



U.S. ENVIRONMENTAL PROTECTION AGENCY

OFFICE OF INSPECTOR GENERAL



Science and Research

EPA Needs to Justify How It Is Using Title 42 Hiring Authority

Report No. 15-P-0109

March 5, 2015



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Abbreviations

CFR	Code of Federal Regulations
EPA	U.S. Environmental Protection Agency
GAO	U.S. Government Accountability Office
OGC	Office of General Counsel
OIG	Office of Inspector General
ORD	Office of Research and Development
SES	Senior Executive Service

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At a Glance

Why We Did This Review

We performed this audit to determine whether the U.S. Environmental Protection Agency (EPA) is properly managing its Title 42 hiring authority. This project was the result of a payroll audit being performed by the Office of Inspector General's (OIG's) Forensics product line.

The Title 42 hiring authority is a flexible hiring mechanism for securing the services of experienced and talented scientists. Title 42 can be used for renewable appointments where the nature of the work or the character of the individual's services render customary employing methods impractical or less effective. It can also be used where a scientist would be otherwise reluctant to leave his or her current position because of an inability to meet individual salary needs under other personnel systems.

This report addresses the following EPA goal or cross-agency strategy:

- *Embracing EPA as a high-performing organization.*

Send all inquiries to our public affairs office at (202) 566-2391 or visit www.epa.gov/oig.

The full report is at: www.epa.gov/oig/reports/2015/20150305-15-P-0109.pdf

EPA Needs to Justify How It Is Using Title 42 Hiring Authority

What We Found

The EPA's Office of Research and Development's (ORD's) justification for using its Title 42 hiring authority to fill positions is ambiguous. ORD does not demonstrate the need to use Title 42 to fill positions that were at one time held by Title 5 employees. Four Title 42 appointees converted from Title 5 positions received salary increases ranging from \$6,149 to \$17,700 after the conversion.

When ORD does not justify how and when it is using Title 42, it is vulnerable to speculation of misuse and abuse of the authority.

Limited availability of Senior Executive Service positions contributed to ORD's use of Title 42 to acquire desired expertise for scientific leadership positions. As a result, stakeholders have raised concerns with the agency's use of the Title 42 hiring authority. By articulating its approach, the EPA will be showing how the remaining 27 authorized Title 42 appointments, with a potential annual salary total between \$3.5 million and \$6.75 million, could be used to fulfill the agency's mission.

Recommendation and Agency Response

We recommend that the Assistant Administrator for Research and Development justify the use of Title 42 for appointments or reappointments, and when ORD determines it will pursue a Title 42 appointment or reappointment, it will make available to staff a memorandum that demonstrates that customary employing methods were impractical or less effective and that the position is in a field deemed most critical in the Strategic Research Action Plans. ORD did not agree with the recommendation and proposed an alternate approach that we do not believe addresses justifying the need to use the authority or the need for more transparency in the decisions to use the Title 42 authority.

Noteworthy Achievements

The EPA has a rigorous process for hiring Title 42 appointees. Based on our review of the EPA's Title 42 Operations Manual and Candidate Evaluation Framework, the EPA has implemented an in-depth hiring process in which the ORD selecting official may use a panel of external and internal members to independently evaluate candidates against the position criteria, and to facilitate the review by collective panel members. Candidates go through multiple interviews and may be asked to give a presentation on a scientific topic to ORD staff. ORD stated that it has conducted scientific research that would not have been possible without the experts hired through Title 42.



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

THE INSPECTOR GENERAL

March 5, 2015

MEMORANDUM

SUBJECT: EPA Needs to Justify How It Is Using Title 42 Hiring Authority
Report No. 15-P-0109

FROM: Arthur A. Elkins Jr. 

TO: Lek Kadeli, Acting Assistant Administrator
Office of Research and Development

This is our report on the subject audit conducted by the Office of Inspector General (OIG) of the U.S. Environmental Protection Agency (EPA). 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. EPA managers in accordance with established audit resolution procedures will make final determinations on matters in this report.

The office responsible for implementing the audit recommendation is the Office of Research and Development's Office of Program Accountability and Resource Management.

Action Required

The report recommendation is unresolved. In accordance with EPA Manual 2750, the resolution process begins immediately with the issuance of this report. We are requesting a meeting within 30 days between the Deputy Assistant Administrator for Research and Development and the OIG's Assistant Inspector General for Audit. If resolution is still not reached, the Office of Research and Development is required to complete and submit a dispute resolution request to the Chief Financial Officer to continue resolution.

We will post this report to our website at <http://www.epa.gov/oig>.

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Purpose

The objective of the audit was to determine whether the U.S. Environmental Protection Agency (EPA) is properly managing its Title 42 hiring authority. This project was the result of a payroll audit performed by the Office of Inspector General's (OIG's) Forensics product line.

Background

Title 42 U.S. Code § 209(f) and (g) provide the agency with authority to appoint special consultants and award fellowships for studies or investigations, without regard to the civil service laws.¹ The EPA uses Title 42 authority to recruit and retain scientific leaders and talent in its different research programs and to retain scientists and senior managers by converting them to Title 42. The Office of Research and Development (ORD) is the only EPA office delegated the authority to allocate positions to be filled through Title 42 within their research and development departments. According to the Code of Federal Regulations (CFR) at 40 CFR § 18.3, Title 42 may be used to secure the services of scientists and engineers for a period of limited duration and for research that furthers the agency's mission where the nature of the work or the character of the individual's service render customary employing methods impracticable or less effective. ORD said it received Title 42 authority because EPA had experienced lost opportunities to hire and retain critical science expertise.

The number of Title 42 appointees that the EPA can hire is predicated upon Title II of the Interior, Environment and Related Agencies Appropriations Act of 2006 and subsequent appropriations laws. The EPA was given authority on the basis of budget and program need for ORD to hire using Title 42 beginning in fiscal year 2006 and, as of February 24, 2014, ORD had 23 Title 42 employees on board.

Table 1: EPA's Title 42 hiring authority limits

Public Law	Time period (fiscal years)	Requirement
Title II of the Interior, Environment and Related Agencies Appropriations Act of 2006, Public Law 109-54	2006 to 2011	Authorized the EPA not to exceed 5 appointments per fiscal year for the ORD.
Omnibus Appropriations Act of 2009, Public Law 111-8		Amended the language to allow the EPA to employ up to 30 persons at any one time with per year limits removed.
Department of the Interior, Environment, and Related Agencies Appropriations Act, 2010, Public Law 111-88	2011 to 2015	Amended the language to extend the EPA's Title 42 authority from fiscal year 2011 to 2015.
Consolidated Appropriations Act of 2014 Public Law 113-76		Increased the number of persons that can be employed at any one time to 50.

Source: OIG analysis of public laws.

¹ As of November 2014, ORD has only made hires under § 209(g).

Each Title 42 appointment’s annual pay should be set at a rate necessary to recruit the candidate and should recognize the individual’s scientific contributions as well as the duties, responsibilities and complexity of the position. The EPA Title 42 Operations Manual says the agency uses Title 42 authority as a mechanism to meet individual salary needs not provided under other personnel systems. Title 42 employees can earn pay within or exceeding pay levels found in the Executive Schedule, which is a pay schedule applicable to the highest-ranking executive appointments in the federal government under Title 5 as shown in Table 2.

Table 2: Salary Ranges of Title 5 Executive Schedule and Title 42 for 2014

Hiring Programs	Minimum Pay Rate	Maximum Pay Rate
Executive Schedule	\$147,200	\$201,700
Title 42	\$130,810	\$250,000

Source: OIG analysis from EPA and Office of Personnel Management data.²

Responsible Office

The office responsible for the implementation of the audit recommendations is ORD’s Office of Program Accountability and Resource Management.

Noteworthy Achievements

The EPA has a rigorous process for hiring Title 42 appointees. The EPA Operations Manual provides detailed operating guidance for managers, supervisors and human resource specialists on the implementation of Title 42. Based on our review of the EPA Title 42 Operations Manual, the EPA has implemented an in-depth hiring process in which the ORD selecting official may use a panel of external and internal members to independently rate and evaluate each candidate’s knowledge, skills, abilities and other characteristics related to the specific position. Candidates go through multiple interviews and may be asked to give a presentation on a scientific topic to ORD staff. ORD stated that it has conducted scientific research that would not have been possible without the experts hired under the Title 42 authority.

Scope and Methodology

We conducted this audit from March 2014 to October 2014 in accordance with generally accepted government auditing standards, issued by the Comptroller General of the United States. 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.

² The minimum annual pay for Title 42 appointee is the dollar figure equivalent to the rate of pay of the current General Schedule grade 15 step 10.

To determine whether the EPA was managing its Title 42 hiring authority, we reviewed the relevant laws, regulations and EPA's Title 42 Operations Manual for the operating and implementation guidance. In addition, we conducted interviews with agency officials to understand how Title 42 appointees are recruited, appointed and compensated. We interviewed 15 of 23 Title 42 employees, including directors and scientists from ORD's Immediate Office and a cross section of ORD labs and centers. We also interviewed a union representative and human resource specialists.

To assess the extent to which the EPA has followed federal and agency guidance, we reviewed the following documents:

- Job announcements and position descriptions.
- Qualification materials.
- Acceptance and compensation data.
- Recommendation memorandums.
- Candidate selection evaluations.

These documents provided us with the opportunity to compare ORD practices with Title 42 policy and guidance. They also provided context and information that enabled us to analyze the EPA's decision to use Title 42 to recruit for certain positions, and determine whether Title 42 was implemented uniformly across ORD.

Prior Audit Coverage

The U.S. Government Accountability Office (GAO) published a report in July 2012 based on a request to assess the extent that the EPA and the U.S. Department of Health and Human Services:

1. Used the authority under sections 209(f) and (g) to appoint and compensate employees since 2006.
2. Followed applicable agency policy, guidance and internal controls for appointments and compensation.

The report found that the EPA's appointment and compensation practices were generally consistent with its guidance. However, GAO reported that the EPA did not have post-appointment procedures in place to ensure Title 42 employees met the ethics requirements to which they had agreed. Since GAO's report, the EPA has implemented a new procedure to address the GAO's ethical concerns. If the Office of General Counsel (OGC) determines that a Title 42 applicant's public financial disclosure form (Office of Government Ethics Form 278) presents a potential conflict of interest, OGC will notify the applicant via phone or email. If appointed, the employee is required to provide OGC confirmation of required actions taken to resolve potential conflicts such as stock divestitures.

Additionally, when OGC ethics personnel issue conflict of interest cautionary memoranda to appointees they also send copies to Deputy Ethics Officials to

implement follow-up procedures. OGC's management is confident that these changes will assist with the monitoring of Title 42 appointees' post-appointment activities, such as financial or non-EPA activity.

ORD Should Develop a Plan for Allocating Title 42 Appointments

ORD's reasoning for using its Title 42 hiring authority to fill management positions is ambiguous. The EPA Title 42 Operations Manual states that ORD will establish and oversee the process for developing recommendations for the allocation of Title 42 positions. ORD does not justify the need to use the Title 42 authority to fill a position and does not have a plan in place that describes how the hiring authority will be used. As a result, ORD is vulnerable to internal and external stakeholders' speculation of misuse and abuse.

EPA Has Not Defined How It will Allocate Title 42 Positions

The EPA uses the Title 42 authority to recruit experts from industry, academia and scientific communities to retain existing scientific expertise. However, we could not find any documentation that defined ORD's intent and overall direction for the program. ORD says it engages in a process where it determines which critical expertise is appropriate for using Title 42 as the mechanism to obtain that expertise, but is unable to provide any evidence supporting the process. As of February 7, 2014, 78 percent of ORD's Title 42 appointments were for managerial positions and 82 percent of positions now filled by Title 42 appointments had previously been filled by Title 5 employees.

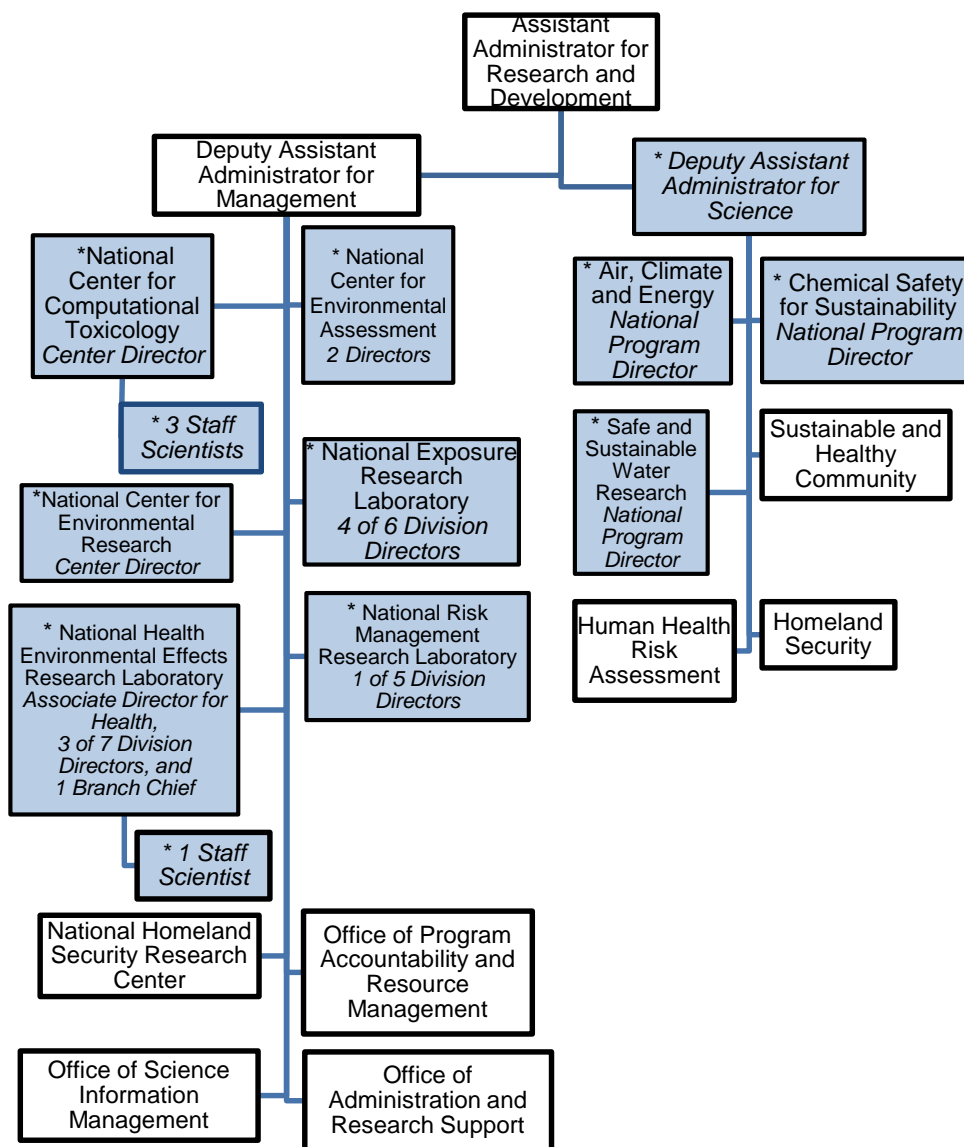
According to the EPA Title 42 Operations Manual, the ORD Assistant Administrator or designee "will establish and oversee the process for developing recommendations for allocating Title 42 positions for each fiscal year and will approve final allocation recommendations." In the notification memorandum, the audit team requested that the agency provide plans or strategies developed for using the Title 42 hiring authority. That request was never fulfilled. ORD provided a PowerPoint presentation that showed the elements, benefits and budget impacts of Title 42, but there was no plan or strategy included in the presentation. ORD stated that a strategic plan is not required. While a strategic plan is not required under the law, the EPA Title 42 Operations Manual states that there is to be a process for developing recommendations for the allocation of Title 42 appointments each year. We did not find any evidence of such a process.

Title 42 Appointments Hold Scientific Leadership Positions

Currently, 18 of the 23 Title 42 appointees hold scientific leadership positions within ORD, including Directors, Branch Chief and Deputy Assistant Administrator. Our review of the Title 42 position descriptions revealed that the position descriptions contained comparable major duties and responsibilities, extramural resources management, supervisory controls, qualifications and

scientific contributions, but varied in scientific discipline requirements. The primary responsibilities, as described in position descriptions, related to scientific leadership as opposed to supervision. Four position descriptions state that between 20 and 40 percent of the time will be spent in supervision and mentoring, but not all of the position descriptions include that percentage of time. Figure 1 shows the distribution of Title 42 appointments in ORD as of February 7, 2014.

Figure 1: Organization chart showing the distribution of Title 42 appointments in ORD



*Blue boxes represent Title 42 appointments.

Source: OIG analysis of EPA data.

We found that as a result of a limited availability of Senior Executive Service (SES) positions, ORD used Title 42 appointments to fill scientific leadership positions. As

stated in the 2010 National Research Council report, *The Use of Title 42 Authority at the U.S. Environmental Protection Agency: A Letter Report*, ORD determined that a number of its scientific leadership positions had been chronically vacant because of the lack of SES positions the report recommended that the positions be filled using Title 42 authority. Additionally, a director stated that he was a GS-15 at a small facility that could not justify an SES position, and Senior-Level or Scientific or Professional positions would not allow him to accomplish his goals. Another director said that without Title 42, ORD would have to hire below the SES level because ORD would not get additional SES positions.

Positions Currently Filled by Title 42 Appointments Were Previously Filled With Title 5 Staff

We found that 19 of the 23 Title 42 positions we reviewed were previously held by Title 5 employees at lower salaries. The EPA Title 42 Operations Manual states that the authority is a mechanism to be used when individual salary needs cannot be met or customary employment methods are impractical or less effective. Based on our review of job announcement documentation to fill the 23 ORD positions under Title 42 authority, there is limited evidence that demonstrated customary employing methods were impractical or less effective. In addition, in four instances it appears that the agency already had the talent in-house, as four employees initially hired under Title 5 were converted, through competitive and noncompetitive hiring processes, to Title 42 at higher salaries for the same position. Table 3 provides a comparison of salaries of four employees before and after their conversion to a Title 42 position.

Table 3: Salary comparison for four converted employees

Example	Title 5 salary	Title 42 salary	Difference
1	\$156,973	\$171,715	\$14,742
2	144,550	153,223	8,673
3	175,695	181,844	6,149
4	165,300	183,000	17,700

Source: Agency Initial Compensation Forms.

ORD believes Title 42 is necessary to recruit and maintain the quality of scientists to lead its science research programs. For example:

- One director said that it would be appropriate to appreciate the level of expertise Title 42 professionals provide because they can always make more money if they worked elsewhere. To retain high-level staff, ORD needs to be able to offer premium salaries.
- One director stated that he would not have taken the position if he did not receive premium pay. This appointee had been a Title 5 employee with the EPA, competed for the position, and was then converted to a Title 42 employee.

ORD said it uses the Title 42 authority to find top-notch experts to lead its different research programs. ORD was granted Title 42 authority because it lacked special pay authority to compete with academia, private industry and other federal agencies when recruiting and retaining top-level talent. Historically, the EPA lost critical recruitment and retention opportunities with regard to both science and science leadership positions. Based on our review, however, we found that ORD did not always demonstrate the need to use Title 42 to recruit or retain staff for these 19 positions to achieve the level of expertise it needed.

Title 42 Appointments Are for a Renewable 5-year Term

The Title 42 positions at the agency are classified as Environmental Protection Research Fellowships for the purpose of securing services of talented scientists and engineers for a period of limited duration and for research that furthers the EPA's mission. ORD stated that it benefited from having term-limited appointments because the term limits provide the flexibility ORD needs to lead science in a new direction or adapt to changes that arise. To fill the term-limited Title 42 appointments, ORD tried to find the most qualified person to address the research drivers and demands. Term limits are set because there may be a new direction or the programs do not get the funding or support by Congress, and Title 5 could never provide this degree of flexibility.

The EPA Title 42 Operations Manual says appointments are initially for a period ranging from 1 year and 1 day to 5-year terms, which may be renewed indefinitely. As of February 7, 2014, six of the 23 Title 42 appointees completed their first term and had been renewed for a second term. Recommendation memorandums for renewed employees focus on past accomplishments, and 50 percent of the recommendations do not address plans or goals for the new term. In addition, Title 42 appointment renewals are recommended based on measurable performance; however, the reappointment justifications are not clearly defined.

Justification of Title 42 Appointments Needed to Guide Program

The law, regulations and EPA's Title 42 Operations Manual do not require the agency to justify using the Title 42 hiring authority to fill a position, nor do they require the agency to demonstrate a need cannot be met by using Title 5 or another hiring authority. ORD does not have a process to annually develop recommendations for allocating Title 42 positions and believes it has justified its need for using the Title 42 hiring authority as an overall organizational need. ORD does not have any requirement to demonstrate that a position could not be filled under any other authority before recruiting under Title 42. Instead of using other personnel systems first to hire for a position, ORD chooses when to hire through the Title 42 authority on a case-by-case basis.

The agency hires Title 42 appointees under Environmental Protection Research Fellowships, which encourage and promote research, studies and investigations

related to the protection of human health and the environment with the recruitment of talented scientists and engineers for a period of limited duration for research that furthers the EPA's mission. However, because ORD has not articulated its approach for allocating the 50 Title 42 appointments it is authorized, and justified the need to use the hiring authority to fill positions, it is susceptible to concerns about how the EPA is using this authority. By articulating its approach, the EPA will be showing how the remaining 27 authorized Title 42 appointments, with a potential annual salary total between \$3.5 million and \$6.75 million, could be used to fulfill the agency's mission.³

Recommendation

We recommend that the Assistant Administrator for Research and Development:

1. Justify the use of Title 42 for appointments or reappointments, and when ORD determines it will pursue a Title 42 appointment or reappointment, it will make available to staff a memorandum that demonstrates that customary employing methods were impractical or less effective and that the position is in a field deemed most critical in the Strategic Research Action Plans.

Agency Comments and OIG Evaluation

In responding to the draft report, the ORD Acting Assistant Administrator stated that the Title 42 authority is an essential tool for enabling EPA research to position its workforce to better adapt to changing priorities. ORD said that, historically, it had not been able to compete for high-quality scientists and science leaders because of the lack of competitiveness due to limitations placed on the agency by Title 5. EPA needs the Title 42 authority to attract, hire and retain the highest-quality scientists and engineers now and in the future if it is to effectively and efficiently support the agency's mission in protecting health and the environment. The Title 42 authority is a critical mechanism for EPA to recruit and retain people who have substantial creative, scientific and technical capabilities, and to compete for these people with private industry, academia and other federal agencies.

The Title 42 authority allows the agency to maintain workforce flexibility and critical expertise in the face of emerging and rapidly changing scientific and technological approaches. The science leaders that ORD has recruited and retained using Title 42 are world-renowned experts in their field and are leading cutting-edge research programs in ORD to address the environmental issues of the 21st century. These science leaders are transforming ORD's research in areas such as computational toxicology, risk assessment, air pollutants and human health

³ Total annual salaries calculated by multiplying the number of remaining authorized Title 42 appointments as of February 7, 2014, by the minimum and maximum Title 42 pay rates (27 x \$130,810 = \$3,531,870 and 27 x \$250,000 = \$6,750,000).

effects. Many of ORD's research programs are years ahead because of the impact of its Title 42 appointees.

The EPA proposed an alternate approach to addressing the perceived transparency issue. ORD proposed documenting the decision to use the Title 42 authority upfront on a case-by-case basis as needs are identified to address the EPA's current and emerging priorities—specifically, the major existing and emerging topics in environmental health research—as reflected in ORD's Strategic Research Action Plans. This documentation will take the form of request memorandums that are approved or disapproved by the ORD Assistant Administrator or designee and maintained in ORD's records.

After the response to the draft report was received, OIG staff met with the Assistant Administrator for Research and Development to discuss the report. During that meeting the AA mentioned the use of market salary surveys as a method for demonstrating that customary employing methods were less practical. We subsequently reviewed several examples of market surveys and the EPA Title 42 Operations Manual. EPA revised the operations manual in February 2015 to include market salary data as part of the process for justifying Title 42 positions. However, the market salary survey is to be in addition to an annual recommendation on allocating Title 42 positions.

The OIG believes ORD's proposed alternative has not addressed the issue of making decisions to use Title 42 transparent and ensuring that the decision to use Title 42 is supported. Therefore, the recommendation is unresolved. The audit resolution process will be used to resolve the recommendation.

Status of Recommendations and Potential Monetary Benefits

RECOMMENDATIONS						POTENTIAL MONETARY BENEFITS (in \$000s)	
Rec. No.	Page No.	Subject	Status ¹	Action Official	Planned Completion Date	Claimed Amount	Agreed-To Amount
1	8	Justify the use of Title 42 for appointments or reappointments, and when ORD determines it will pursue a Title 42 appointment or reappointment, it will make available to staff a memorandum that demonstrates that customary employing methods were impractical or less effective and that the position is in a field deemed most critical in the Strategic Research Action Plans.	U	Assistant Administrator for Research and Development		\$3,531.8	

¹ O = Recommendation is open with agreed-to corrective actions pending.
 C = Recommendation is closed with all agreed-to actions completed.
 U = Recommendation is unresolved with resolution efforts in progress.

Agency Response to Draft Report

(Received November 19, 2014)

MEMORANDUM

SUBJECT: Response to the OIG Draft Report, “*EPA Needs More Transparency in Use of Title 42 Hiring Authority*,” Project No. OA-FY14-0184

FROM: Lek Kadeli, Acting Assistant Administrator
Office of Research and Development (ORD)

TO: Arthur Elkins, Jr., Inspector General
Office of Inspector General (OIG)

Thank you for the opportunity to review and comment on the OIG draft report “*EPA Needs More Transparency in Use of Title 42 Hiring Authority*,” (Project No. OA-FY14-0184). I appreciate OIG’s recognition that EPA developed a rigorous, in-depth process for hiring high-quality scientists and science leaders through its Title 42 authority. The OIG acknowledges that “[t]he EPA Operations Manual provides detailed operating guidance for managers, supervisors and human resource specialists on the implementation of Title 42,” and that EPA has undergone other favorable evaluations, such as the GAO audit *HUMAN CAPITAL: HHS and EPA Can Improve Practices Under Special Hiring Authorities*,” (2012). In response to the draft report ORD offers the following comments.

General Comments

EPA received the authority to make appointments using 42 U.S.C §209 in the Office of Research and Development in FY 2006 under Public Law 109-54 to enable EPA to compete with industry and academia for high-quality scientists and science leaders. Since that time Congress expanded and extended EPA’s Title 42 authority (Public Law 111-8, Public Law 111-88, and Public Law 113-76). We note that Table 1 left out Public Law-111-88 that extended EPA’s authority from FY 2011 to FY 2015.

While EPA’s authority under Title U.S.C. §209 includes the provisions in paragraphs (f) and (g) in §209, to this point the Agency has only made hires under the (g) portion of that authority. The language in the first paragraph of the Background section of the OIG draft report does not state that explicitly.

The primary basis for the Agency receiving Title 42 authority was because EPA had experienced lost opportunities to hire and retain critical science expertise. The Agency did not have a hiring authority that would enable it to compete with private industry, academia and other Federal

organizations. This information is important and we strongly suggest capturing this in the Background section of the OIG draft report.

In 2010, the National Academy of Science (NAS) reviewed EPA's use of its Title 42 authority and concluded that Title 42 is the only "hiring mechanism or authority available to EPA...to recruit and retain world-class scientists and engineers," and that "EPA has approached the use of Title 42 prudently" to hire outstanding candidates and retain top scientists.

Foremost, Title 42 is a hiring and retention authority; a program exists to implement the authority so an overall long-term plan or strategy for "the program" independent of ORD's research planning process and rapidly changing research needs cannot exist. In addition, it would undercut the importance of the flexibility of the authority to be used on an as-needed basis. In addition, Table 2 and its corresponding footnote indicate that the "minimal annual pay for Title 42 appointee is the dollar figure equivalent to the rate of pay of the current General Schedule grade 15 step 10." The footnote leaves out that locality pay is incorporated into this figure. Table 2 should be changed to reflect the locality pay, which would set the minimum salary figure at \$149,333.

While I understand the OIG analysis of EPA's implementation of the Title 42 authority, there are several areas where clarification is needed. ORD provides the following specific comments to the draft report.

OIG Response 1.

We made changes to the report for each of ORD's comments except including locality pay in the Table 2 calculations. Since the Title 42 position can be located in any location, locality pay can vary. Therefore, we used the base pay General Schedule.

Specific Comments

Prior Audit Coverage:

ORD consulted with OGC on this section since it refers to their work. OGC/Ethics provides the following comments on this section of the draft report.

On page 3, the draft report states:

If the Office of General Counsel (OGC) determines that a Title 42 applicant's investment activity represents a conflict of interest, OGC will notify the employee directly via phone or email to send confirmation of stock divestments.

Additionally, when OGC ethics personnel issue conflict of interest cautionary memos to appointees, they also send copies to Deputy Ethics Officials in order to implement follow-up procedures. OGC's management is confident that these changes will assist with the

monitoring of the Title 42 appointees' post appointment activities, such as financial or non-EPA associational activity.

OGC/Ethics does not understand what the phrase “investment activity” is intended to convey. It implies that OGC/Ethics examines the applicant’s trading history, which is not true. Instead, OGC/Ethics examines the applicant’s completed Office of Government Ethics (OGE) Form 278 for both potential conflicts issues as well as potential impartiality concerns. As written, the last sentence of the first paragraph above is inaccurate. For example, OGC/Ethics would never send an applicant “confirmation of stock divestments” because we do not know what that term means. What OGC/Ethics does at this stage is to articulate to the applicant what s/he must do if appointed, but we cannot direct any non-employee to take any action. OIG refers to the term “stock divestments”, the terminology OGC/Ethics uses is “stock divestiture.” OGC/Ethics would not send “confirmation” of stock divestiture because OGC/Ethics is not the owner of the asset and has no idea when it is sold.

It is possible that OIG is trying to describe what happens when OGC identifies a conflict and, when the applicant becomes an employee, directs the employee to sell. In that case, OGC/Ethics determines whether the employee is eligible for a certificate of divestiture (CD) and, if so, seeks approval from OGE for the CD. Upon receiving the CD from OGE, OGC/Ethics sends it to the employee and receives notification (a 278-T) when the conflicting stock is sold.

OGC/Ethics suggests changing the above paragraphs as follows:

If the Office of General Counsel (OGC) determines that a Title 42 applicant’s public financial disclosure report, Office of Government Ethics (OGE) Form 278, presents any potential conflict of interest, then OGC will notify the applicant directly via phone or email to implement an effective remedy should the applicant be selected for an EPA position.

Additionally, when OGC/Ethics officials issue conflict of interest cautionary memoranda to appointees, they also send copies to the respective Deputy Ethics Officials in order to implement follow-up procedures.

On page 4, the draft report states:

During our review, we found that the agency informed some employees of impartiality regulations and did not inform others.

OGC/Ethics disagrees with this conclusion. All Title 42 employees from outside EPA are given initial ethics briefings by OGC/Ethics that cover impartiality as one of the required elements of initial ethics training. See 5 CFR 2638.703. Title 42 appointees who were already federal employees are given initial ethics briefings as part of the federal orientation and annual ethics training.

OIG Response 2.

We made changes to the report for each of ORD’s comments.

EPA Has Not Supported the Need to Use Title 42 to Fill Existing Positions:

On page 4, the draft report states:

According to the EPA Title 42 Operations Manual '[t]he AA-ORD or designee will establish and oversee the process for developing recommendations for allocating Title 42 positions for each fiscal year and will approve final allocation recommendations.' In the notification memorandum, the team requested that the agency provide plans or strategies developed for using the Title 42 hiring authority. That request was never fulfilled. ORD provided a PowerPoint presentation. ORD stated that a strategic plan is not required. While a strategic plan is not required under the law, the operations manual states that there is to be a process for developing recommendations for the allocation of Title 42 appointments each year. We did not find any evidence of such a process.

The draft report does not accurately portray the information ORD provided to the OIG request. The PowerPoint presentation the OIG refers to includes a table of the types of positions that ORD historically lost opportunities to recruit or retain scientists and science leaders because it could not compete with academia, private industry and other federal agencies. These positions include senior science leaders such as an Associate Director for Health, key laboratory Division Directors, senior scientists and engineers, and high quality staff scientists and engineers. These are the exact types of positions ORD is filling using its Title 42 authority.

In addition, EPA continues to use its Title 42 authority on a case by case basis as needs are identified through the research planning process, and not by classes of positions. EPA's use of the authority has been prudent and conservative, consistent with the budgetary realities and programmatic priorities.

OIG Response 3.

ORD did provide OIG staff with a Powerpoint presentation that included positions that were historically lost because it could not compete. However, the EPA's Title 42 Operations Manual states that the Assistant Administrator or designee shall establish a process for allocating Title 42 positions each year. The Powerpoint presentation did not include this type of information and ORD was not able to provide a document with the information described in the operations manual.

Title 42 Appointments Hold Management Positions:

On page 6 the draft report states:

We found as a result of a limited availability of Senior Executive Service positions, ORD used Title 42 appointments to fill management positions.

On page 6 the draft report also states:

Additionally, an ORD manager stated that he was a GS-15 at a small facility that could not justify an SES position, and Senior-Level or Scientific or Professional positions would not allow him to accomplish his goals. Another director said without Title 42, ORD would have to hire below the Senior Executive level because ORD would not get additional Senior Executive Service positions.

The interviews cited by the IG on page 6 of the draft report, though anecdotal in nature, provide evidence of the limitations placed on EPA by Title 5. Historically, ORD has not been able to compete for high quality scientists and science leaders because of the lack of competitiveness due to limitations placed on the agency by Title 5. This is the reason EPA and other agencies were granted the authority to hire under 42 U.S.C 209. The science leaders we have recruited and retained using Title 42 are world-renowned experts in their field and are leading cutting-edge research programs in ORD to address the environmental issues of the 21st century. These science leaders are transforming ORD's research in areas such as computational toxicology, risk assessment, air pollutants, and human health effects. Many of ORD's research programs are years ahead because of the impact of our Title 42 appointees. While some of these hires are in supervisory roles, without these science leaders, whom ORD would not have obtained without Title 42, ORD could not fulfill its mission.

Positions Currently Filled by Title 42 Appointments were Previously Filled with Title 5 Staff:

On page 6 the draft report states:

We found that 19 of 23 Title 42 positions we reviewed were previously held by Title 5 employees at lower salaries. The Title 42 Operations Manual states that the authority is a mechanism to be utilized when individual salary needs cannot be met or customary employment methods are impracticable or less effective. Based on our review of job announcement documentation to fill the 23 ORD positions under Title 42 authority, there is no evidence that demonstrated customary employing methods were impracticable or less effective. In addition, in four instances it appears that the agency already had the talent in-house, as four employees initially hired under Title 5 were converted to Title 42 at higher salaries for the same position.

Even though 19 of the 23 positions currently filled by Title 42 appointees had been held previously by Title 5 employees at lower salaries, many of these positions were vacant for several years because ORD could not compete for the needed scientific expertise. This is the reason why EPA began using Title 42 authority was due to its inability to successfully recruit and retain the type of experts we needed to fill existing positions.

Though the EPA Title 42 Operations Manual does include the language you referenced above, no EPA policy or guidance requires ORD to show documentation that other hiring authorities are less effective before using Title 42 to recruit for the expertise that is needed.

Just to clarify, the Title 42 authority is a recruiting and retention tool, not a means of classifying a position. The use of the authority to fill a position is based on the expertise required. Of the 23 Title 42 employees examined as part of this review, 19 (83%) of these individuals came from outside of the federal government. Of those individuals hired from inside EPA, all but one were selected through a rigorous competitive process, which includes an evaluation of their scientific credentials by subject matter experts from inside and outside the Agency.

The one individual who EPA directly converted to Title 42 is recognized as one of the leading international experts in Computational Toxicology. At the time of the conversion, he was continuing to receive competing job offers from external organizations. Given the factors referenced above, Title 42 was the only hiring mechanism available to provide additional compensation in order to retain such an outstanding leader in environmental research.

On page 7, the draft report states:

Based on our review, we found that ORD did not demonstrate the need to use Title 42 to recruit or retain staff for these 19 positions to achieve the level of expertise it needed.

The basis for this conclusion seems to be that most of the positions filled were once filled by Title 5 employees. As mentioned previously, most ORD positions were once filled by Title 5 employees. However, EPA (like other science agencies) has determined that Title 5 has limited its ability to build the type of world-class science organization necessary to support its mission. A conclusion regarding ORD's "need to use Title 42 to recruit and retain staff" can only be based on the current and future science requirements of the agency, not previous hiring practices. ORD has a rigorous research planning process through which we identify needs, including the need for scientific expertise. The science leaders we have recruited and retained using Title 42 are world-renowned experts in their field and are leading cutting-edge research programs in ORD to address the environmental issues of the 21st century. These science leaders are transforming ORD's research in areas such as computational toxicology, risk assessment, air pollutants, and human health effects.

Title 42 Appointments are for a Renewable 5-year Term:

On page 7, the draft report states:

The Title 42 Operations Manual says appointments are initially for a period ranging from one year and one day to five-year terms, which may be renewed indefinitely. As of February 7, 2014, six of the 23 Title 42 appointees completed their first term and had been renewed for a second term. Recommendation memorandums for renewed employees focus on past accomplishments, and 50 percent of the recommendations do not address plans or goals for the new term. In addition, Title 42 appointment renewals are recommended based on measurable performance; however, the reappointment justifications are not clearly defined.

In its 2010 report, the NAS recommended that ORD finalize a process for reviewing and approving extensions of Title 42 appointments. Based on this recommendation, ORD developed

a rigorous process similar to its Technical Qualifications Board process. This process utilizes internal and external experts to review the impact the Title 42 appointee has made to ORD and EPA's mission and on their scientific field of expertise. The term renewal process was implemented as a pilot and improved after the pilot process ended.

Allocation of Title 42 Appointments Needed to Guide Program:

On page 8, the draft report states:

However, because ORD has not articulated its approach for allocating the 50 Title 42 appointments it is authorized, and justified the need to use the hiring authority to fill positions, it is susceptible to concerns about how the EPA is using this authority.

While I appreciate the OIG's recognition that there is no requirement for ORD to justify using Title 42 or demonstrate that needs cannot be met using Title 5 authorities, I disagree that ORD has not articulated its approach to determining how to fill positions. As I have stated previously, ORD uses the Title 42 authority on a case by case basis to fill critical expertise needs.

In addition, several outside expert panels have reviewed EPA's use of Title 42 and have all approved of ORD's approach in implementing this authority. In both 2010 and 2014, the NAS iterated that Title 42 is essential to EPA's ability to complete its mission, and that the agency be granted permanent authority. In its 2010 report, the NAS, also, applauded EPA on its prudent approach to using its Title 42 authority.

To address these perception issues, the OIG is recommending:

That the Assistant Administrator, Office of Research and Development [b]e more transparent in its use of Title 42 authority appointments by creating an annual plan each year that is available to staff, or develop and document an approach for allocating Title 42 appointments, including justifying the need for reappointments.

EPA continues to use its Title 42 authority on a case by case basis as needs are identified through the research planning process, and not by classes of positions. EPA's use of the authority has been prudent and conservative, consistent with the budgetary realities and programmatic priorities. Therefore, ORD proposes a different approach to addressing the perceived transparency issue. ORD will document the decision to use the Title 42 authority upfront on a case by case basis as needs are identified to address EPA's current and emerging priorities, specifically the major existing and emerging topics in environmental health research, as reflected in ORD's Strategic Research Action Plans. This documentation will take the form of request memoranda that are approved or disapproved by the ORD Assistant Administrator or designee and maintained in ORD's records.

The Title 42 authority is an essential tool for enabling EPA research to position its workforce to better adapt to changing priorities. EPA needs the Title 42 authority in order to attract, hire, and retain the highest-quality scientists and engineers now and in the future if it is to effectively and efficiently support the Agency's mission in protecting health and the environment. The Title

42 authority is a critical mechanism for EPA to recruit and retain people who have substantial creative, scientific, and technical capabilities, and to compete for these people with private industry, academia, and other federal agencies. The Title 42 authority allows the Agency to maintain workforce flexibility and critical expertise in the face of emerging and rapidly changing scientific and technological approaches. In particular, the term nature of the Title 42 appointments promotes increased workforce flexibility that allows for cross-fertilization with other sectors and stakeholders in response to changes in direction as dictated by the emerging science needs of the Agency.

Because of the significant concerns addressed above, I ask you to seriously consider ORD's response to the draft report recommendation and comments, as the final report is prepared. As required by the EPA Order 2750, our written response to the final report will address any recommendations that may be included at that time.

If you have any questions, please contact Amy Battaglia at (202) 564-6701.

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