

PRESIDENT

Dick Champion, Jr.

Director

Independence Water Pollution
Control Department
Independence, MO

VICE PRESIDENT

Christopher M. Westhoff

Assistant City Attorney

Public Works General Counsel
City of Los Angeles
Los Angeles, CA

TREASURER

Marian Orfeo

Director of Planning

& Coordination

Massachusetts Water
Resources Authority
Boston, MA

SECRETARY

Kevin L. Shafer

Executive Director

Milwaukee Metropolitan
Sewerage District
Milwaukee, WI

EXECUTIVE DIRECTOR

Ken Kirk

November 13, 2006

Walker Smith

Director, Office of Regulatory Enforcement
U.S. Environmental Protection Agency (EPA)
1200 Pennsylvania Ave., N.W.
Mail Code: 2241A
Washington, DC 20460

Dear Ms. Smith:

The National Association of Clean Water Agencies (NACWA) recently reviewed a June 21, 2006 copy of the draft *Significant Noncompliance Policy for Clean Water Act Violations Associated with CSOs, SSOs, CAFOs, and Storm Water Point Sources (Draft SNC Policy)* currently under development by the Agency. The scope and definition of SNC are important issues for our member agencies. NACWA believes that collaboration between EPA and the regulated community is the best way to ensure that a final revised *SNC Policy* is fair, effective, and comprehensive.

Attached to this letter are suggestions and comments on the *Draft SNC Policy*. The comments were submitted to NACWA by a diverse cross-section of NACWA's public agency members, located in a wide range of different geographic locations nationwide serving cities of all sizes. Their comments provide a valuable and constructive critique of the proposed SNC policy and merit serious consideration as EPA finalizes the *Draft SNC Policy*.

NACWA recognizes that EPA has likely changed the document in recent months. Nonetheless, we hope that EPA will review and consider the submitted comments as it moves towards a final revised *SNC Policy*. Please do not hesitate to contact me at 202/533-1803 or via email at adunn@nacwa.org if you have any questions regarding our comments.

Sincerely,



Alexandra Dapolito Dunn
General Counsel

Cc: Jim Hanlon, EPA

NACWA COMMENTS ON DRAFT SIGNIFICANT NONCOMPLIANCE POLICY November 13, 2006

The following is a compilation of comments that NACWA received from our public clean water member agencies on the Agency's *Significant Noncompliance Draft SNC Policy for Clean Water Act Violations Associated with CSOs, SSOs, CAFOs, and Storm Water Point Sources (Draft SNC Policy)* dated June 21, 2006. These comments are submitted to the Agency for consideration as EPA moves towards finalization and release of a *Final SNC Policy*.

General Comments

- A final *SNC Policy* needs to contain clear language granting the National Pollutant Discharge Elimination System (NPDES) authority discretion to not designate an overflow as SNC if there are mitigating circumstances.
- The *Draft SNC Policy* may duplicate existing wastewater National Pollutant Discharge Elimination System (NPDES) permit provisions applicable to wastewater treatment facilities. Although there are no specific Discharge Monitoring Report (DMR) reporting criteria for wet weather events, many NPDES permits contain overflow reporting requirements.
- Although the *Draft SNC Policy at 2* states that “this document is intended solely as guidance,” other portions of the *Draft SNC Policy* use words such as “expected” and “expectation” (*see, e.g., Draft Attachment 3, at 3*), which imply that these actions should be taken or consequences will attach for failure to do so. NACWA recommends that EPA remove such language.

Sanitary Sewer Overflow Comments

- NACWA generally supports the stated purpose of the *Draft SNC Policy* – to update the existing Agency SNC Policy to include wet weather events.
- However, NACWA believes that much of the information contained in the *Draft SNC Policy* regarding sanitary sewer overflows (SSOs) would be best incorporated into a national SSO rule or policy. NACWA has urged the Agency to embark on a SSO and C-MOM rulemaking; however a recent letter from EPA to NACWA indicates that such an action is still some time away. NACWA does not believe that “rulemaking through guidance” is an effective approach, particularly regarding a national issue like SSOs, and encourages EPA to move forward expeditiously on a national SSO rule or policy.
- The *Draft SNC Policy* states that “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.” However, it is just as likely that the overflow cause was *not* improper O&M. EPA must recognize that many spills are caused by vandalism, acts of third parties, severe storm events above the design storm used to design the sewer system, or acts of God. NACWA recommends that the final *SNC Policy* include a discussion of possible mitigating factors, as well as a

discussion of how the federal upset and bypass regulatory provisions may apply to alleged violations.

- NACWA is concerned with the inclusion of “associated collection systems” in the examples of a “major facility” (*Draft at 5*). Often, the owner of a treatment plant does not own or operate the attached collection system. Many times, collection systems are operated by separate municipalities or special districts and, therefore, would not fall under the supervision, jurisdiction or control of the owner of the treatment plant. This fact should be discussed. Accordingly, NACWA recommends that the final *SNC Policy* not presume that all major facilities include both a treatment plant and a collection system.
- The *Draft at 11* references Capacity, Management, Operations, and Maintenance (C-MOM) programs as if there were federal regulatory requirements for such programs. While NACWA fully supports C-MOM programs, and recognizes that many utilities are implementing such programs, it is important for any final *SNC Policy* to acknowledge that federal regulations requiring such a program have not yet been promulgated.

Effect of Enforcement Actions

- A final *SNC Policy* should not apply to any violations which are addressed in a formal enforcement action. For example, if an entity has unpermitted SSOs, but has entered a consent order to address the SSOs, those SSOs should not result in SNC while the decree is being implemented. It is not clear in the *Draft* that such an exemption exists, and accordingly, NACWA recommends that it be stated explicitly.
- SNC should not include failure to meet milestones in a formal enforcement action. The parties to a formal enforcement action have already negotiated the appropriate penalty for failure to comply with the agreement (usually, stipulated penalties). It is not appropriate to also include this same violation in the calculation of SNC.
- The discussion of possible enforcement actions (*Draft at 4*) should recognize that if a third party has enforced against a discharger, additional enforcement is likely unnecessary.
- If SNC is to attach to failure to meet milestones in administrative orders (AOs), serious due process concerns arise. Often, AOs are adopted unilaterally with no hearing process and no right to appeal. More due process must be inserted into the AO adoption process to protect constitutional rights, or this element should not be included in the final *SNC Policy*.
- NACWA recommends that EPA provide more explanation on the differences between an APO and an AO, and why an APO alone “is, by definition, considered an informal enforcement action in the NPDES program” (*Draft Attachment 3, at 3*). It is NACWA’s position that any penalty assessment should be done formally with public notice and comment requirements being followed, unless done with the consent of the discharger.

Definitional Comments

- The definition of “*significant overflow*” in the *Draft SNC Policy* includes overflows that are beyond the jurisdictional scope of the Clean Water Act (CWA), such as “backups into basements, yards, parks, or any other areas where people can come into direct contact with sewage” (*Draft at 3; see also Draft at 11 (SSO discussion)*). NACWA believes that such overflows should be regulated by local public health departments and not by a federal or state agency acting under CWA authority. Accordingly, NACWA recommends that EPA limit the discussion of overflows in a final *SNC Policy* to “those overflows that reach waters of the U.S.”
- The *Draft at 11* concludes that “SSOs that reach waters of the U.S. are point source discharges...” This may not always be the case. Many SSOs are indirect, sheet flow discharges, not direct from a pipe to a waters of the U.S.
- The definition of “*significant overflow*” should include an exception for private laterals (like the definition of “*overflow*”).
- The term “insufficient sewer capacity” (*Draft at 17*) should be defined as those spills that occur in storms *below* the design storm for which the sewer was constructed. A sewer system conveying a design storm without spilling should be considered “sufficient” sewer capacity.
- The definition of “*significant unauthorized discharges*” includes those with “the potential to negatively impact human health or the environment.” NACWA recommends removal of the reference to “potential” impacts due to its vagueness.
- It is unclear whether the term “*significant unauthorized discharges*” refers to volume-based discharges, duration-based discharges, or both. These issues are addressed indirectly in footnote 3 (*Draft at 11*), but NACWA believes that more concrete evaluation criteria are needed. NACWA also recommends that the Agency clarify how the term “*significant unauthorized discharge*” differs from the term “*unauthorized discharge*.”
- The term “deputation” is not defined (*Draft at 5*). NACWA recommends explaining this term or using a more commonly used term.
- NACWA recommends that EPA discuss the definition of “multiple” in the definitional section of a final *Policy* and not merely reference the topic in footnotes (*see Draft Policy at 11-12, notes 3, 4*). The discussion should clarify that overflows at different locations may not be any indication of SNC – where a collection system is comprised of hundreds or thousands of miles of pipe, multiple overflows at discrete, non-related areas may not have any relation to each other.

Clarifying Comments

- The list of possible formal enforcement actions (*Draft at 4*) is confusing and incomplete as written. NACWA recommends the following clarifications:

“... (1) unilateral administrative orders ~~or~~ (with or without a penalty); (2)

administrative orders by consent (with or without a penalty); ~~(2)~~(3) civil judicial consent decree or Court order; ~~and (3)~~ (4) criminal action; ~~and (5)~~ citizen enforcement under section 1365 of the CWA.

- The term “significant” should be inserted into the *Draft at 6* at line three of the last paragraph as follows:

... begins in the first quarter that the NPDES authority is able to identify significant noncompliance.”

- NACWA recommends adding “to the maximum extent practicable” to the end of the first paragraph in the storm water discussion (*Draft at 12*) to recognize the statutory standard for municipal separate storm sewer systems (MS4s) contained in CWA § 402(p)(3)(iii) as follows:

These best management practices (BMPs) must be implemented to minimize the discharge of pollutants to receiving waters to the maximum extent practicable.

- NACWA recommends moving the issue of “sewer moratorium” (*Draft at 15*) from the *informal* action section to the *formal* enforcement section. Moratoria are usually judicially imposed or at least are imposed after a formal public process (*i.e.*, in an order or permit issued by a regulatory body after a public hearing).
- The *Draft at 14* states that the NPDES authority has the discretion not to designate alleged wet weather violations as SNC where unusual circumstances result in SNC status beyond a facility’s control. NACWA recommends that the Agency provide examples here to guide enforcement agencies. The list should include vandalism, acts of third parties, severe storm events above the design storm used to design the sewer system, and acts of God. NACWA also recommends that a final Policy state that when enforcement discretion is used to *not* take an enforcement action, this action should be documented and provided to the discharger in any compliance report.
- NACWA recommends that the Agency remove the *Draft SNC Policy’s* references to “uncooperative behavior” and “recalcitrance,” as these are not factors that may be considered in a CWA enforcement action (the allowable factors are outlined in 33 U.S.C. §1319(d) & (g)(3)). In addition, “uncooperative” and “recalcitrance” are subjective terms subject to variation in interpretation. For example, a treatment plant operator might refuse an unannounced inspection by enforcement officers without a search warrant. Although asking for a search warrant is constitutional right, this action might be considered uncooperative or recalcitrant. Similarly, dischargers who have administratively challenged their permits or enforcement orders might be deemed “uncooperative” even though they are exercising their legal rights.
- It is unclear how EPA plans to “encourage” states to use a final *SNC Policy* “via their existing annual NPDES work-share commitment process with their states” (*Draft Attachment 3, at 4*). If EPA will withhold funding if a state does not implement the

SNC Policy as “encouraged,” then the “guidance” becomes an impermissible underground regulation. See *Appalachian Power v. EPA*, 208 F.3d 1015, 1028 (D.C. Cir. 2000).

- The discussion of an “isolated” discharge or overflow rising to the level of SNC should be discussed prominently in the document and not in footnotes (see *Draft Policy at 11-12, notes 3, 4*). NACWA believes that an isolated discharge or overflow qualifying as SNC is inherently inconsistent with the SNC Policy in its entirety. Nonetheless, should the Agency persist in addressing the subject, then NACWA recommends that the Agency move the discussion of isolated incidents into the body of the *SNC Policy*, and that it be both more fully explained and appropriately qualified.
- The *Draft SNC Policy* is not clear as to whether a POTW or municipality would be subject to SNC status for CSOs that occur during the build out of an approved Long Term Control Plan (LTCP). If the LTCP is being implemented, SNC status should not be imposed for any CSOs that occur during that period.
- The *Draft at 17* states that a separate sanitary sewer system that is considered to be in SNC for a significant discharge that occurs during wet weather because of insufficient capacity will be returned to compliance when the sewer capacity assurance projects necessary to eliminate the overflows have been completed. This presents several issues that a final *SNC Policy* should address: 1) the minimum design storm that a sanitary sewer must be capable of conveying must be established, and 2) a municipality may not have the funding available to improve the system capacity.