

\* ~~Pendergast~~  
Brunner

NOTE

SUBJECT: Enforcement Position on Facilities Affected by Midwest  
Floods

FROM: Carol Galloway

TO: Mike Cook

*Carol*

Recently, you asked the Division to prepare a summary of the position that should be taken with regards to Enforcement against facilities in the Midwest which have flood related NPDES violations. You also requested a statement on the permit "upset clause" and unpermitted discharges in the flood area which I understand will be provided separately to you by the Permits Division.

In preparing the attached position paper on enforcement in the flood area, we have coordinated with the Permits Division, the Office of Enforcement, and Brian Maas (OGWDW). Brian was asked by Tudor Davies to prepare a joint CWA/ SDWA position on flood related enforcement. Brian's paper is also attached.

Please let us know if you need any additional information.

cc: Jim Pendergast  
Brian Maas

## OWEC Position Paper

### The U.S. Environmental Protection Agency (EPA) Position On Enforcement Response to Violations of the Clean Water Act (CWA) Caused by the 1993 Midwest Flood

The Midwest flood in 1993 has resulted in a number of facilities regulated under the CWA to have difficulty in complying with federal environmental requirements. This position statement addresses facilities regulated under the CWA's National Pollutant Discharge Elimination System (NPDES) including pretreatment requirements.

#### Enforcement Discretion

EPA has a responsibility to ensure the greatest possible protection of human health to the environment from sources of contamination. As such, all regulated facilities are expected to comply with their NPDES requirements to the best of their ability. To the extent that impacted facilities use their best efforts to return to compliance as quickly as possible and minimize any harmful environmental impacts, EPA will, in appropriate circumstances, use its discretion to forego formal response to violations.

For unpermitted discharges, enforcement discretion would, as appropriate, be exercised where the discharger had taken reasonable care to avoid the violations and no other reasonable alternative was available.

Examples of how enforcement discretion might be applied for flood related violations follows.

#### A. Situations where in most instances EPA would not take action:

- o Discharges without a permit to drain flooded areas behind levees or in homes.
- o Sewage discharges from wastewater treatment plants which are partially or fully submerged.
- o Discharges of wastewater into sewer systems in order to prevent severe bodily injury or substantial property loss.
- o Facilities drawing floodwaters out of buildings into sewers with prior POTW authorization.

**B. Situations where EPA would consider taking action:**

- o Dumping of wastes from unflooded industrial or commercial facilities into a flooded area.**
- o Discharges of untreated wastewater by operating production facilities which have only their treatment plant submerged (need to halt production is not an allowable reason for violating a permit).**
- o Discharge of industrial wastewater into collection systems/POTWs which have ordered a temporary halt of such discharges.**
- o Intentional discharge of substances, including solid and hazardous wastes, prohibited from discharge into sewer systems.**

**Identifying and Tracking of Violations**

EPA and States will identify permittees impacted by the flood so that the status of these facilities can be monitored closely.

EPA will track flood related violations in our standard compliance reports on noncompliant facilities; those in significant noncompliance (SNC); as well as those on our Exception List (repeat SNC). We expect there will be an increase in violations, SNC and EL facilities, as the affected facilities begin operation. Our computerized compliance data base will specifically identify violations at these facilities including nonreporting of monitoring data due to flood conditions. This approach allows us to monitor the status of each affected permittee and also to identify those flood related violations that will not likely be subject to any formal enforcement response. The Quarterly Noncompliance Report (QNCR), which is available for public review, will include violations of flood impacted facilities.

**EPA's Enforcement Response to Violations  
of the Clean Water Act and the Safe Drinking Water Act  
Caused by the Midwest Flood**

The Midwest flood has resulted in a number of facilities regulated under the CWA and the SDWA having difficulties in complying with federal environmental and public health requirements.

EPA has the responsibility to assure the protection of human health and the environment to the greatest extent possible from sources of contamination.

As a result of the Midwest floods, some facilities will be unable to comply due to conditions beyond their control. To the extent these facilities use their best efforts to limit or minimize their problems, EPA will use its discretion to forgo formal response to violations.

EPA will work with States and facilities to determine what measures, if any, specific facilities can take to minimize public health and environmental damage. These measures will be based on the specific circumstances of the facility.

Facilities regulated under the CWA and the SDWA which are physically inaccessible will not be expected to risk human harm to fulfil their regulatory responsibilities. Discharges to waters of the U.S. which are made to protect life and property will not be the subject of any action by EPA if there are no reasonable alternatives to the situation.

Water treatment plants are expected to take every measure to provide water which is safe to drink and to notify the public through any means possible where the water they provide may be contaminated.

Facilities in areas not directly affected by the flood are expected to comply fully with the law. During this emergency period, facilities caught dumping pollutants or otherwise taking advantage of this time of uncertainty in an effort to save compliance costs will be prosecuted to the fullest extent of the law.

EPA and States will identify regulated facilities impacted by the flood. Violations due to the flood will be included in our standard noncompliance reports for the public and EPA management. The status of impacted facilities will be monitored closely.

**Potential Compliance Problems  
Under the SDWA and CWA**

**A. Situations where EPA generally would not take action**

1. Wastewater and drinking water treatment plants which are fully under water and therefore not operating.
2. Wastewater and drinking water treatment plants which have come partially back in operation or are partially submerged but are unable to operate their full treatment system.
3. Discharges without authorization into waters of the U.S. or sewer systems to drain flooded areas to the extent such activities are necessary to prevent bodily injury or property damage, i.e. water accumulation behind levees or in homes.
4. Unintentional discharges of contaminated runoff due to flooding of industrial or commercial plant sites which cannot be reasonably controlled.
5. Municipal wastewater treatment plants which are unable to fully operate their systems due to utility failures or insufficient operating staff due to conflicting priorities from the emergency situation, to the extent that good faith efforts are made to minimize problems.

**B. Situations where EPA would consider action**

1. Intentional unauthorized dumping of wastes from industrial or commercial facilities to circumvent environmental requirements because of the uncertainty of the situation.
2. Discharges of untreated wastewater by production facilities which have only their treatment plant submerged or otherwise unoperational.
3. Facilities continuing to discharge industrial wastewater into collection systems/POTWs which have ordered a temporary halt of such wastewater.
4. Facilities which intentionally introduce prohibited wastes into sewer systems.
5. The dumping of flood related debris into wetlands where there are feasible alternatives.