



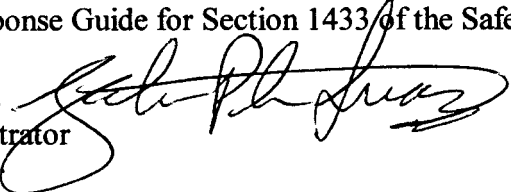
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

MAY 8 2003

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

MEMORANDUM

SUBJECT: Enforcement Response Guide for Section 1433 of the Safe Drinking Water Act

FROM: John Peter Suarez 
Assistant Administrator

TO: Regional Administrators
Regional Water Division Directors
Regional Enforcement Division Directors
Regional Counsel

Attached please find the Enforcement Response Guide for the new Section 1433 of the Safe Drinking Water Act. Title IV of the Public Health Security and Bioterrorism Preparedness and Response Act of 2002 amended the Safe Drinking Water Act to include specific requirements for certain Community Water Systems to conduct Vulnerability Assessments and prepare Emergency Plans to respond to a terrorist attack or other intentional act.

These new requirements are an important part of EPA's mission in implementing the our homeland security program and meeting our critical infrastructure protection responsibilities. As you know, Presidential Decision Directive 63 and the National Strategy for Homeland Security place lead responsibility with EPA for Critical Infrastructure Protection of the Water Sector.

Because these requirements are somewhat different than other parts of the drinking water program, we will need to work closely with the drinking water community to assure that systems fully understand and comply with the requirements of this section. The Office of Water, through the Water Protection Task Force, has developed a number of guidance documents designed to assist water systems in conducting assessments and preparing emergency plans. These materials should be included, where appropriate, in communications with water systems that appear to be struggling with understanding their responsibilities under the law.

Where noncompliance is detected, Regions will need to take measured and consistent actions to assure that systems come into compliance. The Enforcement Response Guide sets forth an escalation process from informal phone calls and letters to more formal enforcement actions depending on the magnitude and duration of the violation.

Given the sensitive nature of these requirements, their importance to Homeland Security, and the national significance of any enforcement efforts in this area, please coordinate with the Office of Enforcement and Compliance Assurance prior to initiating any formal enforcement actions (Administrative Orders, Administrative Penalty Assessment, or referrals to the Justice Department) for violations of these requirements. I have asked Mark Pollins, Director of the Water Enforcement Division, to be the contact person for this coordination. Mark can be reached at 202-564-4001.

If you have any questions on this guide, please feel free to contact me, Mark Pollins or Brian Maas, the Senior Advisor for Counter-Terrorism in my office at 202-564-6019.

Attachment

EPA Enforcement Response Guidance Section 1433 of the Safe Drinking Water Act

I. Background

The Public Health Security and Bioterrorism Response Act, P.L. 107-188, (the “Act”), signed into law by President Bush on June 12, 2002, significantly amends the Safe Drinking Water Act, 42 U.S.C. § 1401, *et seq.* (SDWA).

Title IV of the Act adds Section 1433 to the SDWA, which focuses on ensuring the security and safety of the nation’s drinking water supplies. Section 1433 requires community water systems to prepare vulnerability assessments and emergency response plans, the deadlines for which are staggered, based on the size of the water system. Section 1433 requires EPA to develop stringent measures to protect the information found in, or derived from, these vulnerability assessments. It also imposes duties on EPA to provide technical assistance to certain community water systems. Sections 1434 and 1435 impose additional information gathering and dissemination responsibilities on EPA.

The requirements of the new Section 1433 are made directly enforceable by EPA under the authority of Section 1414. The amendments do not provide for State assumption of “primary enforcement responsibility” under Section 1413, so that EPA will remain the primacy agency for the enforcement of Section 1433. Because of this, EPA should operate under the requirements for Section 1414(a)(2) and (b).

II. Requirements of Public Water Systems

Section 1433 (a)(1) requires community water systems serving a population of greater than 3,300 persons to perform vulnerability assessments of its system to terrorist attack or other intentional acts designed to disrupt the water system.

Community water systems serving a population of 100,000 or more shall perform vulnerability assessments, certify the completion to EPA, and provide a copy to EPA, prior to March 31, 2003. Community water systems serving a population of 50,000 or more but less than 100,000 have until December 31, 2003, and community water systems serving a population of greater than 3,300 but less than 50,000 have until June 30, 2004.

Section 1433(b) also requires community water systems serving 3,300 or more persons to prepare, or revise an existing, emergency response plan that incorporates the results of the vulnerability assessments. The emergency response plans must be completed and certified to EPA no later than six months from the completion of the vulnerability assessments.

Section 1433 subjects community water systems to EPA enforcement orders and penalty orders issued under SDWA Sections 1414, for their failure to perform vulnerability assessments and emergency response plans. All covered community water systems must also comply with the information requirements of SDWA Section 1445, and are subject to the accompanying penalty provisions for non-compliance.

III. Information Security

Following the EPA Information Security Protocol is critical during the review and response process for Section 1433. Section 1433(a)(3) provides that the vulnerability assessments, and any information derived from them, are exempt from a Freedom of Information Act (FOIA) request, under Section 552 of FOIA. Under Section 1433 (a)(4), community water systems are not required directly by the statute to provide these reports to any State, regional or local government, based solely on the requirement to submit the vulnerability assessments to EPA.

Section 1433(a) (5)(A-C) requires EPA to develop protocols by November 30, 2002. for protecting the vulnerability assessments in its possession. These protocols were developed by the Office of Water and govern the information security for all Vulnerability Assessments submitted to the Agency. Section 1433(a)(6)(A) provides for the criminal prosecution of a designated EPA officer or employee who knowingly or recklessly reveals the assessment. There are several exceptions to this:

- 1) A designated individual who is an EPA officer or employee may discuss the contents of the vulnerability assessment with a State or local official (Section 1433(a)(6)(B)),
- 2) EPA may not withhold the information from Congress (Section 1433 (a)(7)),
- 3) Use for the purposes of section 1445 (the enforcement investigative authorities),
- 4) Use for actions under section 1431 (emergency authorities), and
- 5) Use in any administrative or judicial proceeding to impose a penalty for failure to comply with this section under section 1414.

IV. Response Guide

Every effort should be made to assure that facilities comply with the these requirements the same as any other requirement under the Public Water Supply Supervision (PWSS) program. Where facilities do not appear to understand the requirements, Regions should work with the facility to assistant them in their efforts through the informational documents available from EPA. Where facilities appear to be in violation of Section 1433 requirements, Regions should generally follow the normal escalation process for enforcement as with any violation of the PWSS program.

Phone call to system management
Letter notifying the system of the violation
Administrative Order Under Section 1414(2)(A) and 1414(g)
Administrative Order Assessing Penalties < \$25,000
Civil Referral to the Department of Justice

In determining the appropriate level of response, the Region should consider the magnitude and duration of the violation and past and on-going efforts by the system to comply. Where the system has been diligently working toward compliance and is continuing to work diligently, the Region should generally follow an informal or administrative action and track compliance until full compliance is achieved. Where the facility is not making adequate efforts and progress towards compliance or is unwilling to comply, the Region should generally take a formal action and consider civil penalties as appropriate.

A. Potential Violations

- 1 Failure to Submit a Vulnerability Assessment (VA)
2. Failure to Submit Certification of VA Completion.
3. Failure to Develop the Emergency Plan.
4. Failure to Submit Certification of Emergency Plan Completion
5. Assessment Does Not Meet Requirements of Section 1433.
6. Emergency Plan Does Not Meet Requirements of Section 1433.

B. Large Systems - 50,00 or more service population (> 850 systems)

Any failure to submit a required document or certification should result in a phone call or informal letter to the system. The action should notify the system of the violation and ask them to comply within a reasonable number of days. If the system responds favorably, then no additional action is generally necessary, although the system will remain in continuous violation of the law until the document/certification is submitted.

If there is no or a deficient response to this action, Regions should escalate to a formal Administrative Order. This Order should be issued under the Authority of Section 1414 and specifically order the facility to submit the required document/certification with a reasonable number of days based the specific situation of the facility.

If the system cannot submit the information because it has not completed the Vulnerability Assessment or the Emergency Plan and significant work remains, the Region should determine a reasonable compliance schedule based on the actual time that is necessary to complete the document and place that schedule in an Administrative Order issued under Section 1414. Generally a system should be able to complete an assessment or emergency plan in less than six months.

Where a system is unwilling to submit the VA/Certifications or does not appear to be working diligently to complete or is unwilling to complete a VA or Emergency Plan, an escalated formal action should be considered. This could either be an Administrative Order under Section 1414 and followed by seeking civil/administrative penalties for any future violation of the Order or a referral to the Department of Justice for judicial enforcement action.

Where the Region believes that a system has failed to meet the requirements of Section 1433 in developing a Vulnerability Assessment or Emergency Plan, the Region should consult with OECA headquarters on the appropriate action to take.

As with any legal requirement, if the Region has reason to believe that any certification or other document submitted by a water system contains any materially false, fictitious, or fraudulent statements or representations, they should contact the Regional Criminal Counsel or the area office of the EPA Criminal Investigation Division.

C. Medium Systems 3,300 - 49,999 (about 8,000 systems)

The response for medium systems should generally track with the process described above for large systems although Regions may want to set priorities on which facilities they will address and the time frame for action. Regions should be looking closely at the capabilities of the system and their efforts to comply and craft a response that is appropriate to the size, complexity, and sophistication of the system. The Region should stress compliance assistance where the system is diligently attempting to comply.

V. Requests for an Extension of the Compliance Date

The compliance dates for activities required under Section 1433 are specifically included in the statute. EPA does not have the authority to extend the statutory dates. To date we have received several informal requests for compliance deadline extensions from public water systems. Attachment A is a model letter drafted by Region 6 and reviewed by Headquarters which Regions can use to respond to such requests.

For Large Systems

Mr./Ms. Xxx Xxxx
Director, Department of Drinking Water
Address
City, State Zip

Dear Mr./Ms. (Water System Operator)

Based on a review of available records at the U.S. Environmental Protection Agency (EPA), the [name of water system] has not met the statutory deadline of March 31, 2003, for systems serving more than 100,000 people to complete and submit a drinking water system vulnerability assessment (VA) and the associated certification of completion. If you believe that you have submitted these documents to EPA, please contact us immediately at the phone numbers listed below.

The requirements for community water systems to conduct a VA and the deadline for submission were established under the "Public Health Security and Bioterrorism Preparedness and Response Act of 2002" (PL 107-188) amendments to the Safe Drinking Water Act. This law sets forth certain requirements to ensure the safety of our nation's water supply is evaluated as expeditiously as possible. The importance of the VA as a major step in protecting public health cannot be overstated. In addition, failure to meet these requirements is a violation of Federal law.

If you have not completed these requirements, we request that you send a letter [designate specific EPA person] and provide mailing address] within two weeks of receiving this letter indicating when you expect to complete and submit the VA. This letter should also advise us of all measures being taken to come into compliance. Your response will be considered in determining what additional enforcement measures are appropriate to assure that these critical activities are completed.

The completion of your VA is of paramount importance. If you have any questions or need any assistance, please call me at (Xxx) xxx-xxxx, or you may contact [provide name of specific person] at [insert telephone number(s)]. Again, we urge you to make every effort to complete and submit your VA and associated certification of completion as soon as possible, and request that you forward your response letter to us within two weeks.

Sincerely yours,

EPA

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION II
290 BROADWAY
NEW YORK, NEW YORK 10007-1866**

IN THE MATTER OF:

-----, New York

PWS-ID No. NY-----

DOCKET NO.
SDWA-02-2003-80--
ADMINISTRATIVE
ORDER

STATUTORY AUTHORITY

The following findings are made and Order issued under the authority vested in the Administrator of the United States Environmental Protection Agency (EPA) by Section 1414(g) of the Safe Drinking Water Act (SDWA), 42 U.S.C. Section 300g-3(g), and duly redelegated to the undersigned Director, Division of Enforcement and Compliance Assistance, Region II.

FINDINGS

1. ----- (hereinafter "Respondent") owns and/or operates the "public water system", as defined by Section 1401(4) of the SDWA, 42 U.S.C. § 300f(4), and 40 C.F.R. §141.2, of ----- located in -----, New York.
2. Respondent is a "supplier of water" within the meaning of Section 1401(5) of the SDWA, 42 U.S.C. § 300f(5), and 40 C.F.R. §141.2.
3. The Respondent's Public Water System provides piped water for human consumption and regularly serves at least 15 service connections and/or a population of 25 or more individuals, and is therefore a "community water system" as defined by 1401(15) of the SDWA, 42 U.S.C. § 300f(15), and 40 C.F.R. §141.2.
4. On June 12, 2002, the SDWA was amended by inserting Section 1433-Terrorist and Other Intentional Acts, in accordance with the Public Health Security and Bioterrorism Preparedness and Response Act of 2002 (Public Law 107-188).

5. Section 1433 of the SDWA is an “applicable requirement” as defined in Section 1414(i) of the SDWA.
6. The New York State Department of Health (NYSDOH) administers the Public Water Supply Supervision Program in New York pursuant to Section 1413 of the SDWA. The approval of primary enforcement responsibility from EPA to the NYSDOH was effective as of September 9, 1977. NYSDOH is the primacy agency, as that term is defined in 40 C.F.R. §141.151(f). However, EPA has and will retain primary enforcement responsibility for Section 1433 of the SDWA.
7. Section 1433(a) of the SDWA requires community water systems serving more than 3,300 persons to:
 1. Conduct a Vulnerability Assessment (VA) of their system’s vulnerabilities to terrorist attack or other intentional acts intended to substantially disrupt the ability of the system to provide a safe and reliable supply of drinking water.
 2. Certify and submit a copy of the assessment to the EPA Administrator.
 3. Prepare and/or revise an emergency response plan that incorporates the results of the VA.
 4. Certify to the EPA Administrator, within 6 months of completing the VA, that the system has completed or updated their emergency response plan.
8. The purpose of the VA is to help water systems evaluate susceptibility to potential threats and identify corrective actions that can reduce or mitigate the risk of serious consequences from adversarial actions (e.g., vandalism, insider sabotage, terrorist attack, etc.) The VA provides a framework for developing risk reduction options and associated costs.
9. Section 1433(a)(2)(A) of the SDWA requires community water systems serving 100,000 or more persons to certify to the EPA Administrator that the system has conducted a VA and to submit a copy of the VA to the EPA Administrator by March 31, 2003.
10. Respondent’s public water system serves a population of over 100,000 people.
11. Based on the information available to EPA, the Respondent has failed to certify that they have conducted a VA and failed to submit a copy of a VA to the EPA Administrator, as specified in Section 1433(a)(2)(A) of the SDWA, 42 U.S.C. § 300i-2, for the _____ Water System, in violation of Section 1433(a), an “applicable requirement” of the SDWA.
12. EPA is issuing this Administrative Order to address the violations enumerated above and to place the Respondent on an enforceable schedule to comply with Title IV of the Public Health Security and Bioterrorism Preparedness and Response Act of 2002 and the

requirements of Section 1433 of the SDWA.

ORDER

Based on the foregoing FINDINGS, and pursuant to the authority of Section 1414(g) of the SDWA, EPA hereby ORDERS:

1. Within fifteen (15) days of the effective date of this Order, Respondent shall submit a completed VA along with a certification of its completion, as required by Section 1433(a) of the SDWA, to the EPA Administrator. **The submission of this information shall be accomplished in strict accordance with the established protocol that can be found in section 6.3 of the enclosed document entitled "Instructions to Assist Community Water Systems in Complying with the Public Health Security and Bioterrorism Preparedness Act of 2002".**
2. Within twenty (20) days of the effective date of this Order, Respondent shall provide **written confirmation** to EPA, that the Requirements of the above paragraph have been met and that the Respondent is in compliance with Section 1433(a) of the SDWA and the Order. **Do not submit the VA to the below address, only the above referenced confirmation shall be mailed to:**

Mr. Douglas G. McKenna
Public Water Supply Enforcement Team
U.S. Environmental Protection Agency
290 Broadway - 20th Floor
New York, New York 10007-1866
(212) 637-4244

3. Respondent shall comply with all remaining requirements of Section 1433 of the SDWA based on the schedules specified therein.

GENERAL PROVISIONS

1. Notwithstanding Respondent's compliance with any requirement of this Order, Respondent's failure to comply with all of the requirements of the SDWA and Part 141 may subject Respondent to additional enforcement action, including but not limited to administrative and judicial actions for penalties and/or equitable relief.
2. This Administrative Order shall not prohibit, prevent, or otherwise preclude EPA from taking whatever action it deems appropriate to enforce the SDWA in any manner and shall not prohibit, prevent, or otherwise preclude EPA from using this Order in subsequent administrative or judicial proceedings. Nothing in this Order shall constitute a waiver, suspension or modification of the requirements of the SDWA, or the rules and

regulations promulgated thereunder which remain in full force and effect. Issuance of this Order is not an election by EPA to forgo any civil or any criminal action otherwise authorized under the SDWA.

3. Violation of any term of this Order may subject Respondent to an administrative civil penalty of up to \$25,000 under Section 1414(g)(3)(B) of the SDWA, 42 U.S.C. 300g-3(g)(3)(B) or a civil penalty of not more than \$27,500 per day of violation, assessed by an appropriate United States district court, under Section 1414(g)(3)(A) and 1414(g)(3)(C) of the Act, 42 U.S.C. 300g-3(g)(3)(A) and 300g-3(g)(3)(C).
4. This Order does not relieve Respondent of any responsibilities or liabilities established pursuant to any applicable federal, state or local law.
5. This Administrative Order shall take effect upon the signature of the Director, Division of Enforcement and Compliance Assistance.

ORDERED, this _____ day of _____, 2003

Richard L. Caspe, P.E., Director
Division of Enforcement and Compliance Assistance

Mr. Jon C. Vanden Bosch
Director, Department of Public Works
and Engineering
611 Walker
Houston, TX 77002

Dear Mr. Vanden Bosch:

This letter communicates the U.S. Environmental Protection Agency's (EPA) concern that the City of Houston may not be able to meet the statutory deadline of March 31, 2003, for completing and submitting its drinking water system vulnerability assessment (VA). This strict deadline was established under the "Public Health Security and Bioterrorism Preparedness and Response Act of 2002" (PL 107-188; hereafter referred to as "The Act"). The Act sets forth certain requirements to ensure the safety of our nation's water supply as expeditiously as possible. The EPA has no authority to extend the statutory deadline; therefore, we urge the City to make every effort to complete the VA by that deadline.

Due to these developments, we request that you send a letter within two weeks of receiving this letter indicating when you expect to complete the VA. This letter should also advise us of all measures being taken to comply with the statutory deadline.

The importance of the VA as a major step in protecting public health cannot be overstated. In addition to violating the statutory deadline for completing a VA, other potential implications of not having a VA complete by the deadline include citizen lawsuits, or even worse, loss of life or property due to an attack.

The completion of Houston's VA is of paramount importance. We are available in whatever capacity possible to assist you with its completion. If you have any questions or need any assistance, please call me at 214-665-7101, or you may contact Terry Mendiola at 214-665-7144 or Greg Grover at 214-665-2776. Again, we urge you to make every effort to complete the VA by the deadline, and request that you forward your letter regarding the potential delay to us within two weeks.

Sincerely yours,

Miguel I. Flores
Director
Water Quality Protection Division

cc: Janet Pawlukiewicz, OGWDW, EPA