

Date Signed: August 8, 1986

MEMORANDUM

SUBJECT: Guidance for FY 1987 PWSS Enforcement Agreements

FROM: Michael B. Cook, Director (signed by Michael B. Cook)
Office of Drinking Water (WH-550)

TO: Regional Water Division Directors
Regions I - X

I. PURPOSE

The FY 1987 Agency Operating Guidance clearly established a new emphasis on enforcement for the Public Water Supply Supervision (PWSS) program. The emphasis on enforcement has been further reinforced by several provisions of the 1986 amendments to the Safe Drinking Water Act. This guidance supplements for the PWSS program the revised "Policy Framework for Implementing State/EPA Enforcement Agreements" (to be issued 8/86), and covers changes in the scope of the Agreements process, the definition of Significant Noncompliance (SNC), timely and appropriate enforcement and the mandatory enforcement provisions of the SDWA. It should be used in reviewing and updating, as necessary, the State/EPA enforcement agreements.

Enforcement agreements should not be long or cumbersome documents, and they are not expected to repeat the text of national guidance which can be incorporated by reference. The use of existing mechanisms (documents or agreements) is encouraged as long as they achieve the objective of setting clearly out the State's commitments in the enforcement area.

II. BACKGROUND

In FY 1986, the PWSS program negotiated State/EPA agreements which established oversight criteria including requirements for timely and appropriate enforcement actions and identification and tracking of Significant Noncompliers (synonymous with persistent violators for FY 1986).

Over the past year we have reviewed our definition of SNC and reevaluated our concept of timely and appropriate enforcement action. To accomplish this, we formed a workgroup composed of Headquarters, Regional, and State representatives. Two workgroup meetings, and an additional two open workshops were conducted across the country over the past six months. The guidance presented takes into account the input provided through that process.

In addition to this guidance, the Regions and States should ensure they are familiar with the following documents: FY 1987 SPMS and OWAS Targets for the PWSS Program (7/10/86); PWSS Reporting Guidance (to be issued); Revised Policy Framework for State/EPA Enforcement Agreements and Federal Facility Compliance Strategy (Both to be issued 8/85).

III. GUIDANCE

A. Agreements Process and Scope

The agreements process established and implemented for FY 1986 will remain largely unchanged for FY 1987. Changes to the Policy Framework relate to the State Attorney General involvement (or other appropriate government legal staff) oversight of State civil penalties, and Federal facilities compliance.

The State Agency is responsible for ensuring that the State Attorney General or other appropriate legal staff is properly notified and consulted about planned Federal enforcement actions and/or enforcement initiatives, on an ongoing basis.

The focus of oversight of State penalties will be on improving the State's use of penalties in the overall context of the State's compliance and enforcement program.

Federal facilities may require greater or different needs for State and Regional coordination. Advance notification and consultation protocols in the State/EPA enforcement agreements should incorporate any special arrangements necessary for Federal facilities. These protocols should address how the State will be involved in the review of Federal Agency A-106 budget submissions and plans for joint annual reviews of compliance problems at Federal facilities.

*B. Significant Noncompliance

The definition of Significant Noncompliance (SNC) is changed for FY 1987. There was general agreement among the States, Regions, and Headquarters that the FY 1986 definition of SNC (persistent violators) did not focus on the most significant violations, particularly in the area of failure to monitor. The SNC definition has been expanded to incorporate violations of the chemical and radiological MCLs and monitoring requirements. Also, in an attempt to address the seriousness of a water system which fails to adhere to the conditions of a compliance schedule, we will now consider a system which does so to be classed as a SNC. Although it will be difficult to identify and track some of these new criteria, we believe that it is better to include them in the definition now, and begin tracking them. In doing so now, States will know the direction that

EPA's oversight is taking. The definition of SNC is attached.

For FY 1987 we will categorize SNCs into three groups, those which are classified as SNCs because of violations of:

- a) Microbiological MCL or monitoring/reporting (M/R) requirements, turbidity MCL or M/R requirements, or TTHM M/R requirements;
- b) Chemical or radiological MCL requirements, or chemical (other than TTHM) or radiological M/R requirements; and
- c) Compliance agreement/compliance schedule.

C. Timely and Appropriate Enforcement Response

1. Timely and Appropriate Milestones

The timelines for escalating enforcement actions established in the July 3, 1985 memorandum from Vic Kimm, entitled Guidance for the Development of FY 1986 PWSS State Program Plans and Enforcement Agreements, are superseded by the system and definitions described below.

The timely and appropriate milestones for FY 1987 will apply to SNCs. However, States should also respond to other non-SNC violations. States should develop a system to take enforcement actions against violators on a random basis to ensure that a strong enforcement presence is created. Regions should discuss the State's plans to develop and implement such a program where one does not already exist.

* NOTE: The definition of SNC was changed for FY90; See the memorandum dated May 22, 1990.

** If compliance is not achieved for SNCs, an appropriate formal enforcement response will be taken, or a negotiated agreement signed (according to the definitions below) within six months of the State's discovery of a system in Significant Noncompliance for violation of a microbiology or turbidity MCL or M/R, a TTHM M/R requirement, or a compliance agreement/schedule.

** For those systems which are SNC because of a chemical or radiological MCL, or a chemical (other than TTHM) or radiological M/R requirement, an appropriate formal enforcement action will be taken or a negotiated agreement signed within 12 months after the State's discovery* of the SNC.

2. Definition of "Appropriate" Enforcement Response

The following enforcement responses will be considered appropriate actions regardless of what type of violation caused the system to become a SNC:

- a) Issuance of a formal administrative order or compliance order;
- b) Referral of a civil judicial case to the State Attorney General;
- c) Filing of a criminal judicial case in an appropriate State court; and
- d) Finalization of a written bilateral, compliance agreement signed by both parties which includes a compliance schedule.

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 PWSS's program is reclassifying those actions which were previously called "formal" to more closely follow the Agency definitions. Formal enforcement actions will now be administrative orders/compliance orders or civil or criminal case referrals or filings.

* State's discovery -- as a result of the workgroup and workshop meetings, it appears that the vast majority of States can compile and process their violation data, and will, therefore, be aware of a system's SNC status within two months after the end of each compliance period.

** The timeliness criteria changed to six months for all SNCs. See the memorandum date April 20, 1990.

In addition to the formal actions, the PWSS program is including a bilateral compliance agreement as an appropriate response, even though it is not independently enforceable. The rationale for allowing the use of bilateral compliance agreements schedule is first, that the State programs have had success in using this mechanism to bring some types of violators back into compliance. Second, bilateral compliance agreements require fewer State resources than taking formal enforcement actions. Use of bilateral compliance agreements will, therefore, enable a larger number of violators to be handled than would reliance on formal enforcement actions alone, especially given the program's limited experience with using formal enforcement. Third, the appropriate use of penalties has not yet been defined for the program. Once it has been, formal enforcement mechanisms will be required where it is determined that a penalty is appropriate.

The Regions will closely monitor the use of bilateral compliance agreements which are not independently enforceable to ensure the conditions for their use are met. Regions may take additional direct Federal enforcement action if the conditions are not met and/or if the bilateral compliance agreement is not effective in returning the violator to compliance.

To ensure that these bilateral compliance agreements are used effectively, they should meet the following conditions:

- Agreement is a bilateral, negotiated, written document signed by both parties;
- Agreement contains detailed commitments by the violator;
- Agreement contains specific interim milestones which the system is expected to meet and specifies what must be accomplished by those dates;
- Violator has shown good faith in negotiations and has made a good faith effort to comply in the past;
- Violator must not have had a long previous history of noncompliance; and
- Compliance agreement is not an extension of an existing schedule which was violated.

It is critical in all bilateral compliance agreements which include a schedule, but particularly in those which cover a long period, to establish key interim milestones. Tracking of these interim milestones will alert the State or Region to any problems or delays experienced by the system and allow follow-up actions to be taken as necessary without waiting until the end of the compliance schedule.

Generally, these milestones should include specific dates for starting construction or installation of equipment, completing construction or installation of equipment, and when physical compliance will be achieved.

Where appropriate, the bilateral compliance agreements should include any necessary commitment by the violator to ensure an alternative and adequate drinking water supply. This might include commitments to issue boil water notices, supply bottled water, etc.

Where these bilateral compliance agreements are used, it is expected that the State will continue to monitor the system's compliance with the schedule and that each quarter the State will ensure that the system is complying with its schedule. It is expected that the State will promptly escalate to a formal enforcement action if the system violates the schedule and it appears that the system is not making every reasonable attempt to follow the schedule. Likewise, the Region should ensure that the system is complying with the schedule through quarterly discussions with the State. If compliance is not being achieved through this process, and after consultation with the State, the Region may take a formal enforcement action.

3. Tracking Timely and Appropriate Action

Each quarter the Federal Reporting Data System (FRDS) will identify those systems which are classed as SNCs. This list will then be distributed to the Regions who will forward them to the States. States are to review the lists each quarter, and inform EPA whether the system has since returned to compliance or, if not, what type of appropriate enforcement action has been taken.

The names of any SNCs which have not returned to compliance or against which the State has not taken an appropriate action will be placed on an exceptions report. It is the goal that the States will take an appropriate enforcement action for each SNC less than six months after the State discovers the SNC for SNCs of microbiology, turbidity, and TTHM violations defined on page three, or violation of a compliance schedule, or less than 12 months after the State discovers an SNC of a chemical or radiological violation (see page 3).

While it is acknowledged that there may be legitimate reasons why the State has not taken an appropriate action, the 1986 amendments to the SDWA require Federal action if the State has not taken an appropriate action within 30 days of EPA's notification. Thus, the exceptions report will provide a forum for State/Regional discussions during the 30-day period (after EPA receives the exceptions report) in which to focus attention on those systems which require extra effort to be returned to compliance, and to assess whether EPA enforcement action is necessary.

The State and Region should discuss the status of the systems on the exceptions report in the beginning of each quarter. During these discussions, either the State should show that an appropriate enforcement response has been or will be taken within the 30 day period, or EPA should commit to taking a direct Federal action.

4. Failure to Take Timely and Appropriate Action

In general, EPA will defer to State actions which are timely and appropriate. Where States are unwilling or unable to take timely and appropriate enforcement actions, EPA will take a direct enforcement action according to the provisions of the amendments to the SDWA. There are also other circumstances under which EPA may take action, (namely if the State requests Federal action), if there are national legal or program precedents involved, or if the case involves violations of a Federal enforcement action. In any case, direct Federal action should only occur after notification and consultation with the State.