

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