

Attachment 2
OECA Summary of Responses to State Comments on
Interim Significant Noncompliance (SNC) Policy for Clean Water Act Violations
Associated with Combined Sewer Overflows (CSOs), Separate Sanitary Overflows
(SSOs), Concentrated Animal Feeding Operations (CAFOs), and
Storm Water Point Sources
(i.e., Interim Wet Weather SNC Policy)

On April 30, 2007, OECA sent three new draft National Pollutant Discharge Elimination System (NPDES) compliance and enforcement program policies to the Environmental Council of States (ECOS) and the Association of State and Interstate Water Pollution Control Administrators (ASIWPCA) for State review and comment. This document summarizes OECA's responses to key State comments received on the draft *Interim Wet Weather SNC Policy* received during that review.

The major issue areas identified by the States during their recent review include: state resource burden, expanded federal role, and the need for OMB review. Only a few States submitted substantive comments on the policy approach and those comments related to: the potential for inconsistent interpretations of the policy, some of the definitions in the policy, and the applicability of CAFO section.

1. State Resource Burden and Expanded Federal Role

State Comments: Several States expressed concern that they do not have adequate resources to comply with additional data entry, tracking, and reporting that is required to implement this policy and that they need a transition period. Some States said that the policy was expanding EPA's role in NPDES program implementation.

OECA Response: The Interim Wet Weather SNC Policy is a management tool that was developed to focus enforcement resources on the most serious violations. It does not in itself establish any specific data entry requirements. The policy will rely on the ICIS-NPDES data elements and data entry requirements for full implementation. OECA is issuing the policy as "interim" and for EPA Regional use only at first to allow time for the ICIS-NPDES issues to be resolved. During this initial implementation period, EPA Regions will work with any individual States that would like to begin using the wet weather SNC approach immediately. OECA will use this initial period to develop, in consultation with Regions and States, an EPA national tracking and reporting approach for wet weather SNC information and to resolve implementation issues. States should have ample transition time as EPA does not anticipate full implementation of this policy until the ICIS-NPDES database and associated policies/guidance are implemented.

OECA does not believe that the *Interim Wet Weather SNC Policy* expands EPA's role in NPDES implementation – the policy relies on long-standing relationships and processes that exist between EPA Regions and States regarding annual work-share

agreements. OECA hopes the policy will help expand the dialogue between Regions and States on effective ways to leverage resources to identify and address the most serious wet weather violations.

2. Need for OMB Review

State Comments: Several States commented that the policy is a “significant” guidance document under Executive Orders 13422 and 12866 and had not been subjected to the appropriate level of intra- and interagency and coordination and review. They believe that additional consultation is warranted under OMB Bulletin No. 07-02 (“Final Bulletin for Agency Good Guidance Practices”) before it is finalized.

OECA Response: OECA believes that the *Interim Wet Weather SNC Policy* is not subject to the “OMB Good Guidance Practices” review process because it does not meet the definition of the kind of document that needs to be reviewed by OMB - *i.e.*, it does not set forth a policy on a statutory, regulatory, or technical issue or make new statements as to the scope of the regulatory community’s obligations. The *Interim Wet Weather SNC Policy* is a targeting/prioritization and enforcement response policy on how EPA exercises its enforcement discretion. It is a management tool that presumes a violation or liability is present and provides guidelines to Regions and States on how to identify, prioritize, and respond to the most serious wet weather violations.

3. Inconsistent Interpretations

State Comments: Some States expressed appreciation regarding the flexibility in the *Interim Wet Weather SNC Policy*, others expressed concern that the flexibility in the policy will lead to inconsistencies in interpretation. At least one State asked for more flexibility in the time frame to respond to wet weather SNC violations. OGC suggested several edits to clarify that the information in the policy is advisory and not required by regulation.

OECA Response: The definitions, recommended steps, program-specific SNC criteria, and response options and time frames are EPA guidelines - a frame work - not regulatory requirements. At the request of the State-EPA NPDES Advisory Group that developed the policy, existing EPA definitions and mechanisms were utilized as much as possible. Because of the complex nature of wet weather violations, and variations in conditions across the country, it would be very difficult to establish “bright line” criteria for wet weather SNC violations. The recommended response times included in the policy are guidelines based on typical cases. It is assumed that EPA and State staff will apply best professional judgment and enforcement discretion in implementing the policy. Any differences in SNC interpretations should be discussed between EPA Regions and individual States during already established periodic meetings regarding compliance and enforcement commitments.

4. Policy Definitions

State Comments: A couple of States objected to including basement back-ups in the definition of “significant overflow” as there is no nexus between those events and waters of the U.S. One State said EPA should provide a better definition of what constitutes a sanitary sewer overflow or “SSO.” One State suggested that setting specific thresholds instead of using terms such as “multiple unauthorized discharges” or “multiple overflows” would be beneficial.

OECA Response: 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 permit conditions [per 40CFR 122.41(e)]. Basement back-ups can be “significant” due to their potential impact on human health, regardless of impacts to waters of the U.S. The Interim Wet Weather SNC Policy does not attempt to list all existing wet weather program definitions or to re-define them but rather relies on existing definitions as much as possible. The definition of “SSO” in EPA’s *Report to Congress: Impacts and Control of CSOs and SSOs*, may better explain what constitutes a SSO. The State-EPA Advisory Group that developed the policy could not agree on “bright line” thresholds due to the variation in conditions across the country and decided that qualitative criteria (implemented using best professional judgment) provided the flexibility needed to address a range of circumstances.

5. Applicability of the CAFO Section

State Comment: One State questioned the wisdom of including CAFOs in the guidance since EPA has not issued final revisions to the federal CAFO regulations yet.

OECA Response: To exclude CAFOs would inaccurately imply that all violations at CAFOs are insignificant and currently unenforceable. In fact, federal CAFO regulations have been in effect for over 30 years and are still enforceable. CAFOs have been an EPA national Clean Water Act compliance and enforcement priority since 1998 and will continue to be a priority for the foreseeable future. The *Interim Wet Weather SNC Policy* includes the caveat that EPA may need to revise the CAFO section when EPA’s final revisions to the CAFO regulations are issued.