



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

October 30, 2018

OFFICE OF
THE ADMINISTRATOR

MEMORANDUM

SUBJECT: Principles and Best Practices for Oversight of Federal Environmental Programs Implemented by States and Tribes

FROM: Andrew R. Wheeler
Acting Administrator

A handwritten signature in black ink, appearing to read "Andrew Wheeler", written over the printed name and title.

TO: Assistant Administrators
Regional Administrators
Deputy Assistant Administrators
Deputy Regional Administrators

Introduction and Purpose

The 2018-2022 EPA Strategic Plan identifies *cooperative federalism* (Goal 2) as a fundamental priority for the agency with a stated objective (Objective 2.1) to *enhance shared accountability* between the EPA, state, local and tribal co-regulators in the implementation of federal environmental programs.¹ To address one key aspect of this shared accountability, the Agency Reform Plan on Tailoring State Oversight includes steps to establish a comprehensive approach to evaluate co-regulator implementation of federal programs to “help states maintain strong performance and ensure a level playing field.”²

The purpose of these efforts is to provide certainty in oversight for the EPA and its co-regulators. Many of the EPA’s statutes allow states and tribes to be designated as the primary implementers and enforcers of the EPA’s laws and regulations, whether through implementation of authorized or delegated programs, or because the statute invests states with initial implementation responsibilities.³ For the purposes of this memorandum, we refer to all of these activities as “federal programs implemented by states and tribes.” In 1984, EPA Administrator William D. Ruckelshaus issued the first comprehensive policy on oversight of programs implemented by states.⁴ Since that time, the number of such programs has increased substantially,

¹ U.S. Environmental Protection Agency, FY2018-2022 EPA Strategic Plan. Feb. 12, 2018.

² U.S. Environmental Protection Agency Fiscal Year 2019 Justification of Appropriation Estimates for the Committee on Appropriations. February 2018, p .842

³ Examples of the latter are states’ development of water quality standards or identification of impaired waters.

⁴ See Memorandum from William D. Ruckelshaus, Administrator, EPA Policy on Oversight of State Delegated Environmental Programs. Apr. 4, 1984.



and states have significantly more experience with program implementation. In addition, a smaller subset of tribes has gained authorization to implement environmental programs within their jurisdictions. During the same period, however, the regulatory universe has expanded, some environmental protection challenges have become more complex, and funding has presented implementation challenges at all levels of government. This memorandum complements the 1984 policy to modernize its practices and ensure comprehensive, consistent and constructive approaches to the oversight of programs implemented by states and tribes.⁵

For purposes of this memorandum, oversight of state- and tribal-implemented programs consists of activities conducted by the EPA to ensure that states and tribes implement applicable statutes and regulations and make progress toward achieving national environmental goals and expectations. EPA oversight of state- and tribal-implemented programs is generally performed in three ways, and, as with the three legs of a stool, each is a necessary component to ensure overall integrity:

1. Formal, retrospective reviews of state- and tribal- program implementation using established national criteria and procedures. These reviews usually occur at a specified interval, often with several years between evaluations. Not all programs conduct these reviews.
2. Regular meetings and discussions among EPA regional offices and states and tribes. These meetings may occur on an annual or quarterly basis among senior EPA regional and state and tribal leadership and often on a more frequent basis among EPA regional, state and tribal program managers. These meetings and discussions are an important component of oversight and provide the EPA with an up-to-date understanding of how the state or tribe is implementing the program. These engagements also serve to provide a clear understanding of expectations for both parties.
3. Matter-specific consultation between EPA regions, states and tribes to address urgent, precedential or high-profile matters in the state or tribe; to execute EPA obligations established by statute or memoranda of understanding to review state and tribal decisions or changes to states' and tribes' regulations; or to respond to significant violations of federal law.

This memorandum draws from a number of documents on state, tribal and federal roles, including the Environmental Council of the States' efforts under Cooperative Federalism 2.0,⁶ and outlines four key principles informing the EPA's oversight of state- and tribal-implemented programs: general deference to states and tribes in state- and tribal-implemented programs, effective communication, clear standards of review and predictable processes and a clear process for elevating issues.⁷ These principles generally apply to all three types of oversight listed above.

⁵ This memorandum does not address the EPA's oversight of states' or tribes' fiduciary responsibilities under 40 CFR Part 35.

⁶ Environmental Council of the States, "Principles for EPA Oversight Under Cooperative Federalism 2.0." Jul. 3, 2018.

⁷ This memorandum is intended for use by EPA personnel and does not create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officers or any person.

General Deference to States and Tribes Implementing Federally Delegated Programs

- 1) States and tribes have the primary role in state- and tribal-implemented federal programs, and the EPA will generally defer to states and tribes in their day-to-day activities.
- 2) At the same time, the EPA remains responsible and accountable to the President, the Congress and the public for upholding the rule of law, promoting progress toward meeting national environmental goals and ensuring that federal statutes are consistently implemented and enforced.⁸ The EPA thus has the responsibility to support and oversee programs implemented by states and tribes and, in certain circumstances, to take direct action.

Effective Communication

- 1) Effective and frequent communication is the cornerstone of a collaborative and accountable co-regulator relationship. In addition, a “no surprises” goal can be met if states, tribes and EPA regions ensure senior leaders are informed and speak regularly, both formally and informally, with their counterparts.
- 2) The EPA generally should communicate with the state or tribe before acting in a statutory program that is state- or tribal-implemented.
- 3) For the EPA to provide effective oversight, states and tribes should gather, maintain and share information transparently with the EPA and the public regarding the states’ and tribes’ activities conducted and the environmental outcomes achieved. The EPA should share states’ and tribes’ best practices as well as innovative approaches and technologies.
- 4) States, tribes and EPA regions should engage in joint planning and strive to align priorities, define measures of success and come away with a clear understanding of each party’s roles and responsibilities, including work-sharing agreements. Planning and oversight discussions should occur face-to-face, whenever practical.
- 5) As appropriate, the EPA may seek early input from states and tribes on national rulemaking, policies or guidance to benefit from states’ and tribes’ experiences in identifying and understanding evolving science and emerging environmental and implementation challenges and in developing effective programmatic options and alternatives.

⁸ EPA recognizes that some federal environmental statutes allow states to be more stringent than the federal program minimums.

Clear Standards of Review and Predictable Processes

- 1) The EPA will identify clear standards of review against which state and tribal programs and activities will be evaluated. When conducting program reviews, the EPA will consider applicable statutory and regulatory requirements to ensure adherence to applicable law. The EPA will also consider, as appropriate, guidance issued to facilitate effective national implementation of programs. Evaluation activities should be based as much as possible on nationally agreed-upon measures and metrics. Evaluation will also consider specific commitments made by states and tribes.
- 2) During its program evaluations, the EPA will pay particular attention to situations where there is significant risk of human health or environmental harm, where program implementation decisions may be precedential or have impacts beyond the state or tribe or where there are longstanding program implementation issues.
- 3) Information about state and tribal program performance, which can flow from all three types of oversight as well as other sources of information, should be frequent enough to identify problems early, before minor issues become serious.
- 4) Before finalizing findings that indicate a state or tribal program deficiency, the EPA should communicate the findings to the state or tribe and afford the state or tribe an opportunity to review and respond.
- 5) The EPA will act appropriately based on the nature and urgency of the issues:
 - a) For most program performance issues identified through oversight evaluation, the EPA anticipates it will be able to help states and tribes return to appropriate performance levels using a variety of tools such as technical support, education, training programs, guidance, work-sharing, evaluations or other appropriate actions.
 - b) In certain circumstances, such as long-standing program deficiencies, the EPA may conduct enhanced oversight to better understand issues or to ensure that improvements are taking place.
 - c) The EPA should engage with the state or tribe as early as possible regarding potential direct federal action in certain situations. This may include situations where there is substantial risk of harm to human health or the environment; the state or tribe does not have the resources, capability or will to effectively implement programs; the state or tribe may be making a program implementation decision inconsistent with federal-program requirements; the issue involves national interest or priority; or the state or tribe has a documented history of not adequately implementing particular components of their programs (such as not addressing significant non-compliance).⁹

⁹ See the Jan. 22, 2018 “Interim OECA Guidance on Enhancing Regional-State Planning and Communication on Compliance Assurance Work in Authorized States,” for examples of the types of situations that could warrant EPA involvement in individual inspections and enforcement in authorized states.

- 6) Withdrawal of program implementation authority is a last option to be considered after all other options have been exhausted or when human health and the environment are at risk.

Clear Process for Elevation of Issues

- 1) To facilitate the resolution of disagreements at the earliest stage possible, states, tribes and the EPA should have a process in place to elevate issues.
- 2) States, tribes and the EPA should strive for reliable and predictable timing in decision-making.
- 3) Issues should be resolved at the lowest level possible but if they need to be elevated, each party is responsible for talking to its state, tribal or EPA counterpart and making a decision or elevating further.

Evaluation of These Principles

These principles are intended to provide certainty by setting expectations for state, tribal and federal roles and responsibilities and ensuring decisions are made in a timely fashion. EPA headquarters will solicit feedback from regions, states and tribes regarding the application of these principles. On a biannual basis and in consultation with states and tribes, the EPA will use the information gained to identify and implement necessary program improvements.