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OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

MEMORANDUM

SUBJECT: Guidelines for Federal Enforcement in CSO/SSO Cases

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TO: EPA Regions
ECOS Compliance Committee

Combined sewer overflows (CSOs) and sanitary sewer overflows (SSOs) are national environmental problems with significant environmental impacts. Enforcement actions involving CSO and SSO violations are often highly complex and resource-intensive for EPA and authorized states. Neither EPA nor authorized states have adequate resources to handle these problems alone. Resource-allocation and effective leveraging of federal and state resources are therefore particularly important in CSO/SSO actions. The best solution to addressing CSO/SSO problems is for EPA and states to work together, with each contributing their unique expertise and resources.

EPA and a group of interested states formed a joint workgroup (CSO/SSO Workgroup) to address these issues and provide greater clarity on when the federal government would pursue enforcement actions in CSO/SSO cases. The workgroup included participants from the Office of Enforcement and Compliance Assurance and the Office of Water within EPA Headquarters, as well as EPA Regions 4 and 5. The following member-states of the ECOS Compliance Committee participated in the workgroup: Indiana, Nebraska, Ohio, Oregon, Pennsylvania, South Carolina, and Tennessee. The U.S. Department of Justice also actively participated in the CSO/SSO Workgroup.

The purpose of this memorandum is to present guidelines developed by the CSO/SSO Workgroup on federal enforcement in authorized states. This memorandum does not introduce any new standards for federal CSO/SSO enforcement; rather, the guidelines reflect EPA's existing policies. These guidelines are based on the *Revised Policy Framework for State/EPA Enforcement Agreements*, signed by then Deputy Administrator A. James Barnes (Aug. 25, 1986) (1986 Policy).¹

The guidelines presented in this memorandum are not mandatory criteria, but are intended to assist EPA regions and states as they work to address CSO/SSO violations by clarifying and providing more specificity regarding the application of the 1986 Policy to the CSO/SSO context. The intent of this memorandum is to set the stage for early, open, and ongoing communication concerning how to address CSO/SSO issues. These guidelines will not resolve every issue that arises regarding CSO/SSO cases, but will establish a collaborative and joint problem-solving approach to dealing with these issues in a way that best utilizes available federal and state resources and reduces disagreement regarding federal involvement in CSO/SSO cases. It is our hope that the guidelines in this memorandum will improve the working relationship between EPA and the states regarding CSO/SSO enforcement by providing a greater degree of certainty on when EPA will consider taking action and reaffirming the common goal of protecting human health and the environment.

Background. Under the Clean Water Act (CWA), EPA may authorize states to administer the National Pollutant Discharge Elimination System (NPDES) program. States with authorized permit programs have the lead in the day-to-day administration of these programs. In the majority of water enforcement cases (including hundreds of CSO and SSO cases), authorized states in fact take the lead in responding to violations.² EPA retains concurrent authority under Section 402(i) of the CWA to take enforcement action.

CSO and SSO cases have been a longstanding enforcement priority for EPA and many states. EPA again designated CSOs and SSOs as environmental problems under the Clean Water Act/Wet Weather national enforcement priority for 2005-2007. The Wet Weather priority received the broadest support in the 2005-2007 EPA priority-setting process, which included the Office of Water, EPA regions, state representatives, and Indian Tribes. EPA's enforcement priorities were selected because they have significant environmental impacts, have shown serious patterns of noncompliance, and are appropriate for federal compliance assistance and enforcement. See 68 Fed. Reg. 68,893, 68,894 (Dec. 10, 2003).

¹The 1986 Policy was reaffirmed with minor revisions in 1993. See *Oversight of State and Local Penalty Assessments: Revisions to the Policy Framework for State/EPA Enforcement Agreements*, Memorandum from Assistant Administrator Steven A. Herman (July 20, 1993) (1993 Policy).

²See 2004 Report to Congress on the Impacts and Control of Combined Sewer Overflows and Sanitary Sewer Overflows (Aug. 2004).

The federal-state partnership has been a central aspect of CSO/SSO enforcement. The history of EPA's enforcement efforts in CSO/SSO cases reflects this important partnership. When EPA has taken enforcement action in CSO/SSO cases, it most often has occurred in collaboration with states. States have participated as co-plaintiffs in nearly 70% of CSO and SSO judicial cases over the past decade.

State participation as a co-plaintiff in federal enforcement actions yields particularly significant benefits in CSO/SSO cases. EPA and the state can collaborate in determining appropriate injunctive relief, which capitalizes on EPA's national expertise and the state's in-depth knowledge of local issues. Such collaboration helps to ensure that comprehensive and complete injunctive relief is obtained, and that compliance is ultimately achieved. Additionally, the state may share in penalties and in fashioning Supplemental Environmental Projects. While EPA encourages states to align as plaintiffs, even where a state chooses to be a statutory defendant in a CSO/SSO case pursuant to Section 309(e) of the CWA,³ there is a meaningful opportunity for partnership, including sharing resources and technical expertise.

The 1986 Policy sets forth the expectations for the working relationship between EPA and states in the compliance and enforcement program. It defines what comprises a core enforcement program, and outlines a "no surprises" approach to partnering with states to enforce environmental statutes and regulations. The policy also sets forth criteria and instances where it makes sense for EPA to play a major role, and where federal resources, expertise and authorities can be critical to achieving a comprehensive resolution of violations.

EPA and ECOS have developed a related initiative, the 2004 State Review Framework (the Framework), that is also based on the 1986 Policy.⁴ The Framework is designed to identify core enforcement elements from the 1986 Policy and ensure consistency in the level of core enforcement activities in state CWA-NPDES, Resource Conservation and Recovery Act Subtitle C, and Clean Air Act Stationary Source programs. In particular, the Framework contains a process for reviewing whether state enforcement actions are adequate and consistent with EPA enforcement response policies, penalty policies, and compliance monitoring strategies or their state equivalents. It is also intended to ensure uniform federal oversight of state enforcement programs to achieve a consistent level of environmental protection across the country. The Framework can be helpful in the application of the guidelines set forth in this memorandum. Where an authorized state has an adequate enforcement program, as a matter of policy, primary responsibility for enforcement will reside with the state. The guidelines in this memorandum will outline where federal action may be appropriate.

³Under Section 309(e) of the CWA, states must be joined in all civil actions in which a municipality is a party. 33 U.S.C. § 1319(e).

⁴The review process developed under the Framework was piloted in 11 states and 1 EPA region in 2004. EPA and ECOS will evaluate these pilots in 2005 and implement any appropriate changes based on the pilot phase. In July 2005, EPA regions will initiate reviews in the remaining states with the goal of completing all reviews by Fiscal Year 2007. Thereafter, EPA generally expects the reviews to be completed on a three year cycle.

1986 Policy—Direct Federal Enforcement. The 1986 Policy identifies the following instances when EPA may consider taking direct enforcement action: (1) a state or local agency requests EPA action; (2) a state or local enforcement response is not timely and appropriate; (3) national precedents (legal or program); (4) violation of an EPA order or consent decree; and (5) to support the broader national interest in deterring noncompliance.⁵ The policy sets forth the following factors for EPA to consider in determining whether to take enforcement action: (1) cases specifically designated as nationally significant (*e.g.*, significant noncompliers, and explicit national or regional priorities); (2) significant environmental or public health damage or risk involved; (3) significant economic benefit gained by the violator; (4) interstate issues (multiple states or regions); and (5) repeat patterns of violations and violators.⁶

This memorandum applies the 1986 Policy to the CSO/SSO context and is intended to clarify the circumstances where federal enforcement in CSO/SSO cases may be appropriate. Principally, this memorandum addresses when it may be appropriate for EPA to take enforcement action in CSO/SSO cases where state action is not timely and appropriate or there is a need to support the broader national interest in deterring noncompliance. Where EPA takes enforcement action to support the broader national interest in deterring noncompliance, such action does not reflect that a state's enforcement program or response is inadequate or deficient. Instead, EPA involvement is important to deter noncompliance and ensure that issues of national programmatic significance are addressed consistently.

CSO/SSO Enforcement Guidelines. Based on the instances for direct federal enforcement provided in the 1986 Policy, EPA may determine that federal enforcement is appropriate in CSO/SSO cases where one or more of the following circumstances are present:

(1) A state requests that EPA take enforcement action to address CSO/SSO violations.

(2) The responsible entity or permittee is not under and in substantial compliance with an appropriate administrative or judicial order that includes:

(a) a compliance schedule that is consistent with the 1994 Combined Sewer Overflow (CSO) Control Policy, 59 Fed. Reg. 18,688 (Apr. 19, 1994) and the 1997 Combined Sewer Overflows Guidance for Financial Capability Assessment and Schedule Development (Feb. 1997)⁷;

⁵The policy provides that "[t]here are circumstances in which EPA may want to support the broader national interest in creating an effective deterrent to noncompliance. This support may embrace measures beyond which a State may need to undertake to achieve compliance in an individual case or to support its own program." 1986 Policy, Section D.1, "Criteria for Direct Federal Enforcement in Delegated States," p. 21 (as modified by the 1993 Policy, p. 9).

⁶*Id.*

⁷The 1997 Guidance for Financial Capability Assessment and Schedule Development is also used to develop SSO compliance schedules.

(b) complete relief, including: (i) specific injunctive relief with milestones and a clear end date for completion of remedial measures; (ii) a remedy designed to comply with state water quality standards and to protect sensitive areas; and (iii) a remedy that addresses all CSO/SSO violations; and

(c) an appropriate penalty in light of the violations.⁸

(3) Federal enforcement is necessary to address a legal or programmatic issue of national precedential significance (national precedents).⁹

(4) There is a violation of an EPA order or consent decree.

(5) The broader national interest in creating an effective deterrent to noncompliance warrants measures beyond those which a state may need to undertake to achieve compliance or to support its own program. EPA may take enforcement action on this basis where one or more of the following circumstances are present:

(a) Violations have occurred at a large sewer system, as determined by one or more of the following: (i) the cost and complexity of the injunctive relief necessary to correct the violations; (ii) the length of the compliance schedule; (iii) the average daily flow of the system; or (iv) the population served by the system.¹⁰

(b) CSO/SSO violations have occurred that may impact watersheds that cross state or international boundaries.

(c) There is a significant environmental impact that has not been addressed. Examples of significant environmental impacts may include, but are not limited to: (i) a beach or

⁸Consistent with the 1994 CSO Policy, it may be appropriate not to assess civil penalties for past CSO violations "if permittees have no discharges during dry weather and meet the objectives and schedules of this Policy." 59 Fed. Reg. 18,697.

⁹The 1986 Policy states with respect to "national precedents" that "[t]his is the smallest category of cases in which EPA may take direct enforcement action in an approved State, and will occur rarely in practice. These cases are limited to those of first impression in law or those fundamental to establishing a basic element of the national compliance and enforcement program." 1986 Policy, Section D.1.c, p. 23. One example of a legal and programmatic issue under national precedents is where existing state law precludes a municipality from raising revenues necessary to complete injunctive relief. See 33 U.S.C. § 1319(e).

¹⁰The size of the system is often one of several factors that support federal involvement in a CSO/SSO case, and in those instances, there is no numeric guideline for a large system. However, where size of the system is the sole basis for federal action, the definition of a large system for purposes of these guidelines that should serve as a basis for discussion is: (i) it is anticipated that the cost of the injunctive relief may exceed \$250 million; (ii) the implementation schedule for injunctive relief may extend from 15-20 years; (iii) the average daily flow of the system is greater than or equal to 100 million gallons per day; or (iv) the population served by the system is greater than 300,000.

shellfish bed closing; (ii) a fish consumption advisory or fish kill; (iii) substantial sewer overflows; (iv) impacts to sensitive habitats; or (v) impacts to a drinking water system intake.

(d) A citizen suit or notice of a citizen suit has been filed under Section 505 of the CWA.

Federal-State Coordination. It is our hope that the guidelines provided above will enhance federal-state coordination and partnership in the CSO/SSO program. As the 1986 Policy recognizes, early consultation and information-sharing between EPA and states is the lynchpin of effective coordination on enforcement.¹¹ Full communication and coordination between EPA and the states (*e.g.*, early notification of inspections, the basis of and intent for enforcement actions prior to initiation of any action, and other information sharing) are vital in the CSO/SSO context because of the complexity and resource demands of most CSO/SSO cases. Early consultation is particularly important where EPA is considering action on the basis that a state's enforcement response is not timely and appropriate, and is also important where EPA is taking action based on one of the other guidelines. Even where the Agency ultimately determines that a primary federal enforcement role is not warranted based on the guidelines set forth in this memorandum, EPA can provide valuable assistance to states and support state enforcement efforts in CSO/SSO cases.

We recognize that EPA regions and states have entered into enforcement agreements, Performance Partnership Agreements, and grant agreements (including Performance Partnership Grants and categorical grants) governing how CSO/SSO violations will be addressed. We encourage regions and states to reflect these guidelines in their agreements and to include commitments in their enforcement agreements that are consistent with the goals established for the EPA Wet Weather national priority. A region and state may also seek to enter into a Memorandum of Agreement (MOA) specific to CSO/SSO cases that addresses the respective enforcement roles of the federal government and the state. The guidelines provided in this memorandum could serve as a precursor to negotiating such an MOA. Finally, we encourage regions and states to engage in appropriate work-sharing on specific CSO/SSO cases as they arise to leverage federal-state resources.

¹¹See 1986 Policy, Section E, "Advance Notification and Consultation."