




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

JUL 11 2019

ASSISTANT ADMINISTRATOR
FOR ENFORCEMENT AND
COMPLIANCE ASSURANCE

MEMORANDUM

SUBJECT: Enhancing Effective Partnerships Between the EPA and the States in Civil Enforcement and Compliance Assurance Work

FROM: Susan Parker Bodine 

TO: Regional Administrators

This policy sets out expectations and procedures for enhancing effective partnerships in civil enforcement and compliance assurance work between the U.S. Environmental Protection Agency and states that are authorized, delegated, or approved to implement federal environmental programs (hereinafter, "states").¹

The first part of this policy articulates expectations and best practices for periodic joint work planning and effective communication between EPA regions and states to further the goal of shared accountability for the consistent enforcement of the law. The second part articulates the primary role of the states in implementing authorized programs, while acknowledging the EPA's responsibilities to the President, the Congress, and the public to take direct action when a state lacks the economic or technical capability or the will to take timely and appropriate action. The second part also describes those circumstances that may warrant direct federal action. The third part sets out the process by which issues that may arise under this policy will be elevated.

Background

The EPA aims to enhance its partnerships with its state, local, and tribal co-regulators by more effectively carrying out our shared responsibilities under environmental laws. Administrator Wheeler issued a memorandum on October 30, 2018, that complemented and modernized earlier EPA statements on EPA and state roles.² That memorandum outlined four key principles relevant to the enforcement of federal environmental laws: (1) general deference to the states in state-implemented programs, consistent with the

¹ Although this policy is focused on the EPA's work with states that implement federal programs, the EPA will also strive to follow these planning and communication practices when working with federally-recognized Indian tribes, territories, and local governments that implement federal programs.

² See Memorandum from Andrew R. Wheeler, Acting Administrator, Principles and Best Practices for Oversight of Federal Environmental Programs Implemented by States and Tribes (Oct. 30, 2018). See also Memorandum from William D. Ruckelshaus, Administrator, EPA Policy on Oversight of Delegated Environmental Programs (Apr. 4, 1984).

EPA's oversight responsibilities; (2) effective communication between the EPA and the states; (3) clear standards of review and predictable processes; and (4) a clear process for elevating issues.³

In a complementary process, the EPA and the Environmental Council of the States ("ECOS") convened an EPA-ECOS Compliance Assurance Workgroup in September 2017 to develop practical procedures to advance cooperation between EPA and state enforcement offices.⁴ The EPA-ECOS Workgroup published a consensus-based series of recommendations in August 2018 that touched on all four principles in the 2018 Wheeler memorandum.

The EPA also issued interim guidance on January 22, 2018, related to enhancing planning and communication between EPA regions and the states.⁵ The EPA signaled that it would update and finalize that guidance based on input from EPA regions, states, and the EPA-ECOS Workgroup. The EPA published a notice and request for public comments on a draft of this final guidance on May 13, 2019.⁶

After considering the 2018 Wheeler memorandum, the EPA-ECOS Workgroup recommendations, and comments received on the interim and draft final policies, I am now issuing this final enhancing effective partnerships policy.⁷

I. PERIODIC JOINT WORK PLANNING

Cooperative, periodic, and early joint planning and regular communication between the EPA and states is essential to promote enhanced, shared accountability between federal and state enforcement authorities. A "no surprises" principle is the foundation of joint work planning and will minimize the misunderstandings that can be caused by the lack of regular, bilateral communication. With increased EPA cooperation and transparency, the EPA expects the states to respond in kind. A break-down in two-way communication between a state and the EPA should be elevated to senior management in both organizations. The overall goal of joint planning is the sharing of enforcement responsibilities with a clear agreement on EPA and state roles in individual inspections and formal enforcement actions. Such agreements cannot be reached

³ See Wheeler at 2.

⁴ Workgroup members included geographically- and politically-diverse state director-level representatives from Alaska, California, Missouri, New Jersey, Ohio, and Tennessee, and Deputy Regional Administrator-level representatives from EPA Regions 1, 2, 3, 7, and 8. The Workgroup was co-chaired by the Director of the Nebraska Department of Environmental Quality and the OECA Deputy Assistant Administrator. See <https://www.ecos.org/documents/final-report-of-the-ecos-epa-compliance-assurance-workgroup>.

⁵ See Memorandum from Susan Parker Bodine, Assistant Administrator for the Office of Enforcement and Compliance Assurance, Interim OECA Guidance on Enhancing Regional-State Planning and Communication on Compliance Assurance Work in Authorized States (Jan. 22, 2018).

⁶ See 84 Fed. Reg. 20,882 (May 13, 2019).

⁷ This policy withdraws and replaces the January 22, 2018, Bodine interim guidance memorandum. This policy is intended for use by EPA personnel and does not create any right or benefit, substantive or procedural, enforceable by law by a party against the United States, its agencies, its officers, or any person. This policy is not intended to supersede any statutory or regulatory requirements or agency policy. Any inconsistencies between this policy and any statute or regulation should be resolved in favor of the relevant statutory or regulatory requirements. The EPA may revise, replace, or discontinue this policy at any time.

if the EPA or a state is unaware of the actions of the other. Where agreement cannot be achieved, the matter should be elevated within the EPA and the state for resolution under the issue-elevation procedures in Section III. Periodic joint work planning should at a minimum include strategic planning, joint inspection planning, and joint formal enforcement planning.⁸

A. Joint planning participants

Joint work planning should take place at various levels within the EPA and state agencies. The timing, method, and preparation for planning communications will vary based on the EPA-state relationship, and the level of the participants will vary as appropriate to the items to be discussed. In this policy, “career managers” means the employees with day-to-day responsibility for an enforcement and compliance program (e.g., air enforcement managers). “Senior management” means the employees with responsibility for multiple statutory programs, not necessarily limited to enforcement programs (e.g., Regional Enforcement and Compliance Assurance Division Directors and Deputy Regional Administrators).

As a practical matter, most discussions of work-sharing, inspections, and enforcement actions are likely to occur between EPA regional and state career managers. Effective collaboration and shared accountability require appropriate communication up and down the respective management chains within the EPA and the states. This does not mean that every enforcement issue must be elevated to the highest possible level within an organization. It does mean that the more significant the issue, the more likely it will be appropriate to brief more senior managers.

In addition to these day-to-day discussions, the senior management in each region should meet—preferably in person—with their counterparts in a state, including, as appropriate, the EPA Regional Administrator and Secretaries or Commissioners of state environmental agencies. The frequency of these meetings and the participants should be appropriate to the needs and styles of the specific region-state relationship. These meetings should include a jointly-prepared agenda and supporting materials circulated sufficiently in advance to allow for full preparation and participation.

B. Strategic planning

Joint planning should include a strategic element that goes beyond planning for individual inspections and enforcement actions. Strategic planning should include a discussion of: (1) the environmental compliance problems and needs in the state; (2) national, regional, and state compliance assurance priorities; (3) emerging issues; and (4) how the combined resources of the EPA and the state could be used to address these needs. Strategic planning should also include a discussion of how the EPA and the state may mutually build their respective capabilities to conduct inspections and develop and prosecute cases. Strategic planning meetings should include senior management.

C. Joint inspection planning

EPA regions and the states should work together to identify which inspections the EPA or a state will perform, consistent with the guidelines in Section II. Inspection planning will avoid duplicate efforts, improve efficiency, reduce unnecessary burdens on the regulated community, and could provide EPA regions and states with more flexibility in setting and adjusting inspection targets and Compliance

⁸ This periodic joint work planning process is not appropriate for those emergency actions described in Section II(3).

Monitoring Strategies. Cooperative inspection planning also helps the EPA meet its oversight responsibilities to ensure compliance with federal statutes. The following best practices should be followed in the joint inspection planning process.

- 1) EPA regions and states should communicate as they develop their separate inspection priorities and commitments and should work together as appropriate on joint inspection priorities and commitments.
 - a) EPA regions and the states should avoid duplicative or overlapping inspections that would lead them to inspect the same facility for the same regulatory requirements within the same twelve-month period. Multiple inspections by the EPA and the states may, however, be appropriate for complex sites where the inspections will focus on different regulatory requirements or where the EPA and a state agree that multiple inspections serve a valuable purpose.
 - b) EPA regions and the states should exchange and discuss their targeting rationales and draft inspection plans as early as possible. This should be more than a simple exchange of planned inspection lists for informational purposes. Instead, this discussion should create a shared understanding between EPA regions and the states of the purpose and objectives of their respective inspections.
 - c) EPA regions should provide states with advance notice of inspections, especially because inspection plans tend to be dynamic and it might have been some time since the planned inspection was discussed. This type of coordination requires EPA regions and states to reach agreements regarding confidentiality and whether or when facilities are to be provided notice of inspections.
- 2) EPA regions and states should invite each other to participate in inspections where there is value in both entities participating.
- 3) The inspection planning process should make the best use of both EPA and state resources and expertise. EPA regions and states should discuss how they will use their combined resources to meet national inspection coverage expectations under applicable Compliance Monitoring Strategies and statutory requirements and should consider the use of alternative compliance monitoring strategies where appropriate.
- 4) Consistent with the “no surprises” principle, in investigations where the EPA has the lead, EPA regions should share information requests and inspection reports for authorized programs with the state concurrently with sending them to the recipient.

D. Joint enforcement planning

Joint enforcement planning should identify which individual or classes of enforcement actions the EPA or a state will initiate, consistent with the guidance in Section II. The following best practices should be followed in the joint enforcement planning process.

- 1) The EPA should communicate with states when the EPA believes that an enforcement action is warranted in a state. The communication should include a review of the EPA’s observations and findings from inspections and other case development techniques. The communication should include a discussion whether the enforcement action should be federal, state, or joint, and the type of action to be

taken. In these communications, the EPA should expect the state to respond quickly and clearly so that a federal, state, or joint enforcement action may proceed in a timely way, although the state's response does not need to be in writing.⁹

- 2) Where a state proposes to take the lead to address noncompliance identified by the EPA, the state and the EPA should discuss state-specific authorities and procedures and how the claims made and relief sought in an enforcement action taken by a state will—as appropriate for the circumstances of the violation—remedy the noncompliance and deter similar violations, including civil penalties as appropriate.
- 3) Where the EPA is taking an enforcement action in a state, the EPA should notify the state before notifying the facility.
- 4) Joint enforcement planning should include regular, bilateral updates on the progress and outcomes of selected actions (e.g., National Compliance Initiative actions, new areas of state implementation, “priority state assists,”¹⁰ or important cases discussed during joint work planning).
- 5) The EPA and the states should remain mindful of the requirements of confidentiality in enforcement actions—breaches of confidentiality will diminish the ability to work in an effective partnership. It may not be possible for the EPA to share details of a planned enforcement action where a confidentiality agreement with the state is not executed and where differences in freedom of information and evidentiary rules would make case-sensitive information vulnerable to release.
- 6) If the need arises for additional enforcement or compliance actions after making joint planning decisions in an action, the EPA and the state should discuss the appropriate lead agency for these additional actions.¹¹
- 7) Ongoing cooperation and assistance between the EPA and the states is encouraged.

⁹ If a region does not hear from a state, the EPA should document when it communicated with the state and the reasonable length of time the state had to respond.

¹⁰ See Memorandum from Susan Parker Bodine, Assistant Administrator for the Office of Enforcement and Compliance Assurance, Procedures for Measuring Regions’ “State Assists” that Help Remedy Violations (May 31, 2019).

¹¹ Joint work planning has been proceeding under the January 2018 interim guidance for over a year and a half. In the increasingly rare situation where an action has not gone through that or a similar prior process and the state or the EPA seeks a change in the lead agency for an enforcement action, a decision on changing the lead will be made only after consultation among the state’s Secretary or Commissioner, the Regional Administrator, and the Assistant Administrator for the Office of Enforcement and Compliance Assurance. Changes in lead should be memorialized in writing and should include the requirement that the EPA and the state will periodically discuss the progress of the case. To minimize delays in returning an entity to compliance, the likelihood that the EPA will agree to a mid-course change in case lead from the EPA to a state will decrease as EPA case development becomes more advanced.

II. ROLES OF THE EPA AND STATES IN IMPLEMENTING AUTHORIZED PROGRAMS

The EPA will generally defer to a state as the primary implementer of inspections and enforcement in authorized programs. The EPA, however, retains concurrent enforcement authority and so there are specific situations where the EPA may choose to take direct action after following the processes in Section I.¹² Examples of situations that could warrant EPA involvement include the following.

- 1) **Joint work planning or specific situations where the state requests that the EPA take the lead.** Using the processes described in Section I, the EPA may provide enforcement assistance as requested by a state or may take the lead in an enforcement action, sub-program, sector, or geographic area under an EPA-state work-sharing arrangement.
- 2) **Violations that are part of a National Compliance Initiative.** The EPA and the states should discuss work-sharing and how to make the best collective use of EPA and state resources and expertise to achieve the goals of the National Compliance Initiatives (“NCIs”). NCIs will be defined as a subset of cases in a program area where the EPA has determined that national consistency and federal assistance in achieving compliance are important to the protection of public health and the environment. While NCIs are intended to address widespread noncompliance problems, such problems may not be present in each jurisdiction nor a priority for each state. States are not obligated to participate in NCIs, although the EPA welcomes their participation. The EPA is expected to take the lead in some of the specific enforcement actions identified as NCI actions to apply and maintain its expertise, to ensure consistency, and to promote a level playing field, while at the same time inviting individual states to join in a judicial case as it relates to facilities in that state. If a state proposes to take the lead in an NCI case, the EPA should defer to a state that agrees to seek compliance and enforcement outcomes consistent with EPA-led resolutions elsewhere in the nation. States and the EPA are expected to share with each other the specifics of outcomes of the NCI enforcement actions for which they have the lead. The EPA region should provide OECA with a list of facilities where the joint planning process results in a state taking the lead for an enforcement action that falls under an NCI.
- 3) **Emergency situations or situations where there is substantial risk to human health or the environment.** In consultation and coordination with the state, the EPA may take direct action or supplement state enforcement resources in these circumstances.
- 4) **Situations where a state lacks adequate equipment, resources, or expertise.** While the states have built capable environmental enforcement programs, the EPA may take the lead in a case where the state does not have the equipment, resources, or expertise necessary to enforce an aspect of an authorized statutory program. The EPA should defer more to a state that has demonstrated greater compliance assurance capability and may defer less to a state that continues to have difficulty improving compliance. In cases where less deference may be warranted, the EPA and the state should consider working jointly on an enforcement action to build state capacity.

¹² See Wheeler at 3 (“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. At the same time, the EPA remains responsible and accountable to the President, the Congress and the public for upholding the rule of law . . . and ensuring that federal statutes are consistently . . . enforced.”).

- 5) **Situations involving multi-state or multi-jurisdictional interests or interstate impacts.** The EPA should take the lead in cases addressing noncompliance at facilities owned or operated by the same entity in multiple states to ensure consistency and a level playing field, while at the same time inviting individual states with affected facilities to join the case. Similarly, the EPA may take the lead in enforcement actions addressing significant cross-boundary impacts affecting other states or nations to ensure that cross-boundary impacts from noncompliance are resolved equitably.
- 6) **Significant violations that the state has not timely or appropriately addressed.** The EPA may take an enforcement action where a state is not taking timely and appropriate action.
- 7) **Serious violations for which the EPA's criminal enforcement authorities may be needed.** Because only a handful of states have active environmental criminal enforcement programs, most environmental criminal investigations are performed by the EPA in consultation and cooperation with local law enforcement authorities.
- 8) **State enforcement program review inspections.** The EPA has a responsibility under the federal environmental statutes to conduct a limited number of inspections to verify the efficacy of authorized enforcement programs.¹³
- 9) **Situations that involve enforcement at federal and state owned or operated facilities.** The EPA may take the lead or assist a state in an enforcement action at a federally owned or operated facility. The EPA may also take the lead in an enforcement action against a state owned or operated facility where there are conflicts internal to the state that make state enforcement less effective.

III. PROCESS FOR THE ELEVATION OF ISSUES

Issues that may arise under the processes in Sections I or II must be elevated and resolved as quickly as practicable.¹⁴ The following best practices should be followed.

- 1) Issues should be resolved whenever possible at the EPA and state career management level.
- 2) If career management cannot resolve an issue, the matter should be elevated within thirty days for resolution by regional and state senior management.
- 3) If following elevation within the region and the state there remains a dispute between the Regional Administrator and the State Secretary or Commissioner, the matter should be elevated within sixty days to the Assistant Administrator for the Office of Enforcement and Compliance Assurance for a decision. The Regional Administrator and the State Secretary or Commissioner will be afforded the opportunity to present the matter in dispute to the Assistant Administrator prior to a final decision.

¹³ This policy does not concern the situation where a state has not addressed State Review Framework deficiencies adequately. Communications regarding these deficiencies should take place within the structure of that program.

¹⁴ Regions and states may continue to use the dispute resolution provisions in their existing bilateral agreements to the extent they are not inconsistent with this policy.