



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

WASHINGTON, D.C. 20460

OCT 23 2007

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

MEMORANDUM

SUBJECT: OECA's *Interim Significant Noncompliance Policy for CWA Violations Associated with CSOs, SSOs, CAFOs and Storm Water Point Sources (i.e., Interim Wet Weather SNC Policy)*

FROM: Granta Y. Nakayama
Assistant Administrator

A handwritten signature in blue ink, reading "Granta Y. Nakayama", is written over the printed name and title.

TO: Regional Administrators
EPA Regions 1 - 10

The purpose of this memorandum is to issue the attached *Interim Wet Weather SNC Policy* for implementation by EPA, starting in fiscal year 2009. The policy is initially being issued only to EPA Regions because full State implementation requires a final *ICIS-NPDES Policy Statement* to define the Requisite ICIS-NPDES Data Elements (RIDE) necessary for national tracking and program management. The *ICIS-NPDES Policy Statement* is not expected to be issued until a rulemaking process is completed. EPA Regions are encouraged to share a copy of the *Interim Wet Weather SNC Policy* with their States and to work with any individual State that is interested in using the policy. Given the States' interest and overall support of the approach in the policy, the Office of Enforcement and Compliance Assurance (OECA) anticipates that some States will voluntarily join the Regions in utilizing the policy in fiscal year 2009.

The purpose of the *Interim Wet Weather SNC Policy* is to supplement the 1986 *NPDES SNC Policy* by providing an approach for identifying significant violations related to combined sewer overflows (CSOs), sanitary sewer overflows (SSOs), concentrated animal feeding operations (CAFOs), and storm water, thus improving management of today's expanded NPDES program and supporting implementation of OECA's four national Clean Water Act priority program areas. OECA has been working since 2005 with a State-EPA NPDES Compliance and Enforcement Advisory Group, formed in coordination with the Association of State and Interstate Water Pollution Control Administrators (ASIWPCA), to develop the *Interim Wet Weather SNC Policy*. The policy reflects extensive input received from several EPA Headquarters offices, EPA Regions, and ASIWPCA and Environmental Council of States (ECOS) members. Overall, the States involved in this process have been supportive of the approach in the

policy. Attachment 2 is a summary of the major comments OECA received from States during the April to June 2007 ECOS review period. Attachment 3 summarizes the three new OECA policies, their commonalities, and OECA's approach for moving forward on each policy.

During this interim EPA implementation period, OECA will work on resolving any issues identified by the Regions and on developing, in consultation with the State-EPA NPDES Advisory Group, a national approach to tracking and reporting of wet weather SNC information.

I appreciate the Regions' participation in the development of the *Interim Wet Weather SNC Policy* to date, and OECA will continue to work closely with your staff to ensure effective implementation of the policy. If you have any questions relating to the attached *Interim Wet Weather SNC Policy*, please contact Kate Anderson, Associate Director of Office of Civil Enforcement's Water Enforcement Division, at (202) 564-4016, or have your staff contact Kathryn Greenwald at (202) 564-3252 or Robert Klepp at (202) 564-5805.

Attachments

Attachment 1 - *Interim Wet Weather SNC Policy*

Attachment 2 - OECA's Summary Response to State Comments

Attachment 3 - Next Steps for the Three NPDES Policies

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***EPA's Interim Significant Noncompliance Policy for Clean Water Act Violations
Associated with CSOs, SSOs, CAFOs, and Storm Water Point Sources
("Interim Wet Weather SNC Policy")***

I. Scope and Intent

This policy addresses significant noncompliance (SNC) violations associated with combined sewer overflows (CSOs), sanitary sewer overflows (SSOs), concentrated animal feeding operations (CAFOs), and storm water point source discharges covered by the National Pollutant Discharge Elimination System (NPDES) program under the Clean Water Act (CWA). Since 1998, CSOs, SSOs, CAFOs, and storm water point sources have been EPA national compliance and enforcement priorities and referred to as "wet weather" sources or "wet weather" program areas. This policy is referred to below as the "*Interim Wet Weather SNC Policy*," although it applies to both wet weather *and* dry weather (*i.e.*, not caused by a precipitation-related event) violations. The intent is to provide EPA Regions, States, Indian Tribes and U.S. territories with a framework to identify the most significant violations that rise to the priority level for prompt follow-up action, in order to better manage the current NPDES program and to improve accountability. The scope of this policy is limited to the universe of wet weather sources selected by the NPDES authority for compliance evaluation, including inspections, file reviews, and evaluation of self-monitoring and reporting results. This policy does not establish compliance evaluation and enforcement commitments between EPA Headquarters and the Regions, or between EPA Regions and the States. Regions and States should continue to utilize existing documents to determine compliance evaluation targets and negotiate State-EPA management agreements. EPA is issuing this as an interim policy in anticipation that it may need to be revised after an initial implementation period.

II. Introduction

EPA, in consultation with States, developed the Permit Compliance System (PCS) as well as the *NPDES Enforcement Management System (EMS)*, which comprises several policies, including the *SNC Policy*, to guide NPDES authorities in identifying and tracking significant noncompliance and appropriate enforcement responses.¹ When EPA's current, 1986 CWA *Significant Noncompliance Policy (SNC Policy)* was issued, EPA and the States were focused on addressing the most significant sources of water pollution at the time – the universe of large municipal and industrial point sources regulated by the NPDES program, known as "major facilities." (40 CFR §122.2) Tracking information that measures and evaluates compliance with pollutant discharge limits and controls imposed on major facilities on a national scale is important to EPA's efforts to ensure that such limits and controls are appropriate. In the last

¹ See NPDES Enforcement Management System, (1986, revised in 1989). The SNC portion is contained in Chapter VII, B., Part 2, Significant Noncompliance.

twenty years, these efforts have resulted in significant pollutant controls and reductions from traditional major facilities.

Since the *SNC Policy* was issued, state reports submitted under CWA Section 305(b) and periodically compiled by EPA into the *National Water Quality Inventory Report*, indicate the growing significance of water quality impairment due to pollutants associated with wet weather sources. These sources include overflows from combined and sanitary sewer systems, storm water runoff from industrial and municipal sectors, and discharges from CAFOs. CSOs and SSOs can pose a significant threat to public health and the environment due to high concentrations of bacteria from fecal contamination, as well as disease-causing pathogens. Storm water runoff may include a variety of pollutants, such as sediment, oil and grease, chemicals, nutrients, metals, and bacteria. Discharges from CAFOs often include nutrients, organic matter pathogens, and trace metals. In an effort to supplement the 1986 *SNC Policy* to reflect the evolution of the NPDES program and the need to address and track significant noncompliance at these wet weather sources, EPA, in consultation with the States, developed this *Interim Wet Weather SNC Policy*. This *Interim Wet Weather SNC Policy* supplements the 1986 *SNC Policy* for NPDES major facilities and is intended to reflect the importance of wet weather sources in managing, evaluating, and reporting on the effectiveness of the national NPDES compliance and enforcement program.

In developing this *Interim Wet Weather SNC Policy*, EPA recognizes that wet weather point sources differ from traditional NPDES major facilities and that these differences will influence both the manner in which SNC violations are defined, as well as in the approach the NPDES authority takes to respond to SNC violations. Some of the more significant differences include the following:

1. The universe of wet weather sources is far greater than the universe of NPDES major facilities. The universe of certain wet weather sectors, particularly those typically covered by general permits (such as construction storm water and CAFOs), tend to receive less automatic review compared to major facilities covered under individual NPDES permits.
2. While the vast majority of NPDES major facilities are continuous dischargers, many wet weather sources are characterized by intermittent discharges.
3. Permit coverage for the construction storm water sector is often short-term, with permit coverage often ending within a year.
4. Wet weather sources frequently are not subject to numeric effluent limits; consequently, compliance determination for these sources relies heavily on site inspections, supplemented by self-inspection and self-reporting requirements.

The statutory provisions and EPA regulations described in this document contain legally binding requirements. However, this document is intended solely as advisory. This policy is not a regulation, nor does it change or substitute for those provisions and regulations. Thus, it does

not impose legally binding requirements on EPA, States, U.S. territories, Indian Tribes, or the regulated community and it does not confer legal rights or impose legal obligations upon any member of the public or the Agency. In the event of a conflict between the discussion in this document and any statute or regulation, this document would not be controlling. This document may be revised periodically without public notice to reflect changes in EPA policy.

III. Definitions

NPDES authority: the entity – EPA Region, State, U.S. territory, or Indian Tribe – authorized to implement the NPDES program.

Significant noncompliance (SNC): those alleged violations where the NPDES authority, using its enforcement discretion and applying best professional judgment and the criteria described in this policy for the specific program area, has determined that the relevant criteria for SNC have been met.

Discharge: When used without qualification, “discharge” means any addition of any pollutant or combination of pollutants to waters of the United States from any point source. See 40 CFR §122.2

Unauthorized discharge: a discharge that is not authorized by an NPDES permit or that is in violation of an NPDES permit.

Significant unauthorized discharge: an unauthorized release of pollutants to a water of the United States that has negatively impacted or has the potential to negatively impact human health or the environment (see factors to consider in section IV.).

Overflow: any release, spill, or discharge of wastewater from or caused by a sewage collection system, and not private laterals, to public or private property (including building backups) whether or not it reaches waters of the United States.

Significant Overflow: any overflow (refer to above definition) that occurs in a high public use or public access area, or otherwise may affect public health. This definition includes overflows from manholes and other sources that reach waters of the United States, including *significant unauthorized discharges*, and overflows and backups into basements, yards, parks, or any other areas where people can come into direct contact with sewage, that are caused by conditions in the sewage system.

Major milestones: significant actions or corrective measures that a permit or enforcement order requires to be completed by a designated date. Major milestones may include, but are not limited to, the actions and associated deadlines for the following: begin construction of corrective measures, end construction of corrective measures, achieve final compliance, implement best

management practices (BMPs), submit and implement a nutrient management plan (NMP), and pay a penalty.

Formal Enforcement Action: an action that “requires actions to achieve compliance, specifies a timetable, contains consequences for noncompliance that are independently enforceable without having to prove the original alleged violation and subjects the person to adverse legal consequences for noncompliance.”² For purposes of this policy, EPA’s definition of formal enforcement action is consistent with existing policy and includes: (1) unilateral administrative order (with or without a penalty) or administrative order by consent (with or without a penalty); and, (2) civil judicial consent decree or Court order.

Informal Action to Address Wet Weather SNC Violations: an action that does not meet EPA’s definition of formal enforcement action above and: 1) is in writing, 2) informs the permittee of the violation(s), 3) identifies the actions necessary to achieve compliance, 4) specifies milestones and a final date to achieve compliance, and 5) provides notification of the possibility of escalated enforcement action if the violation is not corrected in a timely manner.

Resolved: a violation that no longer meets the SNC criteria.

Resolved Pending: the status of a violation that continues to meet SNC criteria, but is being resolved in accordance with an enforcement order or other mechanism to achieve compliance.

Quarter: three consecutive months in accordance with the same schedule as the quarters defined by the Quarterly Noncompliance Report (QNCR) in 40 C.F.R. 123.45(d), as follows:

January, February, March
April, May, June
July, August, September
October, November, December

Quarter Response Deadline: for purposes of timely SNC determination and follow-up response, deadlines are the same as the date for completion of reports associated with the QNCR schedule in 40 C.F.R.123.45(d). The deadlines are as follows:

<u>Quarter</u>	<u>Reporting Deadline</u>
January, February, March	May 31
April, May, June	August 31
July, August, September	November 30
October, November, December	February 28

² See NPDES Enforcement Management System, (1986, revised in 1989), Chapter 1, p. 24.

First Quarter Response Deadline: the reporting deadline associated with the first quarter that the SNC violation is identified.

Second Quarter Response Deadline: the reporting deadline associated with the second consecutive quarter that a violation is in SNC.

Third Quarter Response Deadline: the reporting deadline associated with the third consecutive quarter that a violation is in SNC.

IV. Factors to Determine Significant Unauthorized Discharge

NPDES authorities should evaluate whether a significant unauthorized discharge has occurred based on impact to human health or the receiving water, condition or quality of the receiving water, and any impairment of the actual and/or designated uses of the receiving water. For example, factors to consider to determine if a significant unauthorized discharge has occurred may include the following:

- the discharge has caused or contributed to an exceedance of any applicable water quality standard;
- the discharge or overflow is not weather-related;
- the discharge has caused or contributed to a fish kill, fish advisory, or shellfish bed or beach closing;
- the discharge impacts an area identified as being disproportionately impacted by pollutants from multiple environmental pathways;
- the waterbody impacted by the discharge is:
 - 1) a drinking water source, has drinking water intakes, or is in a source water protection area;
 - 2) a high quality habitat for aquatic organisms, fish, or wildlife;
 - 3) a habitat for endangered species;
 - 4) an Outstanding Natural Resource Water;
 - 5) a waterfowl staging or nesting area;
 - 6) used for shellfish harvesting;
 - 7) used for primary or secondary contact recreation; and/or
 - 8) a sensitive coastal area where habitat relies on adequate water quality to thrive.

V. SNC Process

“Traditional” NPDES point sources that have individual NPDES permits, are required to periodically submit self-monitoring data in discharge monitoring reports (DMRs) which are routinely screened for noncompliance problems, and a subset of facilities (*i.e.*, major facilities) are automatically screened for alleged SNC violations. In contrast, the wet weather point sources that are frequently covered under NPDES general permits or are unpermitted, may not be

required to submit DMRs, and most are not automatically evaluated for alleged SNC violations. Some wet weather point sources are required to self-report (e.g., annual reports required from CAFOs, spill reports required from sewer systems). However, most wet weather violations are detected by information gathering techniques such as inspections, file reviews, CWA Section 308 requests, and responding to citizen complaints.

An NPDES “major facility” (40 CFR Part 122.2) that is also a wet weather point source should continue to be screened for traditional SNC violations. Examples include large sewage treatment facilities and any associated collection systems they own or operate and large industrial facilities also required to have permits for storm water discharges. In addition, all wet weather point sources (major facilities and non-major facilities, permitted and unpermitted) that are reviewed for compliance status (e.g., via inspection or record review) are to be screened for alleged SNC violations under this new policy. **The four recommended steps in implementing this *Interim Wet Weather SNC Policy* are:**

1. **Conduct compliance monitoring/evaluation activities and determine whether an alleged violation occurred or was reported.**
2. **Determine SNC.**
3. **Identify and undertake a timely and appropriate response.**
4. **Document resolution of noncompliance.**

The overall SNC process is illustrated in Figure 1. The timing of the SNC process (see Figure 3) is based on the existing reporting procedures used to track traditional SNC. The timeline begins in the first quarter that the NPDES authority is able to identify noncompliance. The NPDES authority should determine SNC by the reporting deadline associated with that quarter. Determining a violation is SNC by the reporting deadline places that facility in SNC for the quarter when noncompliance was identified. The NPDES authority should initiate formal or informal action against any facility with a SNC violation no later than the reporting deadline associated with the third consecutive quarter that the identified facility is in SNC.

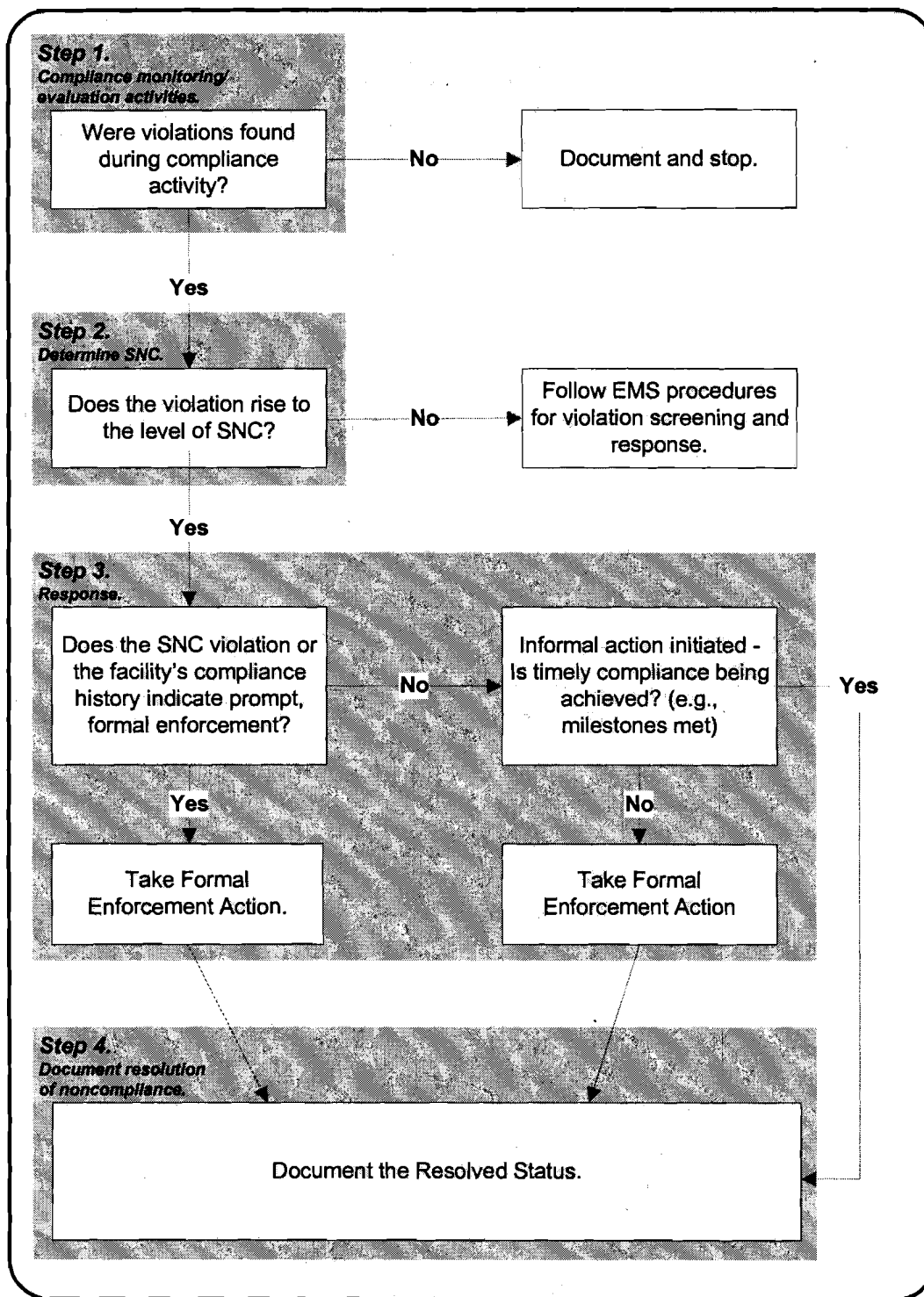


Figure 1. SNC Process

1. Conduct Compliance Monitoring/Evaluation Activities and Determine Whether a Potential Violation Exists

The first quarter of SNC may be triggered by the date the site is inspected, the final inspection report is received, a self-monitoring report or a record is reviewed, or other compliance monitoring activity is completed. In situations where the NPDES authority determines that a follow-up inspection at a facility would be useful, or where the evaluation would be aided by additional sampling, information gathering, and further analysis (*e.g.*, receipt of additional information requested via Section 308 of the CWA), the first quarter of SNC is triggered by the date when adequate information becomes available to the NPDES authority. The two examples in Figure 2 below provide guidance for timely SNC determination. Example #1 is where adequate information on an alleged violation(s) exists at the time of initial compliance monitoring activity, inspection, or record review. Example #2 shows an alleged violation requiring further information or analysis, so Step 1 occurs in the quarter when that additional information (*e.g.*, sampling analysis results) is received or analysis is completed.

Figure 2. Examples of Timing for SNC Determination

	1. Conduct Compliance Evaluation Activity		2. Determine SNC
Example #1	Conduct inspection (no follow-up information or analysis required)		5/31/07
	between 1/1/07and 3/31/07		
Example #2	Conduct inspection	Receive additional information (e.g., sampling results) and complete investigative analysis	8/31/07
	between 1/1/07 and 3/31/07	6/1/07	

NPDES authorities should continue to implement targeting strategies and conduct routine compliance monitoring and evaluation activities (*e.g.*, inspections, file reviews, review of self-reports) to detect CSO, SSO, CAFO, and storm water violations. The NPDES authority should conduct compliance monitoring activities consistent with guidance provided in the *NPDES Compliance Monitoring Strategy* [under development]. Once targets are selected, NPDES authorities should evaluate all available compliance information such as self-monitoring reports, inspection reports, sampling results, contents of permit file, and citizen complaints. The NPDES authority should follow its standard procedures for reporting and tracking violations discovered during compliance evaluation activities. It should also follow its standard procedures regarding informing facilities of their noncompliance status.

More information may be helpful before making a SNC determination. This could be accomplished by the NPDES authority issuing an information request letter under Section 308 of

the CWA or a State's information gathering authority. For example, during a construction storm water inspection, the inspector may be unable to determine the responsible party, owner or operator, or find that information required to be on site is missing. The NPDES authority may decide to issue a follow-up information request letter to document whether or not the construction company obtained a permit, developed a storm water pollution prevention plan (SWPPP), and/or conducted required site inspections.

Another example is when determining *multiple* or *significant* CSOs or SSOs, the NPDES authority may need to gather information such as spill rate and beach closures, or information regarding systemic issues with the condition of the collection system, including examining the operation and maintenance procedures. For evaluation of a CAFO or a construction site, whether a *significant unauthorized discharge* occurred may depend on review of rainfall records and other factors such as overall conditions at the facility and whether required best management practices were properly implemented and maintained.

2. Determine SNC

In most cases, the NPDES authority should determine whether a violation identified in Step 1 rises to the level of SNC by the reporting deadline associated with the quarter in which the violation occurred. In the situations when more information is necessary, the deadline for determining SNC is the reporting deadline associated with the quarter when the information was obtained. Figure 2 above presents two examples – example #1 where all information necessary was obtained at the inspection, and example #2 where the information became available at a later date. This policy does not directly impact EPA's quarterly noncompliance reporting (QNCR) requirements per 40 CFR Part 123.45, however, it does utilize the quarterly reporting deadlines associated with the QNCR. The two examples of timing for SNC determination outlined in Figure 2 above are consistent with the timing of existing NPDES noncompliance reporting, are compatible with EPA's national NPDES database, and allow the identification, determination, and tracking of wet weather SNC violations to be done in batches.

For any alleged violation found during an inspection or other compliance evaluation activity, NPDES authorities should apply the appropriate CSO, SSO, CAFO, and storm water program-specific SNC criteria in this policy – using best professional judgment – to determine whether the violation is SNC. Applying the recommended SNC criteria in this policy will often involve looking beyond actual discharges to evaluate other factors such as substantial failure to implement best management practices or to meet major milestones required in a permit or a judicial or administrative order, or failure to submit timely reports as required. Documentation of the SNC determination (including the person making the determination, the date, and the reason that the alleged violation constitutes SNC) should be kept on file by the NPDES authority,

as well as timely entered or transferred into the ICIS-NPDES national database.³ If the NPDES authority has not yet notified the facility of its noncompliance status, a written notification should be provided at the time of the SNC determination to advise the facility of its status.

Facilities with alleged violations not initially determined to meet SNC criteria can be addressed by either informal or formal enforcement action. EPA's 1989 *NPDES Enforcement Management System (EMS)* encourages all CWA violations be reviewed and considered for appropriate follow-up enforcement action. If non-SNC violations persist without resolution, the NPDES authority should re-classify the alleged violation as SNC and initiate formal enforcement action with an appropriate penalty – particularly if the facility fails to correct violations that are noted during the compliance evaluation or fails to comply with conditions related to an informal action.

A. Combined Sewer Overflows

EPA's 1994 *CSO Control Policy* required all CSO communities to implement the nine minimum controls (NMCs) by January 1, 1997, and develop long term control plans (LTCPs) for achieving compliance with the technology-based and water quality-based requirements of the CWA. The *CSO Control Policy* provided that the requirement to implement the NMCs and develop and implement approved LTCPs with intermediate and final milestones are to be embodied in NPDES permits, or other enforceable mechanisms, such as administrative orders or civil judicial consent decrees. In December 2000, Congress amended the CWA to require conformity with EPA's CSO Control Policy in permitting and enforcement activities (Wet Weather Water Quality Act).

Because developing and implementing LTCPs is the central requirement of the CSO Policy, enforcement efforts should focus on the timely development and implementation of adequate and enforceable LTCPs. Indeed, two of the most significant CSO noncompliance issues, which each warrant inclusion as criteria for use in SNC determinations, are: 1) failure to submit an adequate LTCP, and 2) failure to meet the intermediate and final LTCP milestones. Similarly, substantial failure to implement the NMCs required by a permit or other enforceable mechanism warrants inclusion as a criterion for SNC determination.

The SNC criteria also include “multiple *significant unauthorized discharges*” or multiple unauthorized *significant overflows*. Isolated dry weather overflows (which are prohibited by the CSO Policy) and which may be beyond the control of the permittee, do not necessarily elevate the noncompliance to the status of SNC. For example, under the SNC criteria, a single dry weather overflow that is not indicative of a broader problem would not trigger SNC. However, multiple dry weather overflows at permitted CSO outfalls, which indicate a lack of system

³Specific ICIS-NPDES data entry guidance will be developed prior to full implementation of this policy.

capacity, should be designated SNC. Whether the discharge is from a constructed, unpermitted outfall should also be a factor to consider in determining whether the unauthorized discharge is significant.

When determining whether alleged CSO violations should be designated as SNC, the regulatory authority should evaluate the degree of noncompliance and the significance of the environmental and health impacts associated with the violations.

Each of the following types of alleged CSO violations may constitute SNC:

CSO SNC Criteria
Multiple <i>significant unauthorized discharges</i> or multiple <i>unauthorized significant overflows</i> . ⁴
Substantial failure to implement NMCs as required in a permit or in an administrative or judicial order.
Failure to report unauthorized overflow(s) or discharge(s) as required.
Failure to submit an approvable LTCP, as required in a permit or in an administrative or judicial order, or the submittal is late by 90 days or more.
Failure to meet the major milestones (including LTCP milestones) required in an administrative or judicial order or in a permit (where expressly allowed by state water quality standards) by 90 days or more.
Failure to submit required (e.g., by permit, enforcement order, or information request) report or report is late by 30 days or more.

B. Sanitary Sewer Overflows

SSOs include those overflows that reach waters of the U.S., as well as overflows out of manholes onto city streets, sidewalks, parks and other locations, and backups into buildings caused by conditions in the sewer system. SSOs that reach waters of the U.S. are point source discharges and are prohibited under Section 301 of the CWA. SSOs that do not reach waters of the U.S. may be indicative of improper operation and maintenance of the sewer system, and thus

⁴The term "multiple" includes repeated or recurring overflows at a single location, or an overflow (or overflows) at different locations. The criteria for SNC include "multiple significant discharges or multiple significant overflows," however, using its discretion (see section V.2.E.), it may be appropriate for the regulatory authority to designate an isolated discharge or overflow as SNC if it involves a substantial volume, or has a significant adverse impact on human health or the environment. Important considerations include the duration, frequency, and volume of any unpermitted discharge. An isolated discharge or overflow generally does not elevate noncompliance to the level of SNC unless indicative of a broader problem.

may violate NPDES permit conditions requiring proper operation and maintenance per the federal regulations at 40 CFR 122.41(e).

In 1996, EPA added “Chapter X: Setting Priorities for Addressing Discharges from Separate Sanitary Sewers” to the *EMS*. This *Interim Wet Weather SNC Policy* builds on the guiding principles outlined in Chapter X. For alleged SSO violations, the regulatory authority, using best professional judgment, should assess available information (including steps the municipality has taken to plan for and address its peak wet weather flows), and evaluate the significance of noncompliance and the associated significant impacts to the environment and/or human health, as well as the quality of the municipality’s operation and maintenance or Capacity, Management, Operations, and Maintenance (CMOM) programs as specified in its permit or in an enforcement order.

Each of the following types of alleged SSO violations may constitute SNC:

SSO SNC Criteria
Multiple <i>significant unauthorized discharges</i> , or multiple <i>significant overflows</i> . ⁵
Failure to report overflow(s) or discharge event(s) as required.
Failure to meet the major milestones required in an administrative or judicial order or in a permit by 90 days or more.
Failure to submit required (<i>e.g.</i> , by permit, enforcement order, or information request) report or report is late by 30 days or more.

C. Storm Water Point Sources

Storm water discharges are point sources subject to the NPDES program, as provided in Section 402(p) of the CWA and EPA’s implementing regulations. EPA and State issued individual and general permits for storm water generally require the development and implementation of storm water pollution prevention plans (SWPPP), or storm water management programs (SWMP) in the case of municipal separate storm sewer systems (MS4). These best management practices (BMPs) are to be implemented to minimize the discharge of pollutants to receiving waters.

⁵The term “multiple” includes repeated or recurring discharges or overflows at a single location, or a discharge/overflow at different locations. The regulatory authority may use its discretion to designate an isolated discharge or overflow as SNC (see section V.2.E.) if the discharge or overflow involves a substantial volume, or has a significant adverse impact on human health or the environment. Important considerations include the duration, frequency, and volume of any unpermitted discharge. An isolated discharge or overflow generally does not elevate noncompliance to the level of SNC unless indicative of a broader problem.

For alleged storm water violations, the regulatory authority should make a SNC determination using best professional judgment by assessing available information and evaluating the significance of noncompliance, and the associated potential significant impacts to the environment and/or human health.

Each of the following types of alleged storm water violations may constitute SNC:

Storm Water SNC Criteria
<i>A significant unauthorized discharge.</i>
<i>Any significant unauthorized discharge at a site with a small construction waiver or conditional exclusion for no exposure.</i>
Significant violations of permit requirements. Examples of such violations include, but are not limited to: <ul style="list-style-type: none"> • lack of or a substantially inadequate SWPPP or SWMP, • substantial failure to implement or maintain BMPs, • substantial failure to perform required monitoring, and • substantial failure to implement the MS4 requirements.
Failure to obtain permit coverage as required where there is a discharge.
Failure to meet the major milestones required in an administrative or judicial order or in a permit by 90 days or more.
Failure to submit required report (including failure to respond to an information request), or report is late by 90 days or more.

D. Concentrated Animal Feeding Operations

[Note: the 2/28/05 2nd Circuit decision and subsequent EPA revisions to the CAFO rule may result in future changes to the CAFO criteria.]

Concentrated animal feeding operations are defined as point sources subject to the NPDES program. An EPA national CWA priority is to focus federal compliance and enforcement activities on existing CAFOs that need permits (*i.e.*, met the regulatory definition of “CAFO” prior to the 2003 federal CAFO regulations and discharge to waters of the U.S.) and have the potential to cause the most environmental harm, such as large and medium CAFOs with outdoor production areas that are inadequately designed or operated. EPA and State issued individual and general permits require the development and implementation of a nutrient management plan (NMP) to properly manage manure, litter, and process wastewater generated by

the CAFO and minimize the discharge of pollutants to receiving waters from land application areas.

For alleged CAFO violations, the regulatory authority should make a SNC determination using best professional judgment by assessing available information and evaluating the significance of noncompliance, including the associated impacts on the environment and/or human health. Factors specific to CAFOs include whether there is a:

- discharge from the production area that is not in compliance with an NPDES permit or occurs in the absence of an NPDES permit; or
- non-precipitation related discharge (*i.e.*, dry weather discharge) of manure, litter, process wastewater, or other pollutants from the land application area to a water of the U.S.

Some examples of deficiencies in implementation of a NMP include: inadequate lagoon freeboard, animal burrows in a lagoon berm causing leakage, clogged land application spray gun causing uneven and over-application in some areas, long-term storage of manure in uncovered stockpiles near a stream, disposal of dead animals in an open ditch, and failure to keep records documenting nutrient management practices.

Each of the following alleged CAFO violations may constitute SNC:

CAFO SNC Criteria
<i>Any significant unauthorized discharge.</i>
No NMP when one is required.
(CAFO criteria continued on next page)

Multiple discharges without an NPDES permit (and the failure to apply for an NPDES permit, when one is required) and/or multiple violations of permit requirements.⁶ For example, multiple deficiencies in implementing the permit and the NMP, such as failure to:

- maintain adequate storage capacity and containment
- implement buffer/setback requirements
- properly manage chemicals and other contaminants handled on-site
- properly manage mortalities
- conduct proper operation and maintenance
- properly handle manure, including land applying in accordance with NMP
- test soils and manure, as required
- meet record keeping requirements
- keep the NMP up-to-date

Failure to meet the major milestones required in an administrative or judicial order or in a permit by 90 days or more.

Failure to submit annual report or other required report (including failure to respond to an information request), or report is late by 90 days or more.

E. Discretionary Wet Weather SNC

As with traditional NPDES SNC, the NPDES authority has the discretion to designate any alleged wet weather violation of concern, even if it does not meet any of the specific criteria above, as SNC. Interpreting and applying the criteria involves use of discretion as well. For example, for alleged violations related to CSOs and SSOs, the NPDES authority has discretion to determine how many violations constitute “multiple” *significant overflows*. Similarly, for alleged storm water violations, the NPDES authority has discretion to determine the number of violations that constitute “significant violations of permit requirements.”

The NPDES authority also has the discretion to ***not*** designate alleged wet weather violations that meet the above SNC criteria to account for unusual circumstances that result in SNC violations beyond a facility’s control.

⁶The term “multiple” includes repeated or recurring violations or deficiencies. The CAFO criteria for SNC include “multiple violations of permit requirements” or “multiple deficiencies in implementing the permit and NMP,” however, it may be appropriate for the regulatory authority to use its discretion (see section V.2.E.) to determine an isolated violation/deficiency as SNC if it has the potential for a significant adverse impact on human health or the environment. Important considerations include type, duration, frequency, and outcome of any violation or deficiency. An isolated violation or deficiency generally does not rise to the level of SNC unless it is indicative of a broader problem.

3. Identify and Undertake a Timely and Appropriate Response

The NPDES authority should take appropriate follow-up action against a wet weather SNC violation no later than the reporting deadline associated with the third consecutive quarter that the violation identified in Step 1 is in SNC. In most cases, EPA expects that the NPDES authority will initiate formal enforcement actions to address SNC violations. The NPDES Authority should use the *1995 Interim Clean Water Act Settlement Penalty Policy* and supplemental guidance documents to determine whether a penalty is appropriate and the penalty amount, but EPA expects that most facilities will receive substantial penalties for violations that rise to the level of SNC. The NPDES authority should consider the violator's past history of compliance and/or recalcitrance. A pattern of violations (e.g., failure to obtain permit coverage at multiple sites, similar violations at multiple sites owned or operated by the same entity, or history of similar violations at one site) would be a factor to consider. For example, if the violator has a poor compliance history, multiple violations, or a single violation resulting in extreme adverse impacts (e.g., a fish kill), the NPDES authority should initiate formal enforcement action, with a penalty when appropriate. In some circumstances, such as a first-time violator that promptly implements corrective measures, SNC may be addressed by informal action. Recommended SNC response options and deadlines are illustrated in Figure 3 below.

This policy does not directly impact EPA's quarterly noncompliance reporting (QNCR) requirements per 40 CFR Part 123.45, however, it does utilize the quarterly reporting deadlines associated with the QNCR. The quarterly approach outlined in Figure 3 is consistent with the timing of existing NPDES noncompliance reporting, is compatible with EPA's national NPDES database, and allows the identification, tracking, and response to wet weather SNC violations to be done in batches.

A. Formal Enforcement Approach

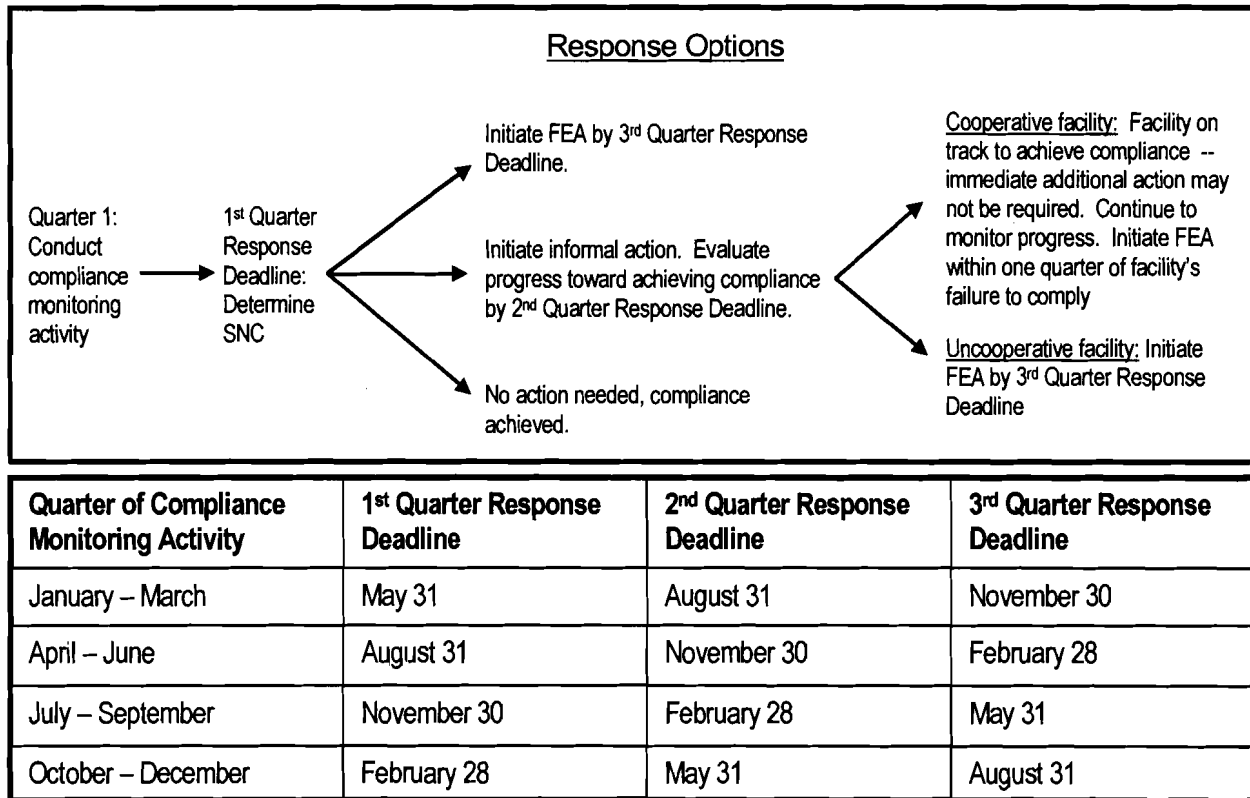
When the NPDES authority determines that the violation rises to the level of SNC, the NPDES authority should determine whether the violation should be resolved by a prompt, formal enforcement action. A particularly egregious violation or a facility with history of noncompliance or uncooperative behavior may compel the NPDES authority to proceed directly to formal enforcement, with a penalty, when appropriate. EPA has existing guidance in the *EMS* on the range of appropriate enforcement responses. Although the *EMS* does not specifically address all wet weather sources, the same basic principles apply. The NPDES authority should refer to existing national guidance and/or any program-specific guidance for recommendations and use its discretion in determining appropriate enforcement responses.

B. Informal Approach

When the NPDES authority determines that prompt and timely compliance is likely to be achieved and that the violator has a good compliance record, it may decide to initially respond with an informal action to resolve the SNC violation. All informal actions should be in writing and well documented and should contain the following major elements: 1) informs the permittee of the violation(s), 2) identifies the actions necessary to achieve compliance, 3) specifies milestones and a final date to achieve compliance, and 4) provides notification of the possibility of escalated enforcement action if the violation is not corrected in a timely manner.

Whenever an informal action is used to address a wet weather SNC violation, the NPDES authority should evaluate progress made by the facility towards achieving compliance by the second quarter response deadline. If the facility is being cooperative and is on track to achieve compliance but has not yet obtained full compliance, the NPDES authority may not need to take immediate additional action. The NPDES authority should continue to monitor the facility's progress toward achieving compliance. However, if the facility fails to correct violations and comply with the conditions specified in an informal action, the NPDES authority should escalate to a formal enforcement action, with an appropriate penalty, as soon as practicable, but no later than within one quarter of determining the facility's failure to maintain its "resolved pending" status. If, however, after the NPDES authority initiates an informal action, the facility is uncooperative and is not making progress towards achieving compliance by the second quarter SNC response deadline, the NPDES authority should escalate to a formal enforcement action with appropriate penalty by the third quarter SNC response deadline.

Figure 3. SNC Response Options and Deadlines



Whenever an administrative penalty order (APO) is selected as an appropriate enforcement response, it should be accompanied by an administrative order requiring compliance, unless compliance has already been achieved. When a facility has returned to compliance on its own, the NPDES authority may decide that an APO alone may be an appropriate enforcement response to alleged wet weather SNC violations. For example, for a construction company that failed to obtain storm water permit coverage and implement BMPs at a particular site but has completed the construction project and moved on, an APO may be an appropriate enforcement response if there are no ongoing violations at the site and no injunctive relief is required to achieve compliance.

Consistent with EPA's existing NPDES SNC policy, when appropriate, the NPDES authority may decide that no action is required because the facility has promptly and fully returned to compliance once aware of its problems. A decision to take no action should be well documented and kept in the NPDES authority's program files.

4. Document Resolution of Noncompliance

The NPDES authority should document the pending resolution and final resolution of SNC violations and include all documentation in its program files. This information should also be timely entered or transferred into the ICIS-NPDES national database. Determining that a wet weather violation is resolved is challenging because most wet weather facilities do not submit DMRs, therefore the NPDES authority does not automatically receive self-monitoring data to verify a facility's compliance status. For example, the NPDES authority may utilize either a certification letter submitted by the owner/operator of the facility or conduct a follow-up inspection to determine if compliance has been achieved. Key documentation items to be included in the certification letter or the report that follows the inspection should include a detailed description of corrective measures and dates implemented as well as identification of any other longer term actions planned (*e.g.*, training of staff) and the schedule for those items. The date the NPDES authority receives this documentation (*i.e.*, date the certification letter received or follow-up inspection is conducted) is critical in tracking when the facility's SNC violation was resolved and if it was resolved expeditiously.

Where a SNC violation determination is based on intermittent discharges, having several months without significant discharge is not necessarily sufficient to classify the facility as having resolved SNC and returned to compliance. Generally, the facility will remain in SNC or Resolved Pending status until it implements the appropriate corrective measures to resolve the alleged SNC violations. For example, a separate sanitary system may be listed as SNC for a significant discharge that occurs during wet weather because of insufficient sewer capacity. If no corrective measures are implemented by the facility, the facility should not be considered to have returned to compliance simply because a quarter passes without another significant discharge. Generally, the facility will have resolved its SNC violation and returned to compliance when the sewer capacity assurance projects necessary to eliminate the overflows have been completed.

VI. SNC Tracking and Reporting

Tracking and reporting of wet weather SNC information is linked to the implementation of EPA's ICIS-NPDES national database and associated policy and guidance documents currently under development. In coordination with EPA's Office of Compliance, EPA's Office of Civil Enforcement will draft recommendations for tracking and reporting wet weather SNC information and will seek input from the State-EPA NPDES Advisory Group.

**Attachment
List of Acronyms**

APO	Administrative Penalty Order
BMP	Best management practice
CAFO	Concentrated animal feeding operation
CMOM	Capacity, Management, Operations, and Maintenance
CSO	Combined sewer overflow
CWA	Clean Water Act
DMR	Discharge monitoring reports
EMS	Enforcement Management System
EPA	Environmental Protection Agency
ICIS	Integrated Compliance Information System
LTCP	Long term control plan
MS4	Municipal separate storm sewer system
NMCs	Nine minimum controls
NMP	Nutrient management plan
NPDES	National Pollutant Discharge Elimination System
PCS	Permit Compliance System
SNC	Significant noncompliance
SSO	Sanitary sewer overflow
SWMP	Storm water management plan
SWPPP	Storm water pollution prevention plan