

***EPA's Significant Noncompliance Policy for Clean Water Act Violations
Associated with CSOs, SSOs, CAFOs, and Storm Water Point Sources***

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. From hereinafter, this policy will be referred to as the “*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 guidelines to identify the most egregious 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. Existing documents and procedures should continue to be utilized to determine compliance evaluation targets and negotiate annual work-share agreements.

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 Ensuring appropriate pollutant discharge limits and controls, issuing effective permits, monitoring compliance, and pursuing appropriate enforcement actions for this universe resulted in the need to nationally track the information required to measure, evaluate, and report on these efforts. In the last twenty years, these efforts have resulted in significant pollutant controls and reductions from traditional major sources.

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

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 *Wet Weather SNC Policy*. This *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 *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 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.

This document is intended solely as guidance. The statutory provisions and EPA regulations described in this document contain legally binding requirements. 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. 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, applying best professional judgment and 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.

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 or administrative order by consent (with or without a penalty); (2) civil judicial consent decree or Court order; and, (3) criminal action.

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). Reporting 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

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.

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

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 without depuration;
 - 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 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 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.

A 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 their associated collection systems and large industrial facilities also

required to have permits for storm water runoff. 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 *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 time line 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 SNC violation no later than the reporting deadline associated with the third consecutive quarter that the identified violation is in SNC.

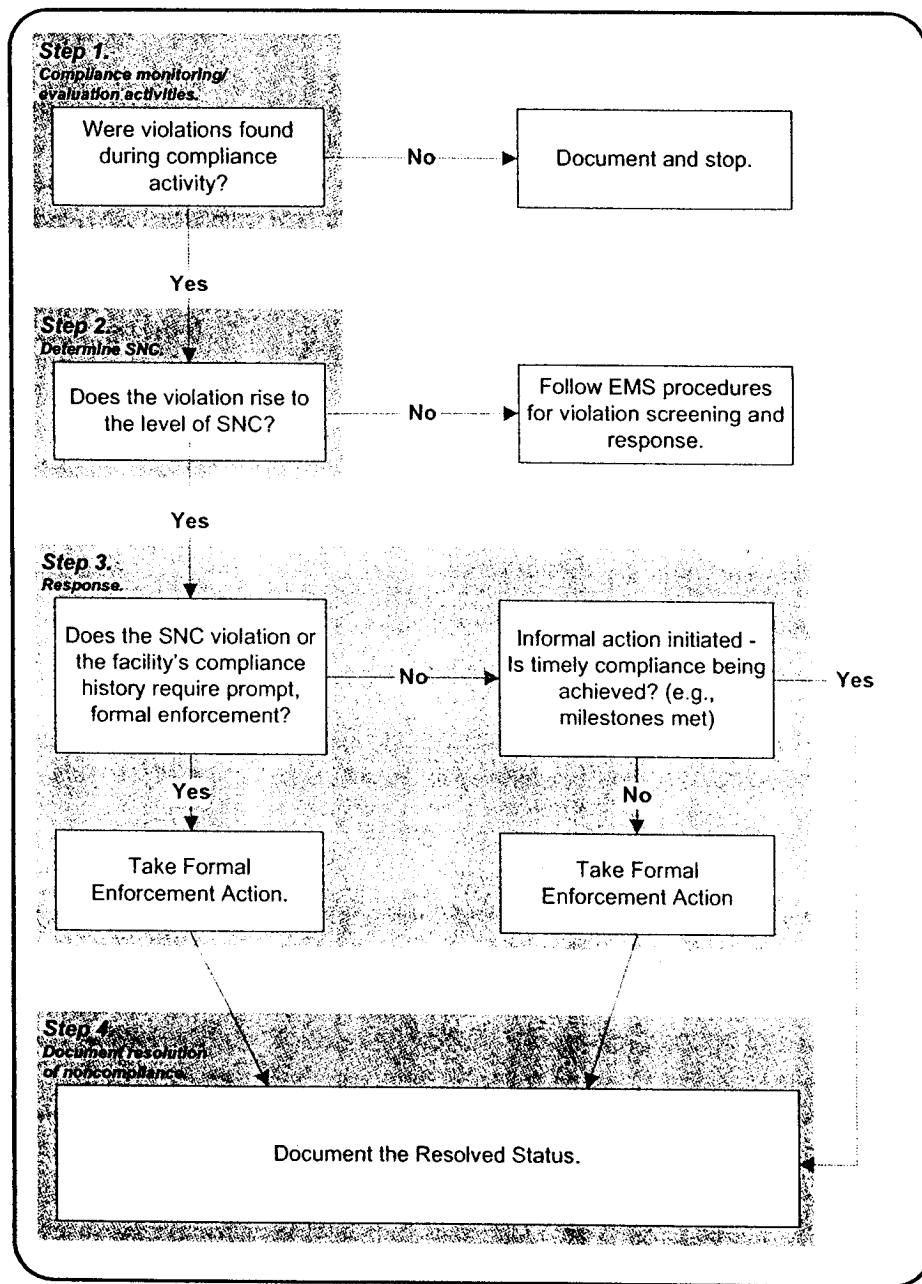


Figure 1. SNC Process

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 is needed, or where the evaluation requires 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

	<i>1. Conduct Compliance Evaluation Activity</i>		<i>2. Determine SNC</i>
Example #1	Conduct inspection (no follow-up information or analysis required)		5/31/06
	1/1/06		
Example #2	Conduct inspection	Receive additional information (e.g., sampling results) and complete investigative analysis	8/31/06
	1/1/06	6/1/06	

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 need to be gathered before making an 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 need 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 was 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, one where all information necessary was obtained at the inspection, and two where the information became available at a later date.

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. 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 Policy* provided that the requirement to implement the NMCs and develop and implement approved LTCPs with intermediate and final milestones must 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 discharge*" 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 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> . ³
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 may violate NPDES permit conditions.

For alleged SSO violations, the regulatory authority, using best professional judgment, should assess available information, 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.

³The term “multiple” includes repeated or recurring discharges at a single location, or a discharge (or discharges) at different locations. The 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, 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.

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

SSO SNC Criteria
Multiple <i>significant unauthorized discharge</i> , or multiple <i>significant overflows</i> . ⁴
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 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) must be implemented to minimize the discharge of pollutants to receiving waters.

For alleged storm water violations, the regulatory authority should make an 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.

⁴The term “multiple” includes repeated or recurring discharges at a single location, or a discharge (or discharges) at different locations. The 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, 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.

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

Storm Water SNC Criteria
<i>A significant unauthorized discharge.</i>
Any <i>significant unauthorized discharge</i> at a site with a small construction waiver or conditional exclusion for no exposure.
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. EPA and state issued individual and general permits require the development and implementation of a nutrient management plan (NMP), whose terms and conditions are incorporated into the permit, 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 an 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 a 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.

Each of the following alleged CAFO violations may constitute SNC:

CAFO SNC Criteria
Any significant unauthorized discharge.
No NMP when one is required.
Multiple violations of permit requirements (including failure to apply for an NPDES permit, when one is required). For example, multiple deficiencies in implementing the permit and the NMP, such as failure to: <ul style="list-style-type: none"> • maintain adequate storage capacity • 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, whether or not it meets 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.

3. Identify and Undertake a Timely and Appropriate Response

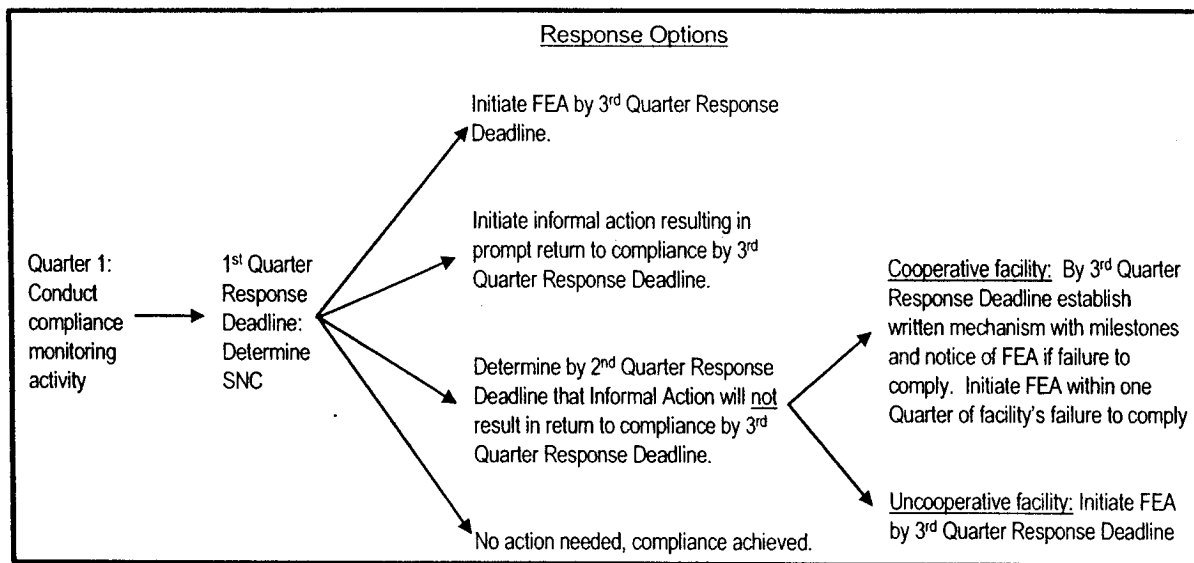
The NPDES authority should take appropriate follow-up action against a wet weather SNC violation no later than the reporting deadline associated with the third consecutive quarter that the violation identified in Step 1 is in SNC. In most cases, EPA expects that the NPDES authority will initiate formal 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, the NPDES authority should initiate formal enforcement action, with a penalty when appropriate, without providing an opportunity for the violation to be addressed informally. In some circumstances, such as a first-time violator that promptly implements corrective measures, SNC may be addressed by informal action. Figure 3 illustrates the recommended timing for SNC response.

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 take informal action to resolve the SNC violation. All informal actions should be in writing and well documented; examples include notices of violation, letters of warning, sewer moratoriums, stop work orders, and schedules of compliance within permits. NPDES authorities may also issue an administrative consent order or a consent agreement that is not equivalent to EPA's definition of a formal enforcement action in the NPDES program.



Quarter of Compliance Monitoring Activity	1st Quarter Response Deadline	2nd Quarter Response Deadline	3rd Quarter Response Deadline
January – March	May 31	August 31	November 30
April – June	August 31	November 30	February 28
July – September	November 30	February 28	May 31
October – December	February 28	May 31	August 31

Figure 3. Recommended Timing for SNC Process

If the NPDES authority initiates an informal action and anticipates that the violation will not be resolved by the third quarter SNC response deadline but the facility is being cooperative and is on track to achieve compliance, then the informal mechanism should specify a date certain for compliance, contain interim milestones, and provide notice that a formal enforcement action with a penalty will be taken for failure to comply. If a facility fails to correct violations and comply with the conditions of an informal action that extends beyond the third quarter response deadline, the NPDES authority should take a formal enforcement action, with an appropriate penalty, within one quarter of determining the facility’s failure to maintain its “resolved pending” status. If, after the NPDES authority takes an informal response, the facility is uncooperative and is not making progress towards achieving compliance by the second quarter SNC response deadline, the NPDES authority should take a formal enforcement action with appropriate penalty by the third quarter SNC response deadline.

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, completed the construction project and moved on (*i.e.*, essentially the site has returned to compliance since injunctive relief is no longer needed), an APO may be an appropriate enforcement response.

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 returned to compliance once aware of its problems. A decision to take no action must 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. 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 an 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. Rather, 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. Implementation

Implementation of this policy 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, a subgroup of the State-EPA NPDES Advisory Group that drafted this policy will draft recommendations for tracking and reporting wet weather SNC information. The subgroup's wet weather SNC recommendations may ultimately have to be revised depending on the final outcome of the ICIS-NPDES project.

**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
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

Attachment 3
Qs and As for EPA's Draft Significant Noncompliance Policy for CWA Violations
Associated with CSOs, SSOs, CAFOs, and Storm Water Point Sources
(i.e., Draft Wet Weather SNC Policy)
July, 2006

Background

1. What is Significant Noncompliance (SNC)?

SNC is a program management tool: A key principle in EPA's 1989 *NPDES Enforcement Management System* is that all violations should be evaluated for appropriate enforcement response. Since EPA and the states do not have the resources to take enforcement actions against all NPDES violations, SNC was a program management tool developed in the mid-1980's to help focus enforcement resources on the most serious violations.

2. What is the current NPDES SNC policy and how is it implemented?

SNC is guidance: Identifying SNC violations is not a regulatory requirement, it is an Agency policy utilized for program management purposes.

SNC applies to majors: In the 1980's, the emphasis was on the largest NPDES facilities so SNC screening was tied to facilities meeting the definition of "major facility." For example, major municipal facilities include all facilities with design flows of greater than 1 million gallons per day and facilities with EPA-approved pretreatment programs. Major industrial facilities are determined based on a set of rating criteria. There are approximately 6,500 NPDES majors, of which 4,100 are municipals and 2,400 are industrials. Since most NPDES major facilities have permits and submit discharge monitoring reports (DMRs), EPA's PCS database is used to automatically flag and track SNC violations.

Timely and appropriate enforcement: The concept of NPDES SNC includes the expectation that SNC violations must receive a formal enforcement action or return to compliance within a fixed time period (*i.e.*, after two quarterly reporting periods). Unaddressed SNC violations without adequate justification for inaction end up on EPA's Watch List.

Program Performance: NPDES SNC rates are used by EPA (*e.g.*, State framework review and OMB Part 106 review) and outside groups (*e.g.*, PIRG) as program performance measures. The public currently has access to a major facility's SNC status via information in "ECHO." Like existing NPDES SNC, RCRA SNC, and CAA HPV data, EPA anticipates that the public will eventually have access to wet weather SNC violation information in ECHO once the *Wet Weather SNC Policy* is final and fully implemented.

3. How does the current NPDES SNC policy versus the Wet Weather SNC Policy relate to the NPDES regulations?

NPDES SNC policy overlays reporting requirements: It is a regulatory requirement for NPDES authorities to list, on a quarterly noncompliance report (QNCR), certain categories of violations at NPDES “majors” per 40 CFR Part 123.45. SNC violations are a subset of the total universe of reportable noncompliance (RNC) violations required to be listed on the QNCR.

To be consistent in national tracking and reporting, EPA’s *Wet Weather SNC Policy* does utilize the quarterly reporting deadlines associated with the QNCR, however, it does not result in facilities with wet weather violations being added to the regulatory QNCR.

4. Why is OCE/WED developing a “Wet weather SNC Policy”?

Update the NPDES program: The NPDES program has evolved over the past twenty years. Some key changes include: the universe of regulated facilities has expanded to include wet weather discharges (CSOs, SSOs, CAFOs, and storm water). Due to environmental and human health impacts, wet weather issues have been EPA/OECA national compliance and enforcement priorities since 1998. The primary focus has shifted from NPDES “majors” to wet weather point sources. Because many wet weather facilities are unpermitted, or covered by general permits, have non-traditional controls (such as best management practices) that are not reported on DMRs, and don’t fit the definition of NPDES “major” facility, they are not routinely screened for SNC status or tracked.

Prioritize violations in the wet weather areas: The *Wet Weather SNC Policy* will supplement the existing *NPDES SNC Policy* and provide guidance on identifying and prioritizing the most serious wet weather violations.

Improve accountability of resources: EPA has been criticized for not being able to account for resources being shifted from the NPDES core program to the wet weather national priorities. Developing an approach to identify and prioritize wet weather SNC, will help fill in that gap and provide a more complete picture of the current NPDES program.

5. What are the key elements of the draft wet weather SNC approach?

Four step approach:

- Conduct compliance monitoring/evaluation activity (e.g., inspection, file review, follow-up to citizen tip) to identify violations
- Determine SNC (applying wet weather program-specific criteria in policy)
- Identify and undertake a timely and appropriate response
- Document resolution of noncompliance

6. How does the draft wet weather SNC approach differ from existing NPDES SNC?

Change in NPDES “mind-set”: The wet weather approach involves a significant change in the NPDES program due to the lack of DMRs and traditional effluent limit controls for wet weather sources. Identification of wet weather SNC is predominantly inspection-driven versus the current approach of having major facilities automatically screened for SNC via DMR self-monitoring data in PCS.

More flexibility: Regions and states want more flexibility in the timeframes for determining and reporting wet weather SNC violations, as well as in the timing and range of appropriate actions to address SNC because wet weather cases tend to be more complex to develop and resolve. Like the existing NPDES SNC approach, the expectation is that most wet weather SNC violations will be addressed by a formal enforcement action. The draft wet weather SNC approach provides additional flexibility in resolving some SNC violations, where appropriate, via a written informal response. However, if timely compliance is not achieved with a written informal action within recommended timeframes, the NPDES authority is expected to promptly escalate to a formal enforcement action.

7. How does the draft wet weather SNC approach compare to the RCRA SNC and CAA HPV approaches?

Examples of how the wet weather approach is similar to approaches used in the CAA and RCRA enforcement programs include: a compliance monitoring activity such as an inspection or file review (versus receipt of self-monitoring data) is the predominant way that violations are identified; the facility’s history of compliance and recalcitrance is considered; an underlying principle is that all violations should be reviewed and are subject to possible enforcement response; SNC/HPV is a management tool needed to focus enforcement resources on the most serious violations; and, SNC/HPV identification and resolution is documented and tracked in a national database.

Examples of how the wet weather approach differs from the RCRA and CAA approaches include: issuance of an APO alone (*i.e.*, without an AO) is, by definition, considered an informal enforcement action in the NPDES program versus a formal enforcement action in the RCRA and CAA programs; RCRA and CAA programs require that all SNC/HPVs be addressed by formal enforcement action (which includes APOs) versus the wet weather approach which includes the expectation that the majority of SNC will be addressed by formal enforcement action but does allow the NPDES authority flexibility to try a written informal action for a limited period of time in certain circumstances; wet weather SNC (consistent with traditional NPDES SNC) is determined on a violation-by-violation basis rather than on a facility-wide basis; and, the wet weather SNC process timeframe (consistent with traditional NPDES SNC) is expressed in terms of quarters and quarterly reporting deadlines utilized in the NPDES program versus in terms of “day 0, day 90, day 240” in the RCRA and CAA programs.

8. *What were some key issues raised by the states?*

The need for flexibility in enforcement response to wet weather SNC: the states on the workgroup said it was critical for them to have the flexibility to address some SNC informally. Addressing all SNC violations via formal enforcement actions would be a tremendous resource burden to some states that have to refer all formal enforcement actions to their Attorney General's office. Some SNC violations can be addressed more promptly and efficiently via informal action. The states agreed that the opportunity to utilize informal action should not be left open-ended and the workgroup developed recommended conditions and timeframes for its use and for taking follow-up formal enforcement action, if needed.

State burden associated with increased data entry: many of the concerns were actually related to OECA/OC's separate project to modernize PCS (ICIS-NPDES) national database and the associated *PCS (ICIS-NPDES) Policy Statement* that spells out data entry requirements. While EPA's *Wet Weather SNC Policy* will rely on wet weather data elements for implementation, it will not separately establish any PCS (ICIS-NPDES) data entry requirements.

The *Wet Weather SNC Policy* will increase the number of facilities on EPA's Quarterly Noncompliance Report (QNCR) and Watch List: The *Wet Weather SNC Policy* will not significantly affect the NPDES quarterly noncompliance report (QNCR) required by 40 CFR Part 123.45 because QNCR requirements are only for "majors." Type and frequency of wet weather SNC reports has not been determined yet but will be discussed and developed by EPA and states during an "interim period" prior to full implementation of the *Wet Weather SNC Policy*. The *Draft Wet Weather SNC Policy* does not propose specific changes to EPA's Watch List, although OECA may decide later that revisions to the Watch List to track unaddressed wet weather SNC are needed. Any future changes to the Watch List will be provided well in advance of implementation.

OECA is circumventing the rule making process: EPA's existing NPDES SNC definition was issued as a policy in the mid 1980's -- not as a rule. However, because the NPDES regulations include specific noncompliance reporting requirements for majors, the original NPDES SNC policy was tied more strongly to state regulatory reporting efforts. The *Wet Weather SNC Policy* is being developed solely as a policy and Regions will be encouraged to use the policy via their existing annual NPDES work-share commitment process with their states. It will not have any companion regulatory requirements, however -- at the request of the workgroup and for the sake of consistency -- it does utilize the regulatory NPDES quarterly reporting deadlines.

9. *What are the key issues expected to be raised by outside groups?*

States: Workgroup members from 11 states support the current approach. We will seek assistance from these representatives to explain the approach to the other states who have not been part of the workgroup in order to achieve broader state support.

Environmental groups: They believe that EPA guidance for identifying SNC at wet weather sources is needed, but may be concerned that we are allowing an informal response to resolve some wet weather SNC violations. SNC violations are – by definition – more serious violations.

Industry / Municipalities: The regulated community may be concerned that information on wet weather SNC violations will now be identified and tracked, and will be made available to the public. (Traditional NPDES SNC, RCRA SNC, and CAA HPV information is currently available to the public.)

10. *What are EPA's next steps and timing associated with issuing its Wet Weather SNC Policy?*

EPA's tentative schedule is:

- July - Sept. 2006: Send draft policy out for review and comment period by full ASIWPCA membership. Set up 1-2 conference calls during the comment period to walk through the document and answer questions.
- Summer 2006: Form subgroup to begin working on wet weather SNC national tracking and reporting details.
- Sept. - Oct. 2006: Work with State-EPA Advisory Group and ASIWPCA on addressing state comments and revising the draft policy.
- Early Nov. 2006: Send revised draft policy for ECOS review and comment.
- Nov.- Dec. 2006: Address ECOS comments and revise draft policy.
- Late Dec. 2006: Issue *Wet Weather SNC Policy*.
- 2007 - 2008: Work on implementation issues with Regions and States