



U.S. ENVIRONMENTAL PROTECTION AGENCY

OFFICE OF INSPECTOR GENERAL

Cleaning up and revitalizing land

While EPA Regions Enforce at Six Superfund Sites Reviewed, Four of Those Sites Remain in Significant Noncompliance, and Nationwide Reporting and Tracking Can Be Improved

Report No. 20-P-0011

October 24, 2019



Report Contributors:

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Abbreviations

AOC	Administrative Order on Consent
CD	Consent Decree
CERCLA	Comprehensive Environmental Response, Compensation, and Liability Act
CERCLIS	Comprehensive Environmental Response, Compensation, and Liability Information System
EPA	U.S. Environmental Protection Agency
OECA	Office of Enforcement and Compliance Assurance
OIG	Office of Inspector General
OSRE	Office of Site Remediation Enforcement
PRP	Potentially Responsible Party
SEMS	Superfund Enterprise Management System
SNC	Substantial Noncompliance
UAO	Unilateral Administrative Order

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At a Glance

Why We Did This Project

We evaluated whether the U.S. Environmental Protection Agency (EPA) enforced Potentially Responsible Parties' (PRPs') compliance with EPA Superfund Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) Response Settlements and Unilateral Response Orders.

Under its CERCLA authority, the EPA can employ Superfund enforcement instruments to require PRPs to address environmental contamination at Superfund sites. The EPA is responsible for enforcing the terms specified in enforcement instruments and for taking action when violations occur. The EPA monitors violations of enforcement instruments when the violations amount to Substantial Noncompliance (SNC).

This report addresses the following:

- *Cleaning up and revitalizing land.*

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While EPA Regions Enforce at Six Superfund Sites Reviewed, Four of Those Sites Remain in Significant Noncompliance, and Nationwide Reporting and Tracking Can Be Improved

What We Found

EPA regions we reviewed were enforcing for all six of our sampled sites. However, four of those sites remained in significant noncompliance. Additionally, the EPA's ineffective tracking of SNC for Superfund enforcement instruments limited headquarters' ability to measure whether, and how well, the regions were addressing noncompliance at sites.

The effectiveness of EPA headquarters' oversight of enforcement at Superfund sites was limited as headquarters was not aware of all SNCs and thus could not assess adequacy of regional actions.

As of May 2018, there were 1,625 active Superfund enforcement instruments nationwide. The EPA's Office of Enforcement and Compliance Assurance was aware of 50 enforcement instruments in SNC, which represented 3 percent of active enforcement instruments, suggesting that 97 percent were in compliance. However, that level of compliance for our sample was overstated, as four of the six enforcement instruments we reviewed were erroneously coded as "Not in SNC" when they should have been coded as "In SNC." We found that the guidance for tracking and monitoring noncompliance allows for overly subjective determinations of SNCs, and EPA headquarters did not use the compliance reports to thoroughly monitor compliance with enforcement instruments nationally.

Headquarters oversight is critical in cases where PRPs have liabilities in more than one region. Without appropriate oversight, headquarters' awareness of all PRP liabilities and possible inability to pay for cleanup is limited. This situation could lead to increased expenditures from the Superfund trust fund to pay for cleanups, resulting in less Superfund money being available for other sites. Cleanups can also be delayed when negotiations slow or stall, thereby extending human health exposures.

Recommendations and Planned Agency Corrective Actions

We recommend that the Assistant Administrator for Enforcement and Compliance Assurance revise guidance on the tracking and monitoring of SNC to better define "In SNC" and "Not in SNC"; require correction of SNC status where designations are inaccurate; communicate to regions the clarified guidance on proper designations of SNC and how to report them; remind regions to correct and update compliance data as appropriate for all active enforcement instruments; and develop, document and assign the roles and responsibilities of headquarters staff for oversight of monitoring noncompliance with Superfund enforcement instruments. The agency agreed with the recommendations, which are resolved with corrective actions pending.



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

OFFICE OF
INSPECTOR GENERAL

October 24, 2019

MEMORANDUM

SUBJECT: While EPA Regions Enforce at Six Superfund Sites Reviewed, Four of Those Sites Remain in Significant Noncompliance, and Nationwide Reporting and Tracking Can Be Improved
Report No. 20-P-0011

FROM: Charles J. Sheehan, Acting Inspector General

A handwritten signature in blue ink that reads "Charles J. Sheehan".

TO: Susan Parker Bodine, Assistant Administrator
Office of Enforcement and Compliance Assurance

This is our report on the subject audit conducted by the Office of Inspector General (OIG) of the U.S. Environmental Protection Agency (EPA). The project number for this assignment was OA&E-FY18-0215. This report contains findings that describe the problems the OIG has identified and corrective actions the OIG recommends. This report represents the opinion of the OIG and does not necessarily represent the final EPA position. Final determinations on matters in this report will be made by EPA managers in accordance with established resolution procedures.

The Office of Land and Emergency Management is responsible for the EPA's Superfund cleanup program. The Office of Enforcement and Compliance Assurance is responsible for enforcement of the Superfund program, and its Office of Site Remediation Enforcement tracks active enforcement activities throughout the 10 EPA regions.

In accordance with EPA Manual 2750, your office provided acceptable corrective actions and milestone dates in response to our recommendations. Our recommendations are resolved, and no final response to this report is required. However, if you submit a response, it will be posted on the OIG's website, along with our memorandum commenting on your response. Your response should be provided as an Adobe PDF file that complies with the accessibility requirements of Section 508 of the Rehabilitation Act of 1973, as amended. The final response should not contain data that you do not want to be released to the public; if your response contains such data, you should identify the data for redaction or removal along with corresponding justification.

We will post this report to our website at www.epa.gov/oig.

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Chapter 1

Introduction

Purpose

The purpose of this audit was to determine whether the U.S. Environmental Protection Agency (EPA) is enforcing Potentially Responsible Parties' (PRPs') compliance with EPA Superfund Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) Response Settlements and Unilateral Response Orders.¹

Background

CERCLA provides the EPA with the authority to employ Superfund enforcement instruments to require PRPs to address environmental contamination at Superfund sites. The EPA is responsible for enforcing the terms specified in Superfund enforcement instruments, including taking action when violations occur. The EPA primarily uses three types of enforcement instruments to oversee PRPs:

- **Administrative Order on Consent (AOC):** An AOC² is a legal document that formalizes an agreement between the EPA and one or more PRPs. The agreement obligates some or all of the parties responsible for a site to conduct response activity and/or reimburse the government's response costs.
- **Consent Decree (CD):** A CD is a legal agreement entered into by the United States (through the EPA and Department of Justice) and PRPs and entered by a court.
- **Unilateral Administrative Order (UAO):** If the PRPs do not agree to perform the cleanup work or fail to satisfactorily perform the work through an AOC or CD, the EPA can order parties to perform cleanup work under a UAO and may subsequently seek to recover from the PRPs any money that the agency spends on the cleanup. The EPA can also issue a UAO when it finds there may be an imminent and substantial endangerment to the public health or the environment. The EPA prefers to use AOCs and CDs when possible.

¹ For purposes of this report, Response Settlements and Unilateral Response Orders will be referred to as enforcement instruments. In addition, Unilateral Response Orders also are referred to as Unilateral Administrative Orders.

² In recent years, the EPA generally has re-styled these instruments as Administrative Settlement Agreements and Orders on Consent. For purposes of this report, the terms AOCs, Administrative Settlement Agreements and Orders on Consent are treated as synonymous.

Further details on these three instruments are in Table 1.

Table 1: Types of enforcement instruments

Instrument	Requires PRP agreement?	Requires court approval?	Type of work conducted under instrument
AOC	Yes	No	<ul style="list-style-type: none"> • Short-term cleanup • Investigation • Remedy design work • Reimbursement for costs
CD	Yes	Yes	<ul style="list-style-type: none"> • Longer-term cleanup work
UAO	No	No	<ul style="list-style-type: none"> • Work to address imminent and substantial endangerment • EPA overtakes cleanup work when PRPs are unwilling to comply with the UAO

Source: Created by the Office of Inspector General (OIG) based on EPA documents.

The Superfund Enterprise Management System (SEMS) is the EPA’s official repository for Superfund data and electronic records in support of CERCLA. EPA headquarters uses SEMS data as the basis for tracking, managing and reporting accomplishments and compliance on national program performance. The primary focus of a SEMS compliance tracking report is to monitor enforcement instruments that require parties to perform work. During this audit, we reviewed enforcement instruments at sites we sampled.

There are two categories of compliance for purposes of compliance tracking and determining whether and how to enforce and aiding headquarters’ oversight regarding instances of Substantial Noncompliance (SNC):

- **“Not in SNC”**: Instruments that have no violations or only less significant violations.
- **“In SNC”**: Instruments that have more significant violations, including significant deviation from the enforcement instrument or chronic violation.

Regions are expected to document violations of enforcement instruments and work with violators to return to compliance without regard to whether the violations constitute SNC.

Definitions of SNC for CERCLA enforcement instruments are in Table 2.

Table 2: Definitions of SNC for CERCLA enforcement instruments

<p>1. Significant deviation from the terms of the enforcement instrument:</p> <p>A determination of significant deviation may be based on one or more of the following factors:</p> <ul style="list-style-type: none">• Importance of the requirement violated and the extent of the violation.• Impact on site conditions or the affected community.• Impact on the quality or timeliness of response activities.• Harm to the integrity of the enforcement process.• Impact on site costs or the level of oversight required.
<p>2. Chronic violations:</p> <p>A determination that multiple violations cumulatively constitute a pattern of chronic violation may be based on one or more of the following factors:</p> <ul style="list-style-type: none">• Importance of the requirements violated and the extent of the violations.• Impact on site conditions or the affected community.• Impact on the quality or timeliness of response activities.• Harm to the integrity of the enforcement process.• Impact on site costs or the level of oversight required.
<p>3. Other:</p> <p>Noncompliance not encompassed within the preceding criteria but which the region deems substantial. A written description of the circumstances constituting SNC should be prepared.</p>

Source: Excerpt from the August 2009 *Guidance on Determining and Tracking Substantial Noncompliance with CERCLA Enforcement Instruments in CERCLIS*. [“CERCLIS” stands for “Comprehensive Environmental Response, Compensation, and Liability Information System.”]

According to the EPA’s August 2009 *Guidance on Determining and Tracking Substantial Noncompliance with CERCLA Enforcement Instruments in CERCLIS* (the most recent guidance we identified that defines SNC), when site-specific questions arise about the definition of SNC, appropriate EPA Office of Site Remediation Enforcement (OSRE) personnel should be consulted. OSRE is within the Office of Enforcement and Compliance Assurance (OECA).

OSRE officials designate a regional liaison from the office’s Regional Support Division and a regional analyst from the office’s Policy and Program Evaluation Division for each EPA region. The liaisons and analysts are provided with quarterly compliance monitoring reports and are asked, among other things, to: (a) check with their regions to update the status of any enforcement instruments that are “In SNC” for two or more quarters and have not been addressed by formal enforcement; and (b) check whether violations of enforcement instruments that OSRE has become aware of have been listed as “In SNC” and, if not, suggest to the region that they should be.

There are several key enforcement compliance tracking reports in SEMS that are managed and used by OSRE to track active enforcement activities throughout the 10 EPA regions. These include a report listing UAOs and AOCs that have been issued, and another report that lists all of the enforcement instruments nationwide

including compliance status. These reports provide OSRE an awareness of enforcement actions taken by the regions.

To help maintain enforcement consistency among the regions, OSRE issued guidance that establishes the roles and responsibilities of headquarters and the regions for various areas of Superfund enforcement, including PRP SNC. One purpose of the guidance is to promote headquarters' review of penalties/settlements for noncompliance with settlements and agreements in order to maintain consistency among regions.

Superfund penalties and damages can include statutory penalties, stipulated penalties and treble damages:

- There are a variety of Superfund statutory penalty provisions that may apply if a PRP does not comply with the requirements of a settlement agreement.
- Stipulated penalties occur when the parties agree within a settlement agreement what the penalty will be for a certain type of noncompliance. While the agency strongly encourages use of stipulated penalty provisions in CDs, stipulated penalties also are employed in administrative orders.
- Treble damages refer to the EPA's ability to recover punitive damages of up to three times the costs from PRPs that did not comply with a UAO.

According to the EPA, the following criteria must be considered in determining penalties: (1) penalties should be large enough to serve as a deterrent, (2) penalties should be fair and equitable, and (3) penalties should provide a swift resolution to the environmental problems posed by the noncompliance at issue.

Responsible Offices

The Office of Land and Emergency Management is responsible for the EPA's Superfund cleanup program. OECA is responsible for enforcement of the Superfund program. Within OECA, OSRE tracks active enforcement activities throughout the 10 EPA regions.

Scope and Methodology

We conducted our audit from May 2018 to July 2019, in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objective. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objective.

To address our audit objective, we reviewed documents and interviewed regional and headquarters staff for evidence of agency actions—such as referrals to the Department of Justice, notices of violation, etc.—to achieve compliance with the terms and conditions of the enforcement instruments. We reviewed prior reports related to Superfund enforcement and cleanup. We also reviewed SEMS, which contained key enforcement documents such as AOCs and UAOs, key cleanup documents, and correspondence between the EPA and PRPs and between the EPA and the Department of Justice. We reviewed several OSRE tracking reports spanning multiple years to help us gain a national perspective on active enforcement instruments.

We selected six sites to review that each included one of the following criteria: (1) enforcement instruments that had been “In SNC” and then removed from “In SNC” but were still active, (2) enforcement instruments that were “In SNC” for a significant period of time and (3) response actions that were enforced under a UAO where the UAO was still active but had never been “In SNC.”

We interviewed managers, staff and officials from remediation/removal programs and regional counsel in EPA Regions 2, 4, 6 and 7 to discuss overall enforcement of sites, enforcement of instruments at the sites we sampled, and the regions’ coordination and communication with OSRE. In addition, we interviewed officials from OSRE to discuss that office’s involvement with the regions and oversight of regional enforcement actions. We also interviewed officials from the Office of Superfund Remediation and Technology Innovation to discuss its role in enforcement cases.

We reviewed various criteria, including those found in the EPA’s *Guidance on Determining and Tracking Substantial Noncompliance with CERCLA Enforcement Instruments in CERCLIS*, August 2009; and the 2011 *Transmittal “Superfund Compliance Monitoring Measure” Definition/Methodology for Incorporation into Superfund Program Implementation Manual (SPIM) for FY2012*.

Prior Report

An April 28, 2008, EPA OIG report, *EPA Needs to Track Compliance with Superfund Cleanup Requirements* (Report No. [08-P-0141](#)), relates to the objective and findings of our audit. The report made four recommendations to improve the reporting of SNCs nationwide. The EPA agreed with the recommendations and took corrective actions to improve the reporting of SNCs and the overall reporting of compliance data. Our work identified some of these reporting improvements through our review of the compliance tracking reports provided by OECA.

Chapter 2

Ineffective Tracking of Superfund Enforcement Instruments Limits Oversight

The four EPA regions we reviewed were enforcing for all of our six sampled sites. However, significant noncompliance remains at four of the six sites we reviewed. Additionally, the EPA's ineffective tracking of SNC with respect to Superfund enforcement instruments limited headquarters' ability to measure whether, and how well, the regions were addressing and enforcing against noncompliance at sites generally. The guidance for tracking and monitoring noncompliance allows for overly subjective determinations of SNC, and headquarters did not use the compliance reports to thoroughly monitor compliance with Superfund instruments nationally. The EPA's compliance was overstated to us as four of the six instruments we reviewed should have been coded "In SNC" but were not. As a result, headquarters is limited in implementing consistent enforcement across the nation and a level playing field for the regulated community. Further, because the effectiveness of headquarters' oversight was limited and it was not aware of all SNCs, headquarters could not assess the adequacy of regional actions against noncompliant PRPs and assist when appropriate.

Regions Took Enforcement Actions but Ineffectively Reported Compliance

While the EPA regions we reviewed (Regions 2, 4, 6 and 7) were enforcing the instruments for all of our six sampled sites, they did not effectively report compliance status for five of the sites we reviewed. When appropriate, the EPA included penalty and damage stipulations in the enforcement instruments. The EPA did not effectively report compliance status because the guidance for tracking and monitoring noncompliance allows for overly subjective determinations of SNC. Four of the six sites reviewed had PRPs that did not perform portions of the required work detailed in the Superfund enforcement instruments, and none of these were reported in the May 2018³ SNC report from headquarters. The regions tried to resolve the issues informally, but if these efforts were not successful the regions used other enforcement mechanisms (e.g., notice of deficiency or referral to the Department of Justice).

SNC Designations Were Not Consistently Identified by Regions

Regions were inconsistent in identifying, defining and reporting SNCs. Staff in one region stated that an enforcement instrument may be in noncompliance but they threaten the use of the SNC designation to regain compliance by the PRP. Staff

³ OSRE provided the OIG SNC tracking reports at the beginning of the audit in May 2018.

in the same region explained that if an enforcement instrument had a cleanup that the EPA took over and funded, the region did not designate the enforcement instrument as “In SNC” while other regions with similar situations did designate them as “In SNC” because the party was not complying with the original enforcement instrument. As a result, OECA was unable to monitor compliance or accurately assess the region’s overall performance.

Regions reviewed provided a net underreporting of SNCs due to incorrect SNC designations. For example, in our sample of six sites, we found that:

- Three instruments were removed from the SNC tracking system and subsequently re-listed as SNCs when we notified the region that they were not listed as “In SNC.”
- One instrument was not listed as “In SNC” but regional staff stated that it could have been.
- One instrument was improperly listed as “In SNC” when it actually had been “Not in SNC” for 6 years.

Therefore, regions did not properly designate SNC status for five of the six instruments. As a result, the overall compliance reported from headquarters was overstated.

As of May 2018, there were 1,625 active Superfund enforcement instruments nationwide. At that same time, OECA was aware of 50 enforcement instruments that were “In SNC,” which represented 3 percent of the active instruments. Consequently, the EPA estimated the compliance rate with Superfund enforcement instruments as 97 percent. However, based on our limited sample of these enforcement instruments, the compliance was overstated, as four of the six enforcement instruments we reviewed were erroneously coded as “Not in SNC” when they should have been coded as “In SNC.” OECA’s regional liaisons and analysts did not closely monitor the tracking reports for accuracy; had they done so, they would have identified the instruments that should have been coded as “In SNC.”

Guidance for Identifying and Reporting SNCs Allows for Overly Subjective Determinations

Regional inconsistency in SNC designations occurred, at least in part, because the EPA’s guidance⁴ allows regional staff a high degree of flexibility in determining the significance of the noncompliance that is reported. The guidance provides examples of SNC, including significant deviation from the enforcement instrument, chronic violation and other cases the region deems substantial. However, the guidance does not provide examples of sites that are “Not in SNC” or sites with enforcement instruments that have only less significant violations

⁴ The August 2009 *Guidance on Determining and Tracking Substantial Noncompliance with CERCLA Enforcement Instruments in CERCLIS*.

that do not rise to the level of “substantial.” As a result, the guidance allows for overly subjective determinations.

Although we agree that there can be a level of subjectivity, the guidance should be more descriptive in defining instances and examples of when an instrument should be considered “In SNC.” For example, in one region, the EPA was dealing with a PRP that claimed it did not have the ability to pay. When we questioned whether the instrument should be designated “In SNC,” the region agreed it could be but, using its discretion, had not done so. Another region sampled has never designated an instrument “In SNC” but other regions had designated similar instruments as “In SNC.” In none of these examples did headquarters verify whether the SNC designations were revised in SEMS. When regions consult headquarters on an issue that meets the SNC definition, headquarters should also alert regions to update the SNC status in the system.

Enforcement Roles for Regions and Headquarters Need to Be More Clearly Defined

In addition to the ineffective reporting of SNC, headquarters oversight was inhibited by unclear roles regarding oversight of enforcement instruments with SNC and compliance designations. The 2011 guidance identifies data that is included in SNC tracking and in the Superfund compliance monitoring report. However, that guidance as well as the 2009 guidance do not define roles for when headquarters oversight should occur with regions for sites that are “In SNC” with their enforcement instrument. Without sites appearing as SNCs, OECA has no way of efficiently tracking PRP noncompliance. Likewise, OECA is unable to accurately assess regional performance with noncompliant PRPs and cannot confirm consistent enforcement nationwide.

Headquarters Oversight Critical for Consistent Tracking of National Enforcement

Headquarters oversight is critical to the success of the EPA’s ability to assess regional enforcement against noncompliant PRPs and confirm consistent enforcement nationwide (a level playing field for regulated parties), and to determine accurate compliance rates. The EPA uses a compliance tracking process to:

- Prioritize violations.
- Have a viable management tool.
- Understand how frequently SNC occurs.
- Understand how SNCs are addressed.

These activities have been compromised due in part to unclear guidance, ineffective reporting and the lack of defined roles for consistently designating SNCs.

Headquarters oversight also is critical in cases where PRPs have liabilities in more than one region. For example, two sites reviewed had ongoing enforcement negotiations with PRPs that had liabilities across multiple regions and noncompliance was common across the sites. Having central oversight of sites with these complexities could improve the rate at which the cleanup process can progress and create a level playing field for the regulated community. Without appropriate oversight of PRPs with sites in multiple regions, EPA awareness of all PRP liabilities and possible inability to pay for cleanup is hindered. This situation could lead to increased expenditures from the Superfund trust fund to pay for cleanups, resulting in less Superfund money being available for other sites. Moreover, when additional negotiations are required due to noncompliance, delayed cleanups can result, thereby extending human health exposures.

Conclusions

The EPA was enforcing the EPA Superfund CERCLA enforcement instruments for the six enforcement cases across the four regions we reviewed. However, headquarters was not aware of site-specific enforcement due to ineffective reporting by the regions, and did not use the SNC monitoring reports to verify consistent enforcement nationally. Compliance was overstated by the agency for our limited sample. EPA regions underreported the number of SNCs because OECA issued unclear guidance, provided a limited review of SNC status, and did not have the controls in place to monitor all SNCs that existed at the time. The effectiveness of OECA's oversight was limited as it was not aware of all SNCs and therefore could not assess the adequacy of regional actions against noncompliant PRPs and assist when appropriate. Further, the EPA was limited in its ability to track enforcement compliance consistently across the nation and create a level playing field for the regulated community.

Recommendations

We recommend that the Assistant Administrator for Enforcement and Compliance Assurance:

1. Revise the August 2009 *Guidance on Determining and Tracking Substantial Noncompliance with CERCLA Enforcement Instruments in CERCLIS* to (a) better define "In Substantial Noncompliance" and "Not in Substantial Noncompliance" and (b) require correction of the Substantial Noncompliance status when headquarters is consulted by the regions for an issue that meets the Substantial Noncompliance definition.
2. Communicate to EPA regions clarified guidance on proper designations of Substantial Noncompliance and how to report them in the Superfund Enterprise Management System so that all regions consistently identify instances of Substantial Noncompliance.

3. Remind regions to correct and update the Superfund Enterprise Management System compliance data as appropriate for all active enforcement instruments.
4. Develop, document and assign the roles and responsibilities of headquarters staff for oversight of monitoring noncompliance with Superfund enforcement instruments.

Agency Response and OIG Evaluation

OECA agreed with the substance of the report's recommendations and offered technical comments. We revised the report as appropriate based on those comments. These recommendations are resolved with corrective actions pending. Appendix A contains the agency's response to the draft report as well as our comments on those responses.

Status of Recommendations and Potential Monetary Benefits

RECOMMENDATIONS

Rec. No.	Page No.	Subject	Status ¹	Action Official	Planned Completion Date	Potential Monetary Benefits (in \$000s)
1	9	Revise the August 2009 <i>Guidance on Determining and Tracking Substantial Noncompliance with CERCLA Enforcement Instruments in CERCLIS</i> to (a) better define "In Substantial Noncompliance" and "Not in Substantial Noncompliance" and (b) require correction of the Substantial Noncompliance status when headquarters is consulted by the regions for an issue that meets the Substantial Noncompliance definition.	R	Assistant Administrator for Enforcement and Compliance Assurance	6/30/20	
2.	9	Communicate to EPA regions clarified guidance on proper designations of Substantial Noncompliance and how to report them in the Superfund Enterprise Management System so that all regions consistently identify instances of Substantial Noncompliance.	R	Assistant Administrator for Enforcement and Compliance Assurance	8/31/20	
3.	10	Remind regions to correct and update the Superfund Enterprise Management System compliance data as appropriate for all active enforcement instruments.	R	Assistant Administrator for Enforcement and Compliance Assurance	8/31/20	
4.	10	Develop, document and assign the roles and responsibilities of headquarters staff for oversight of monitoring noncompliance with Superfund enforcement instruments.	R	Assistant Administrator for Enforcement and Compliance Assurance	11/30/20	

¹ C = Corrective action completed.

R = Recommendation resolved with corrective action pending.

U = Recommendation unresolved with resolution efforts in progress.

Agency Response to Draft Report and OIG Comment




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

AUG 26 2019

ASSISTANT ADMINISTRATOR
FOR ENFORCEMENT AND
COMPLIANCE ASSURANCE

MEMORANDUM

SUBJECT: Response to Office of Inspector General Draft Report No. OA&E-FY18-0215
"EPA Was Enforcing Compliance with Superfund Enforcement Instruments at Sites
Reviewed but Compliance Rate Was Overstated," dated July 29, 2019

FROM: Susan Parker Bodine 

TO: Tina Lovingood, Director
Land Cleanup and Waste Management Program Evaluations
Office of Audit and Evaluation
Office of Inspector General

Thank you for the opportunity to respond to the issues and recommendations in this draft audit report. The following is a general response to the report, along with responses to the report's recommendations. We have solicited comments from the Environmental Protection Agency's (EPA's) regions and the Office of Land and Emergency Management's Office of Superfund Remediation and Technology Innovation and have incorporated their input in this response. We agree with the substance of the recommendations made by the Office of Inspector General (OIG) with one suggested language revision and have provided intended corrective actions and estimated completion dates. For your consideration, we have attached Technical Comments from staff to supplement this response in the form of a redline/strikeout on the draft report.

OVERALL POSITION

We appreciate OIG's attention to the compliance monitoring program for enforcement instruments under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). Effective management of this program is essential for ensuring that environmental obligations are met. We are encouraged that OIG found that the EPA was enforcing compliance at all the sites OIG reviewed. The Office of Enforcement and Compliance

Assurance (OECA) believes that OIG's report has highlighted the need to ensure the quality of data in the Superfund Enterprise Management System (SEMS) that is used to track compliance with CERCLA enforcement instruments. Our office agrees that, in line with several of OIG's recommendations, we can refine existing guidance and better document standard operating procedures for the CERCLA compliance monitoring program. To this end, OECA accepts OIG's recommendations in the draft report with one suggested revision to Recommendation 4 (described below) and agrees that actions undertaken in response to these recommendations will support improvement of the Superfund compliance monitoring system.

However, we continue to disagree with OIG's characterization of the draft report's findings on the following topics: (1) the assertion that "the compliance rate was overstated;" (2) the inadequate description and acknowledgement of ongoing substantial noncompliance (SNC) enforcement oversight and OECA's 2011 compliance monitoring measure; and (3) the weight given to the compliance rate statistic in assessing compliance monitoring effectiveness.

(1) OIG's Findings Do Not Establish That the Compliance Rate Was Overstated

We would like your office to reconsider the title of this report because we do not believe it accurately reflects the report's findings. The report's title and its text repeatedly state that "the compliance rate was overstated." However, the report's findings are not sufficient to support that conclusion. OIG reviewed a "judgmentally selected sample" of six enforcement instruments, which represent less than 1% of the 1,625 enforcement instruments active at that time. The report does not address the SNC status of the remaining 1,619 enforcement instruments. The finding that five out of 1,625 enforcement instruments had incorrect SNC status codes in SEMS does not support the broad conclusion that "the compliance rate was overstated." The enforcement instruments reviewed were not randomly selected and the sample size was much too small to project findings as to six enforcement instruments onto the larger universe of enforcement instruments. We suggest that the report's title be changed to "EPA Was Enforcing Compliance with Superfund Enforcement Instruments at Sites Reviewed but Compliance Tracking Can Be Improved." We also request that other references in the report to the "overstated" compliance rate be similarly modified to be consistent with the report's findings.

OIG Response 1: We did not project in this report. We found that there were four more instruments that were "In SNC" than were identified. We have revised the report language to state that the compliance for our sample was overstated as the designations were incorrect and four instruments should have been "In SNC". We also revised the report title.

(2) The Draft Report Does Not Adequately Describe OECA's 2011 Compliance Monitoring Measure and the Current Process for Headquarters Oversight of SNC Enforcement

The draft report's Recommendation 4 suggests that OECA "[d]evelop, document and assign the roles and responsibilities of headquarters staff for oversight of monitoring noncompliance with Superfund enforcement instruments." Headquarters roles and responsibilities for oversight of monitoring noncompliance with Superfund enforcement instruments already exist, a fact that the draft report does not adequately describe or acknowledge. In particular, the draft report fails to mention the 2011 Superfund compliance monitoring measure, which is the cornerstone of OECA's compliance monitoring oversight process. Once data became available after the 2009

Guidance on Determining and Tracking Substantial Noncompliance with CERCLA Enforcement Instruments in CERCLIS was implemented, OECA reconvened the national workgroup that had written the guidance to design a compliance monitoring measure based on the data. The outcome of those discussions was the 2011 compliance monitoring measure, which focuses on whether the EPA has timely and appropriately addressed instances of SNC. The measure, which was incorporated into the 2012 Superfund Program Implementation Manual, identifies enforcement instruments that have been in SNC status “for two or more consecutive quarters and not addressed through formal enforcement.” The measure allows OECA to focus on the small subset of enforcement instruments that still require a formal enforcement response. Most instruments in SNC status have already been addressed by formal action, e.g., an EPA fund takeover of the work or enforcement referral to the Department of Justice (DOJ). The SNC status remains until all enforcement actions to resolve the noncompliance are complete. For example, as of May 2019, seven of the fifty-one SNC enforcement instruments had been in SNC for two or more quarters without formal enforcement action. OECA circulates Superfund compliance monitoring reports quarterly to both regional and headquarters Superfund personnel. The purpose of the 2011 measure is to “flag” the SNC and to focus attention, both in the regions and at headquarters, on timely addressing noncompliance with enforcement instruments.

OIG Response 2: We reviewed the 2011 measure during our audit and have added mention of it in Chapter 1. We have added reference to the guidance. However, the 2011 measure does not define roles for when headquarters oversight should occur with regions for sites that are “In SNC.” As a result, further description of the measure is not necessary.

OECA’s Office of Site Remediation Enforcement (OSRE) assigns personnel to monitor and coordinate enforcement issues with each region. These headquarters staffers are asked, among other things, to work with their regional counterparts to update the status of enforcement instruments that are flagged by the measure. Staffers are also asked to work with regional staff to determine if other instruments with potential violations should be listed in SNC. OIG’s draft report mentions this process (at p.3) and indirectly quotes the 2011 measure language in describing information headquarters personnel are asked to track but does not directly acknowledge the existence of the 2011 measure or its ongoing use to ensure appropriate EPA responses to noncompliance. (OIG’s March 2019 discussion document listed the 2011 measure as among the documents reviewed by OIG but did not further discuss it; even that reference has been deleted from the draft report.) We suggest that Recommendation 4 be modified to suggest that OECA “expand and document the existing roles and responsibilities of headquarters staff for oversight of monitoring noncompliance with Superfund enforcement instruments.” We also request that the report more fully describe and acknowledge current SNC oversight processes, specifically including the 2011 compliance monitoring measure.

OIG Response 3: In response to OECA’s comments to the OIG’s March 2019 Discussion Document, we added to the report information on the function of OECA’s regional analysts and regional liaisons. However, we did not see evidence of compliance oversight during our regional interviews or that the regional analysts questioned SNC designations. In addition, we did not see evidence that the monitoring measure was used to ensure appropriate EPA responses to noncompliance as OECA states. Even though monitoring requirements are included in the 2011 guidance we continue to recommend that OECA needs to more fully develop, document and assign the roles and responsibilities of headquarters staff for oversight of monitoring noncompliance with Superfund enforcement instruments. We believe that the EPA’s proposed corrective action for Recommendation 4 meets the intent of the recommendation.

(3) The Draft Report Places Too Much Weight on the Flawed Compliance Rate Statistic

We believe the draft report places too much weight on the compliance rate (e.g., 97% *Not in SNC* and 3% *In SNC*) in assessing the effectiveness of OECA’s compliance monitoring. Although the compliance rate statistic does have some limited value because it shows that PRPs generally comply with the obligations in Superfund enforcement instruments, OECA specifically chose not to adopt this statistic as a measure. The national workgroup created the 2011 compliance monitoring measure because they concluded that the compliance rate statistic was not an appropriate compliance monitoring measure, as it did not measure the EPA’s progress in responding to specific instances of SNC. In fact, two of the most common EPA responses to SNC, fund takeovers of work and enforcement referrals to DOJ, typically have the effect of locking instruments into SNC status for multiple quarters rather than returning them to *Not in SNC* status. Consequently, these two EPA responses to SNC actually increase the SNC rate statistic. For example, when the EPA takes over response work due to a PRP’s failure to perform, the EPA ensures timely completion of a cleanup and at the same time typically causes the relevant enforcement instrument to remain in SNC status until after the EPA completes the response work and pursues its costs and/or penalties. Similarly, referrals to DOJ often leave instruments in SNC status for multiple quarters while DOJ takes legal action. By contrast, other effective enforcement responses decrease the SNC rate statistic by causing the PRP to bring the relevant instrument back into compliance. Because effective enforcement responses to SNC can either increase or decrease the compliance rate statistic, that statistic cannot serve as an effective measure of OECA’s oversight of SNC.

OIG Response 4: The OIG has not stated or implied that the compliance rate is a measure of OECA’s oversight of SNC. See OIG Response 1.

Thank you again

RESPONSE TO REPORT RECOMMENDATIONS

Agreements

No.	Recommendation	Qualifications/ Comments	High-Level Intended Corrective Action(s)	Estimated Completion Date
1	Revise the August 2009 <i>Guidance on Determining and Tracking Substantial Noncompliance with CERCLA Enforcement Instruments in CERCLIS</i> to (a) better define “In Substantial Noncompliance” and “Not in Substantial Noncompliance: and (b) require correction of the Substantial Noncompliance status when headquarters is consulted by the regions for an issue that meets the Substantial Noncompliance definition.		EPA will revise the August 2009 <i>Guidance on Determining and Tracking Substantial Noncompliance with CERCLA Enforcement Instruments in CERCLIS</i> to (a) better define “In SNC” and “Not in SNC”: and (b) require correction of the SNC status when headquarters is consulted by the regions about an issue that meets the SNC definition.	June 30, 2020
2	Communicate to EPA regions the clarified guidance on the proper designations of Substantial Noncompliance and how to track them in the Superfund Enterprise Management System so that all regions consistently identify instances of Substantial Noncompliance.		EPA headquarters will communicate to EPA regions the clarified guidance on the proper designations of SNC and how to track them in the SEMS so that all regions consistently identify instances of SNC.	August 31, 2020
3	Remind regions to correct and update the Superfund Enterprise Management System compliance data as appropriate for all active enforcement instruments.		EPA headquarters will remind the regions to correct and update the SEMS compliance data as appropriate for all active enforcement instruments.	August 31, 2020
4	Develop, document and assign the roles and responsibilities of headquarters staff for oversight of monitoring noncompliance with Superfund enforcement instruments.	OECA developed and implemented roles and responsibilities for monitoring compliance with Superfund enforcement instruments after adopting the 2009 guidance and 2011 measure.	EPA will expand and document the existing roles and responsibilities of headquarters staff for oversight of monitoring noncompliance with Superfund enforcement instruments.	November 30, 2020

CONTACT INFORMATION

If you have any questions regarding this response, please contact Gwendolyn Spriggs (OECA) at 202-564-2439.

Attachment:

Technical Comments

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