promulgation of these regulations has been repealed. As discussed above, EPA is unaware of any hearing pending under these rules, but during this interim period may nonetheless continue to provide the opportunity for such an information-gathering hearing even in the absence of this regulatory subpart.

For the same reasons, EPA believes there is good cause for deleting these rules from the CFR effective immediately. See 5 U.S.C. 553(d).

III. Administrative Requirements

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is not a "significant" regulatory action. It also does not impose any federal mandate on State, local or tribal governments or the private sector within the meaning of the Unfunded Mandates Act of 1995. Further, this action would not impose any requirements under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*, require prior consultation with State officials as specified by Executive Order 12875 (58 FR 58093, October 28, 1993), or involve special consideration of environmental justice related issues as required by Executive Order 12898 (59 FR 7629, February 16, 1994).

The Agency has determined that this rule is not subject to the Regulatory Flexibility Act ("RFA"), which generally requires any agency to conduct a regulatory flexibility analysis of any significant impact the rule will have on a substantial number of small entities. By its terms, the RFA applies

only to rules subject to notice-and-comment rulemaking requirements under the Administrative Procedure Act ("APA") or any other statute. As explained above, this rule is not subject to notice and comment requirements under the APA or any other statute.

The Agency has nonetheless assessed the potential of this rule to adversely impact small entities. Because this rule change does not effect any change in the law applicable to small entities, but only concerns Agency practice and procedure, it has no adverse impact on small entities.

Pursuant to 5 U.S.C. 801(a)(1)(A), as added by the Small Business Regulatory Enforcement Fairness Act of 1996, EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives and the Comptroller General of the General Accounting Office; however, in accordance with 5 U.S.C. 808(2), this rule is effective on September 8, 1998. This rule is not a

"major rule" as defined in 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 142

Environmental protection,
Administrative practice and procedure.

Dated: August 24, 1998.

Carol M. Browner,
Administrator.

For the reasons set out in the preamble, title 40, chapter I of the Code of Federal Regulations is amended as follows:

PART 142—[AMENDED]

1. The authority citation for part 142 continues to read as follows:

Authority: 42 U.S.C. 300g, 300g-1, 300g-2, 300g-3, 300g-4, 300g-5, 300g-6, 300j-4, and 300j-9.

2. Part 142 is amended by removing and reserving Subpart J (§§ 142.201 through 142.208).

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