



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

DEC 8 2009

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

MEMORANDUM

SUBJECT: Drinking Water Enforcement Response Policy

FROM: Cynthia Giles
Assistant Administrator *Cynthia Giles*

TO: Regional Administrators

Attached is a new enforcement approach designed to help our nation's public water systems comply with the requirements of the Safe Drinking Water Act. This new approach replaces the existing contaminant by contaminant compliance strategy with one that focuses enforcement attention on the drinking water systems with the most serious or repeated violations. The new strategy will bring the systems with the most significant violations to the top of the list for enforcement action in states, territories and in federal Indian Country, so that we can return those systems to compliance as quickly as possible. As we work to protect the public's access to clean and safe drinking water, we need to be especially vigilant about noncompliance that has the potential to affect children, such as violations at schools and day care centers.

This policy was developed through the intensive cooperation of the Association of State Drinking Water Administrators, all EPA Regions, the Office of Water and Office of Enforcement and Compliance Assurance, and reflects our shared commitment to clean and safe drinking water. This new approach will be implemented starting in January of 2010, and will be evaluated during the coming year to see if improvements are necessary to best protect public health.

Thank you for the work your staff does, working closely with the states, to achieve the goals of the Safe Drinking Water Act. We expect that this new enforcement approach will help us do an even better job of increasing compliance with this important law.

If you have any questions, please contact me, or have your staff contact Mark Pollins at (202-564-4001) or Karin Koslow at (202)564-0171.

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MEMORANDUM

SUBJECT: Proposed Revision to Enforcement Response Policy
for the Public Water System Supervision (PWSS)
Program under the Safe Drinking Water Act and
Implementation of the Enforcement Targeting Tool

FROM: Mark Pollins, Director
Water Enforcement Division
Office of Civil Enforcement *Mj*

fan Karin Koslow, Acting Director *R. Farrell*
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TO: Office of Regional Counsel, Regions 1-10
Drinking Water Program Managers, Regions 1-10
Drinking Water Enforcement Managers, Regions 1-10
Association of State Drinking Water Administrators

Introduction

EPA is proposing a new approach for enforcement targeting under the Safe Drinking Water Act (SDWA) for Public Water Systems. The new approach is designed to identify public water systems with violations that rise to a level of significant noncompliance by focusing on those systems with health-based violations and those that show a history of violations across multiple rules. This system-based methodology is intended to ensure consistency and the integrity of the PWSS national enforcement program. The new approach includes a revised Enforcement Response Policy (ERP) and new Enforcement Targeting Tool (ETT).

The Enforcement Response Policy and Enforcement Targeting Tool re-emphasize a focus on "return to compliance" (RTC) rather than simply "addressing" a violation. The policy is intended to increase our

effectiveness in the protection of public health. Together the ERP and ETT will prioritize and direct enforcement response to systems with the most systemic noncompliance by considering all violations incurred by a system in a comprehensive way. The policy and tool identify priority systems for enforcement response, provide a model to escalate responses to violations; define timely and appropriate actions; and clarify what constitutes a formal action.

In general, the goal of the revised ERP and new ETT is to allow States and EPA to:

- Align public water system violations of the Safe Drinking Water Act within a prioritization that is more protective of public health;
- View public water system compliance status comprehensively;
- Ensure that both EPA and the States act on and resolve drinking water violations;
- Recognize the validity of informal enforcement response efforts while ensuring that, if these efforts have proven ineffective, enforceable and timely action is taken;
- Ensure that EPA and the States escalate enforcement efforts based on the prioritization approach;
- Increase the effectiveness of state and federal enforcement targeting efforts by providing a "tool" that calculates comprehensive noncompliance status for all systems and identifies those systems not meeting national expectations as set by EPA. It also provides an additional resource for identifying systems possibly in need of other State/EPA assistance in the areas of Capacity Development and Sustainability.

The final revised Enforcement Response Policy will supersede the following existing guidance by revising the definition of "timely" and "appropriate" enforcement response: *"Change in the PWSS Program's Definition of Timely and Appropriate Actions"* WSG 56 (Water Supply Guidance), April 20, 1990 and *"Revised Definition of Significant Non-complier (SNC) and the Model for Escalating Responses to Violations for the PWSS Program"* WSG 57 (Water Supply Guidance), May 22, 1990.

Identification of Priority Systems for Enforcement Using the Enforcement Targeting Tool

This system-based approach uses a tool that enables the prioritization of public water systems by assigning each violation a “weight” or number of points based on the assigned threat to public health. For example, a violation of a microbial rule maximum contaminant level will carry more weight than that of a Consumer Confidence Report reporting violation. Points for each violation at a water system are summed to provide a total score for that water system. Water systems whose scores exceed a certain threshold will be considered a priority system for enforcement. Based on this approach, States and EPA will be able to target resources to address those public water systems which EPA determines have the most significant problems.

Currently it is difficult to identify a systematic pattern of violations for a PWS because the focus of the current approach has been to assign “significant non-compliance” (SNC) status based on failure to comply with individual drinking water rules. Under the existing system, all SNCs are treated equally, without regard to the gravity of the violation and without considering other violations a system may have that are not identified as SNC. The new approach will look at PWS noncompliance comprehensively across all rules without using the rule-based SNC definitions and will ultimately replace the current rule-based SNC definitions to identify systems that are a high priority for an enforcement response.

Enforcement Targeting Formula

The enforcement targeting formula is the basis for the enforcement targeting tool that identifies public water systems having the highest total noncompliance across all rules, within a designated period of time. A higher weight is placed on health-based violations (including Treatment Technique and Maximum Contaminant Level violations). The formula calculates a score for each water system based on open ended violations and violations that have occurred over the past 5 years, but does not include violations that have returned to compliance or are on the “path to compliance” through a specified enforceable action. The “path to compliance” is the status of a public water system that has been placed under an enforceable action to return it to compliance. These enforceable actions have different names in different states but the characteristic they all share is that an enforceable consequence results if the schedule is not met. The formula only considers violations for Federally-regulated contaminants.

As part of any State or Federal program, it is expected that enforceable actions will be adequately tracked to make certain compliance is ultimately achieved.

The formula provides a rank-order of all public water systems based on the total points assigned for each violation and the length of time since the first unaddressed violation. The factors of the formula are:

- The severity of the violation—which is based on a modification of Public Notification Tiers, as set forth in Title 40 of the Code of Federal Regulations at Part 141, Subpart Q, “Public Notification of Drinking Water Violations,” Section 141.201. The severity or weight of the violation is highest for acute contaminant health based violations, with a lower weight for chronic and other health based violations (and nitrate monitoring and total coliform repeat monitoring violations), and with the lowest weighting for other monitoring, reporting, and other violations.
- The number of years that a system’s violations have been unaddressed

For each public water system (PWS), a point score of non-compliance is calculated using this formula:

$$\text{Sum } (S_1 + S_2 + S_3 + \dots) + n$$

The total points for each violation are added together, and a time factor is added to achieve the total score for the public water system, where:

S = violation severity factor

- 10** For each acute health-based violation
- 5** For each other health-based violation and Total Coliform Rule (TCR) repeat monitoring violation
For each Nitrate monitoring and reporting violation
- 1** For each other monitoring and reporting, or any other violation

n = number of years that the system's oldest violations have been unaddressed (0 to 5)

Examples of Priority Systems for Enforcement

During the trial period, any public water system with a score resulting from the application of the enforcement targeting formula which is greater than or equal to 11 points will be considered a priority system for an enforcement response under this policy. Public water systems whose violations score at this level have at least one recent acute health-based violation, or at least two recent other non-acute health-based violations, or eleven other recent non-health-based violations. The following table illustrates examples of how a public water system may exceed the 11-point threshold:

Violations (S)	Years since first unaddressed violation (n)	Score (ΣS)+n	
2 acute turbidity exceedances	0 (occurred in current year)	$(10+10)+0$	=20
2 non-acute TCR MCL violations	1 (1 in previous year)	$(5+5) +1$	=11
11 monthly TCR monitoring violations	0 (all in current year)	$(1+1+1+1+1+1+1+1+1+1+1) +0$	=11
6 quarterly TCR monitoring violations, 1 annual nitrate monitoring violation	1 (first violations occurred in previous year)	$((1+1+1+1+1+1)+5) + 1$	=12
Failure to monitor annual VOC, SOC, IOC, Stage 1 DBP and 2 TCR MCL	2 (chemical violations occurred 2 years ago)	$((1+1+1+1)+5+5) + 2$	=16

Violations of tier 1 public notification requirements are significant because they reflect the failure to provide critical and real-time information to the public regarding drinking water. Although these violations are assigned a "1" under the policy, they would, by definition, be accompanied by an underlying violation of the health-based standard and would receive a score of at least 11.

Model for Escalating Responses to Violations

The existing model for escalating responses to violations sets forth EPA's expectation for EPA and the States' responses to a violation. The following concepts continue to be part of this new Enforcement Response Policy:

The primacy agency should respond to each violation of the national primary drinking water regulations.

Responses to violations should escalate in formality as the violation continues or recurs.

Some violations are very serious and pose an immediate risk to public health. In these circumstances, it is appropriate to proceed directly to a formal action, such as an emergency administrative order, an injunction or a temporary restraining order (TRO), or an emergency civil referral.

States have primary enforcement responsibility, and EPA retains independent enforcement authority under the Safe Drinking Water Act. In cases where the EPA Region is directly implementing the program "State" should be read to include the EPA Regional office. In addition, these guidelines should not be interpreted to preclude federal action at any point in the process if the situation warrants it.

Historically, the majority of enforcement actions taken for violations at public water systems are administrative in nature and these actions continue to be an important tool. Judicial cases also are an important enforcement tool and the use of judicial authority is encouraged.

EPA recognizes that States carry out both formal and informal enforcement and compliance assistance activities. These activities are effective tools for achieving compliance. Nevertheless, systems specifically identified by the targeting tool as priorities must be returned to compliance (RTC) or EPA will expect formal, enforceable mechanisms to return such systems to compliance. States will be expected to escalate their response to ensure that return to compliance is accomplished. Systems that are unable to sustain compliance should receive additional scrutiny.

Timely and Appropriate Response

Once a PWS is identified as an enforcement priority on the targeted list, an appropriate formal action or return to compliance will be required within two calendar quarters to be considered “timely.” However, regardless of a public water system’s position on a State’s enforcement target list, EPA expects that States will act immediately on acute, health-based violations and subsequently confirm that systems with such violations return to compliance.

Formal enforcement response includes: administrative orders with and without penalty, civil/criminal referral, and civil/criminal case filed. (See Table A, below, for a complete list.) Nevertheless, it should be noted that EPA has broad prosecutorial discretion to discuss specific timetables and mechanisms to return a system to compliance. For example, if a system can show that RTC is imminent but for reasons such as installation of new treatment or construction or other reason, RTC may take just over two quarters, EPA may not require a formal action by the State to give the system the opportunity to RTC. This discretion allows for some flexibility for systems that simply need a little more time but whose return to compliance is imminent. It is not, however, something that can be extended indefinitely as a way to avoid formal action.

The return to compliance or enforcement action needs to be achieved within two quarters of a system appearing as a priority system for enforcement and recorded such that it is reflected in the next update of the national database. For example, if a system is identified in January as an enforcement priority, the state would have until June to RTC the system’s violations or take a formal enforcement action. The return to compliance or enforcement action should be reported to EPA so that it is reflected in the Federal database in October.

Formal Enforcement

EPA has defined what constitutes a “formal” enforcement response in Water Supply Guidance 27 (WSG 27), *“Guidance for FY 1987 PWSS Enforcement Agreements”*. That guidance states: “According to the Agency’s policy framework, a formal action is defined as one which requires specific actions necessary for the violator to return to compliance, is based on a specific violation, and is independently enforceable without having to prove the original violation”. The definition of “formal” enforcement response in WSG 27 will be adopted by this Policy. A formal enforcement action has the

intent and effect of bringing a non-compliant system back into compliance by a certain time with an enforceable consequence if the schedule is not met. This may be accomplished through a variety of mechanisms, depending on a State's legal authorities. The enforcement mechanism selected by the State must (1) contain a description of the non-compliant violation, a citation to the applicable State, or federal law or rule, a statement of what is required to return to compliance, and a compliance schedule; and (2) provide the State with authority to impose penalties for violation of the State's enforcement document.

Trial and Implementation of the Enforcement Response Policy and Targeting Tool

During the trial period, EPA will generate a national scored list using the enforcement targeting tool and formula described above. This list will include only systems with violations that have not been returned to compliance nor are on the path to compliance. Systems on the list with a score of 11 points or more will be considered as priority systems for enforcement response. This list will also indicate those systems that scored 11 points or higher on a previous list for tracking systems on the path to compliance and to help ensure return to compliance is achieved. EPA and the States will discuss the priority water systems on the list each quarter and determine additional steps that may be needed to achieve RTC.

As discussed above, a State may use initial compliance assistance to resolve the violations, as long as the return to compliance (RTC) takes place within two quarters of the system appearing as a priority for enforcement response. If RTC is not likely during those two quarters, escalation of the response is expected via an enforceable action within the "timely" period to compel the system to RTC in the shortest time possible. In many cases, this response will be in the form of an administrative order with or without penalties or other enforceable mechanism. States will enter the appropriate code in the SDWIS data base to reflect the State formal action or that compliance has been achieved.

Once a system's violations are on the path to compliance (i.e. incorporated into a formal enforcement action) or returned to compliance, the system drops off the targeting list and is no longer a priority for enforcement response. Those systems on the path to compliance will continue to be tracked by States and EPA until return to compliance is achieved with appropriate escalated enforcement response, as necessary.

Return to compliance is the ultimate goal and the State and Federal data systems should reflect all final return to compliance codes.

Defining the Status of Systems on the "Targeting List"

Until a State has returned a system's violations to compliance, the violations have not been completely resolved. The following categories are the general categories that States and EPA can use when discussing whether a system's violations are being adequately addressed. The focus under the new Enforcement Response Policy is to have a public water system return to compliance in the shortest time possible.

No Action/Unaddressed- Violation reported by State, with either no action taken to return the public water system to compliance, or where the initial informal action(s) or compliance assistance have not been successful to return to compliance. Further action will be needed.

Returned to Compliance- The public water system has completed monitoring, reporting or implementation of treatment or other activities to be in compliance with the regulations. All forms of compliance assistance and informal or formal enforcement actions are appropriate means to return to compliance. The appropriate return to compliance code shall be entered into SDWIS.

Unresolved but on the Path to Compliance: This category includes systems that have an EPA or State enforceable compliance order or schedule in place to resolve violations. In these cases, formal enforcement is expected to be successful toward implementing a schedule for sampling, treatment or construction, and therefore no further enforcement is required. The State and/or EPA will continue to monitor compliance with schedules and other requirements of the order.

Unresolved: Systems with continuing, ongoing violations that have had compliance assistance, informal and/or formal enforcement response without a return to compliance. This category is for those systems with a chronic failure to return to compliance.

Additional Factors to Consider in the Evaluation of the Targeting Formula: *Population and System-Type Factors*

The joint EPA-ASDWA workgroup recommended initiating the policy using the formula previously described. However, there was significant discussion over whether population and system type factors should be included in the formula. Concern was generally expressed that an emphasis on large population systems might skew the relative ranking of systems toward those servicing large population centers. Care must be given, however, to make certain small systems receive attention, particularly since those systems often serve vulnerable populations and have the most difficulty maintaining compliance. During the trial period evaluation, EPA requests that States consider whether including population and system-type factors, or other variables, should be incorporated into the targeting formula. The details of this analysis may be found in the Appendix to this Memorandum.

Safe Drinking Water Information System (SDWIS) Enforcement Codes and Descriptions

The following table evaluates the existing enforcement codes available for use in SDWIS and categorizes them into formal and informal categories.

FORMAL According to the Agency's Policy Framework, a formal action is defined as:

- One which requires specific actions necessary for the violator to return to compliance,
- Is based on a specific violation, and
- Is independently enforceable without having to prove the original violation.

A formal enforcement action has the intent and effect of bringing a non-compliant system back into compliance by a certain time with an enforceable consequence if the schedule is not met. This may be accomplished through a variety of mechanisms, depending on a State's legal authorities.

To be formal, the enforcement mechanism selected by the State must:

1. Contain a description of the non-compliant violation, a citation to the applicable State, or federal law or rule, a statement of what is required to return to compliance, and a compliance schedule; and
2. Provide the State with authority to impose penalties for violation of the State's enforcement document.

Current SDWIS Code	Description
SFL or EFL	St or Fed AO (w/o penalty) issued
SFO	St AO (w/penalty) issued
<i>None - closest is SFK or EFK</i>	<i>St or Fed BCA signed (if meets "Formal" definition)</i>
SF& or EF&	St or Fed Crim Case referred to AG
SF9 or EF9	St or Fed Civil Case referred to AG or Fed case referred to DOJ
SFQ or EFQ	St or Fed Civil Case filed
SFV or EFV	St or Fed Crim Case filed
EF/	Fed 1431 (Emergency) Order
<i>SF% or EF%</i>	<i>St or Fed Civil Case concluded</i>
<i>SFR or EFR</i>	<i>St or Fed Consent Decree/Judgment</i>
<i>SFW or EFW</i>	<i>St or Fed Criminal Case concluded</i>
<i>SFM</i>	<i>St Admin Penalty assessed</i> NOTE: EPA recognizes the use of administrative penalty actions as a valid tool to move a system toward compliance even though the penalty action may not include a compliance schedule per EPA's definition of "formal action".

EF-	<i>Fed Complaint for Penalty Consent Agreement/Final Order with penalty</i>
EF=	<i>Fed Complaint for Penalty Default Judgment</i>
EF<	<i>Fed Complaint for Penalty issued</i>

Once a system reaches the level of a priority system for enforcement, the actions above will put the system on the path to compliance. These systems will continue to be tracked until a resolution is achieved.

** Changes from the current "addressing" approach are in italics.*

Resolving		
SOX or EOX	St or Fed Compliance achieved	
SO0 or EO0	St or Fed No Longer Subject to Rule	
SO6 or EO6 for violation types 9, 12, 29, 37, 56, 57, 58, 59, 63, 64.	St or Fed Intentional no-action for violation types: 9 Record Keeping; 12 Treatment Technique No Certif. Operator; 29 M&R Filter Profile/CPE Failure; 37 Treatment Technique State Prior Approval; the following codes are also applicable if a PWS has "tested back into compliance" and no longer has lead/copper results over the action level: 56 Initial, Follow-up, or Routine SOWT M&R ; 57 OCCT Study Recommendation; 58 OCCT Installation/ Demonstration; 59 WQP Entry Point Non-Compliance; 63 MPL Non-Compliance; 64 Lead Service Line Replacement (LSLR)	

These six resolving actions/ codes mean that the violation has been resolved either by return to compliance, a determination that the rule is no longer applicable, or a determination that no further action is needed.

Note that any violation that has one of the above Formal or Resolving codes will not count against a system's total score using the formula.

INFORMAL	The actions below are informal. Violations with these codes will continue to count against a system until a formal or resolving action is taken and recorded in SDWIS/Fed. If a system has reached the level of a priority system for enforcement, these actions will NOT count for putting the system on a "path to compliance."	
Current SDWIS Code	Description	Examples of States Actions
None - closest is SFK or EFK	St or Fed BCA signed (if does not meet "Formal" definition)	
SFJ or EFJ	St or Fed Formal NOV issued	Violation Notice; Notice of Violation(NOV);
SO6 or EO6 for violation types not specified in resolving list	St or Fed Intentional no-action	
None - propose new code SIU	Referral to U.S. EPA	
None - propose new code SIT or EIT	Treatment Installed	
SF2 or EF2	Referred for Higher St or Fed Level Review	
SFH or EFH	St or Fed Boil Water Order	
SF3	St Case appealed	
SF4	St Case dropped	
SFP	St Civil Case under development	
SIB or EIB	St or Fed Compliance Meeting conducted	
SFS or EFS	St or Fed Default Judgment	
SF5	St Hook-up/Extension Ban	
SFT or EFT	St or Fed Injunction	
SO+ or EO+	St or Fed no additional Formal Action needed	
SO8 or EO8	St or Fed Other	
SFG or EFG	St or Fed Public Notification issued	
SIF or EIF	St or Fed Public Notification received	
SIE or EIE	St or Fed Public Notification requested	
SFN or EFN	St or Fed Show-cause Hearing	
SID or EID	St or Fed Site Visit (enforcement)	
SIC or EIC	St or Fed Tech Assistance Visit	
SFU or EFU	St or Fed Temp Restrain Order/Prelim Injunction	
SOZ or EOZ	St or Fed Turbidity Waiver issued	
SO7 or EO7	St or Fed Unresolved	
SOY or EOY	St or Fed Variance/Exemption issued	
SIA or EIA	St or Fed Violation/Reminder Notice	
SII or EII	St or Fed CCR Follow-up Notice	

APPENDIX

In an effort to analyze the influence of a population factor on the outcome of the system's ranking, the States and EPA Regions should calculate the results using the following formula. The results should then be compared to the results of the non population-based formula.

The alternative formula would calculate a point score for each drinking water system using this formula:

Alternate Formula:

$$\text{Sum } (S * T * P) + n$$

Where:

S and n = use the definitions on page 4

T = water system type factor

2	CWS, NTNCWS
1	TNCWS

P = retail population served factor

1	Very small (less than 501)
1.5	Small (501-3,300)
2	Medium (3,301-10,000)
2.5	Large (10,001-100,000)
3	Very large (100,001...)