



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

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OFFICE OF
WATER

MEMORANDUM

SUBJECT: Update to the Implementation of Capacity Development & Drinking Water State Revolving Fund Programs to Reflect the New Enforcement Policy & Enforcement Targeting Tool

FROM: Cynthia C. Dougherty, Director
Office of Ground Water and Drinking Water

TO: Regional Water Division Directors
Regions I-X

The purpose of this memorandum is to provide updated policy on how EPA and the states will implement the Capacity Development and Drinking Water State Revolving Fund (DWSRF) programs to reflect the new Enforcement Response Policy (ERP) and the Enforcement Targeting Tool (ETT). The terms "historical significant noncompliance" and "significant noncompliance" are to be interpreted for purposes of the Capacity Development and DWSRF program implementation as systems with ETT scores of 11 or greater. This policy change is effective beginning in Fiscal Year 2013.

Background

Section 1420(b)(1) of the SDWA requires that "... *each state shall prepare, periodically update, and submit to the Administrator a list of community water systems and nontransient, noncommunity water systems that have a history of significant noncompliance... and, to the extent practicable, the reasons for noncompliance.*" In 1997, the states agreed with EPA to implement this provision of the Act by reviewing every three years an EPA-generated list of public water systems that met the definition of historical significant noncompliance (HSNC) and indicating if the system lacked technical, managerial and financial capacity.

In an effort to prioritize scarce resources, section 1452(a)(3) of the SDWA requires that "...*no assistance... shall be provided to a public water system that... does not have the technical, managerial, and financial capability to ensure compliance with the requirements of this title... or is in significant noncompliance with any requirement of the national primary drinking water regulation or variance.*" However, a public water system not meeting these standards "...*may receive assistance... if the use of the assistance will ensure compliance.*" Similarly, section

1452(b)(3), requires that intended use plans “...provide, to the maximum extent practicable, that priority for the use of the funds be given to projects that address the most serious risk to human health [and] are necessary to ensure compliance with the requirements of this title...”

The SDWA also requires each state to implement a capacity development strategy and authorizes EPA to assess the efficacy of the program as a condition for the state to receive full allocation of their DWSRF allotment. To assess the efficacy of the program, states are required submit annual capacity development reports. As part of this annual report, states are required to submit a list of new community and nontransient noncommunity systems and identify which of these new systems received a significant noncompliance (SNC) designation during the first three years of operation.

In December 2009, the Office of Enforcement and Compliance Assurance (OECA) released the ERP, which provides a new enforcement targeting approach that identifies all unaddressed violations at a public water system. This new approach replaces the prior strategy, which focused on water systems in SNC on a rule-by-rule basis. The ERP is supported by the ETT which assigns a point value to individual violations at each system to help prioritize drinking water systems with the most serious, numerous, or long lasting unaddressed violations for possible enforcement. To be consistent with this new approach, the Office of Ground Water and Drinking Water (OGWDW) is updating the requirements of the Capacity Development program, which currently include SNCs and HSNCs, in order to facilitate implementation of the SDWA.

Meeting Section 1420(b)(1) and Annual Capacity Development Program Report Requirements

To meet the requirement of SDWA section 1420(b)(1) for states to submit to the Agency a list of systems with a history of significant noncompliance every three years, EPA will utilize the ETT results which are generated on a quarterly basis. Currently, as part of the ETT implementation, EPA and states have quarterly discussions on the status of public water systems identified as enforcement priorities (i.e., with an ETT score greater than or equal to 11) on this list and identify steps to return to compliance. EPA believes that discussing the priority systems generated by the ETT and the steps states are taking to return these systems to compliance on a quarterly basis is a more proactive approach to help resolve potential system capacity issues than the current approach of reviewing the reasons for non-compliance once every three years.

Under this new approach, states will not be required to submit a list of HSNCs every three years. However, to meet the intent of section 1420(b)(1), state capacity development coordinators should be familiar with the ETT outputs and utilize this list as one of the ways to identify systems that might lack technical, managerial or financial (TMF) capacity and prioritize assistance. At a minimum, regional capacity development coordinators should work with state capacity development coordinators to identify whether any of the systems identified in the

priority list lacks technical, managerial and/or financial capacity before approving the state's annual capacity development report.

As part of the annual capacity development program reports, states should continue to report a list of new systems, but rather than reporting SNCs, they should indicate which of those new community and non-transient non-community water systems have, at any point during the first three years of operation, had unaddressed violations that incurred an ETT score of greater than or equal to 11. Under the ERP, systems that receive an ETT score of 11 or greater are considered a priority system by EPA.

We believe that this revised approach will provide for more effective, cross-program collaboration across the drinking water program and will minimize the burden on states with their reporting requirements to the Agency. The state capacity development coordinators are urged to work closely with their state enforcement staff, and to discuss any findings from reviewing the ETT list provided each quarter to identify systems that lack TMF capacity and to determine steps to help the system return to compliance in a timely manner.

Meeting SDWA Section 1452(a)(3) Requirement for the Drinking Water State Revolving Fund (DWSRF) Program

The DWSRF program was established to provide a financing mechanism for ensuring safe drinking water to the public. Section 1452(a)(3) of the SDWA explicitly states that DWSRF assistance cannot be provided to any public water system that is in significant noncompliance with any requirement of a national primary drinking water regulation or variance, unless certain stated conditions are met. To address the ERP & ETT, the DWSRF program is modifying the current implementation practices and interpreting that wherever the statute or EPA's regulations and guidance refer to SNC or HSNC, these terms mean public water systems with ETT scores of greater than or equal to 11. Thus, DWSRF assistance may not be provided to any public water system with an ETT score greater than or equal to 11, unless the conditions delineated in SDWA section 1452(a)(3)(B) and (C) are met.

Many states have developed DWSRF project priority ranking systems that explicitly consider a system's "SNC" status. State DWSRF programs are urged to update their Intended Use Plan (IUP) terminology and criteria that contain SNC or HSNC to reflect the new ETT terminology. State and Regional DWSRF coordinators should meet with their corresponding state and regional capacity development coordinators and/or enforcement programs to coordinate priorities, including DWSRF set aside assistance and/or DWSRF infrastructure assistance agreements, to ensure that systems prioritized for attention through the ETT are given the fullest possible consideration for available assistance. The significance of such cross-program coordination was documented in the recommendations of the December 1, 2011, Office of Inspector General

report entitled, *Enhanced Coordination Needed to Ensure Drinking Water State Revolving Funds Are Used to Help Communities Not Meeting Standards* (Report No. 12-P-0102).

For purposes of the DWSRF 20 percent Capacity Development withholding determination, the regional capacity development coordinator is expected to provide written documentation to the regional DWSRF coordinator at least once per year on the implementation status of the state Capacity Development program. If the regional capacity development coordinator provides written documentation concluding that a state is meeting its ongoing implementation requirements under SDWA Section 1420, then the regional DWSRF coordinator can inform the appropriate state grant project officer that no 20 percent withholding related to capacity development will be required from any DWSRF capitalization grants awarded that year.

As a reminder, for purposes of the DWSRF 20 percent Operator Certification withholding determination, the regional operator certification coordinator is expected to provide written documentation to the regional DWSRF coordinator at least once per year on the implementation status of the state Operator Certification program. If the regional operator certification coordinator provides written documentation concluding that a state is meeting its ongoing implementation requirements under SDWA Section 1419, then the regional DWSRF coordinator can inform the appropriate state grant project officer that no 20 percent withholding related to operator certification will be required from any DWSRF capitalization grants awarded that year.

EPA will continue to work with the capacity development and DWSRF coordinators to facilitate the transition to this new approach and assist where necessary. We may revisit this policy in the future based on lessons learned from implementing this new approach. To download a copy of the latest ETT priority list, please visit the following website:
http://www.epa-otis.gov/otis/sdwa_home.html.

Should you have any questions or concerns regarding this new approach please contact Mindy Eisenberg, Acting Chief of the Protection Branch, at 202-566-1290 or Charles Job, Chief of the Infrastructure Branch, at 202-564-3941.

cc:

Regional Drinking Water Program Managers
Regional DWSRF Program Managers
Regional Drinking Water Enforcement Program Managers
Mark Pollins, OECA
Ed Messina, OECA
Jim Taft, ASDWA