



U.S. ENVIRONMENTAL PROTECTION AGENCY

OFFICE OF INSPECTOR GENERAL

Limitations on the EPA's Authority Under the Safe Drinking Water Act Resulted in Unaddressed Concerns at a Tribal Drinking Water Plant

Report No. 13-P-0308

July 2, 2013



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Report Contributors:

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Abbreviations

ARRA	American Recovery and Reinvestment Act of 2009
CFR	Code of Federal Regulations
DWIG-TSA	Drinking Water Infrastructure Grant – Tribal Set Aside
DWTP	Drinking Water Treatment Plant
EPA	U.S. Environmental Protection Agency
FBIC	Fort Belknap Indian Community
OIG	Office of Inspector General
SDWA	Safe Drinking Water Act

Cover photo: Corrosion in the chemical room of the Fort Belknap Indian Community Drinking Water Treatment Plant approximately 7 months after the plant went operational. (EPA photo)

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At a Glance

Why We Did This Review

The U.S. Environmental Protection Agency provided American Recovery and Reinvestment Act of 2009 funds for tribal drinking water infrastructure projects. The EPA provided the funds to the U.S. Department of Health and Human Services-Indian Health Service through a 2009 interagency agreement. In response to a hotline complaint, we sought to determine whether the EPA followed applicable criteria in awarding and monitoring of funds provided to the Fort Belknap Indian Community Drinking Water Treatment Plant in Montana, and whether the EPA met its responsibility under the Safe Drinking Water Act.

This report addresses the following EPA Goals or Cross-Cutting Strategies:

- *Protecting America's waters.*
- *Strengthening state, tribal and international partnerships.*

For further information, contact our Office of Congressional and Public Affairs at (202) 566-2391.

The full report is at:
www.epa.gov/oig/reports/2013/20130702-13-P-0308.pdf

Limitations on the EPA's Authority Under the Safe Drinking Water Act Resulted in Unaddressed Concerns at a Tribal Drinking Water Plant

What We Found

In 2007, prior to providing funding to the FBIC DWTP project, the EPA contracted with Rural and Tribal Environmental Solutions to provide plan and specification reviews for public water system construction in Indian Country. The contractor reviewed the FBIC DWTP and provided numerous comments to Region 8, including concerns about the plant design. Region 8 provided the comments to the FBIC and discussed key concerns with the tribe on two occasions.

Despite the plan and specification review comments, the EPA contributed \$572,700 toward the project. EPA Region 8 staff said that, due to a limitation under the National Primary Drinking Water Regulations, they did not have the authority to require the tribe to address the plan and specification review comments outlining the EPA's concerns. The FBIC's DWTP went operational in March 2010 but continues to not be in compliance with the SDWA, specifically the Disinfection Byproduct Rule.

Although the EPA followed applicable criteria in awarding and monitoring funds provided for the FBIC DWTP, we found that the EPA believed—based on an incorrect interpretation of its authority under the SDWA—that it could not require tribes to address plan and specification review comments prior to awarding funds.

Recommendations and Planned Agency Corrective Actions

We recommended that the Office of Water reexamine its interpretation of the drinking water regulations that purportedly prevented the agency from requiring tribes to address plan and specification review comments. If the determination was still that this limitation exists, we recommended that the Office of Water pursue a regulatory or guidance change to address it. The agency concurred with the recommendation and provided its intended corrective action and estimated completion date. The agency determined that it can require tribes to address plan and specification review comments prior to grant awards and plans to include language to reinforce this in guidelines currently under revision.



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

THE INSPECTOR GENERAL

July 2, 2013

MEMORANDUM

SUBJECT: Limitations on the EPA's Authority Under the Safe Drinking Water Act Resulted in Unaddressed Concerns at a Tribal Drinking Water Plant
Report No. 13-P-0308

FROM: Arthur A. Elkins Jr.

A handwritten signature in black ink, appearing to read "Arthur A. Elkins Jr.", is written over the printed name.

TO: Nancy K. Stoner, Acting Assistant Administrator
Office of Water

Shaun McGrath, Regional Administrator
Region 8

This is our report on the subject audit conducted by the Office of Inspector General of the U.S. Environmental Protection Agency. 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 audit resolution procedures.

Reason for Review

In March 2012, the EPA OIG received a hotline complaint expressing concerns about the design and construction of the drinking water treatment plant at the Fort Belknap Indian Community in Montana. The FBIC DWTP is classified as a small system that serves less than 3,300 people (the FBIC system serves a population of 2,200). After preliminary fact finding on the merits of this complaint, we opened an assignment to examine the EPA's business decision to award American Recovery and Reinvestment Act of 2009 funding to Phase 2 of the FBIC DWTP project. Specifically, our objectives were to determine whether the EPA followed applicable criteria in awarding and monitoring funds provided to the FBIC DWTP and met its responsibility under the Safe Drinking Water Act. This memorandum summarizes the results of our review.

Background

In 2007, prior to providing project funding, the EPA contracted with Rural and Tribal Environmental Solutions to provide plan and specification reviews for public water system construction in Indian Country. Staff in Region 8's Montana Operations Office indicated that they made the decision to fund plan and specification reviews due to concerns about

unscrupulous engineering firms doing work in Indian Country, and because tribes generally do not have in-house staff who can review technical engineering materials. They added that the review was done as part of technical assistance per the EPA's role under Part 141 when neither a state nor tribal government has primacy. The director of the Region 8 Water Program said the region provides comments to help plants be protective of public health.

Under the statement of work, the Rural and Tribal Environmental Solutions contractor reviewed the FBIC DWTP.¹ Rural and Tribal Environmental Solutions provided numerous comments to the EPA on July 23, 2007, including concerns about the facility's design. Region 8 provided the comments to the FBIC, and Region 8 staff in the Montana Operations Office also discussed key concerns with the FBIC on two occasions. After addressing some but not all of the EPA's concerns, the FBIC and its contractor proceeded with construction planning.²

The SDWA authorizes the EPA to establish minimum standards for drinking water quality and allows the EPA to award primary enforcement responsibility for public water systems to states and tribes. The National Primary Drinking Water Regulations and implementation and enforcement of such regulations are found in 40 CFR Parts 141 and 142. Per definitions in Part 141, when neither a state nor tribal government has primacy under the SDWA, the EPA regional administrator will be referred to as the "state" who retains authority for Part 141. Part 142 outlines the requirements for states to receive a determination of and maintain primacy, including a provision that states assure that the design and construction of water system facilities will be capable of compliance with drinking water regulations. The EPA Region 8 has Part 141 authority over the FBIC as the tribal community does not have SDWA primacy. The FBIC began planning for a new DWTP in the late 1990s. The FBIC and its contractor commenced with planning on Phase 2 of the project in 2007, primarily through funding by the U.S. Department of Agriculture-Rural Development.

In May 2009, EPA signed an interagency agreement with the U.S. Department of Health and Human Services-Indian Health Service transferring \$30 million of Drinking Water Infrastructure Grants-Tribal Set Aside ARRA funds from the EPA to the Indian Health Service. The interagency agreement listed EPA-approved projects to fund, identified by the Indian Health Service Sanitary Deficiency System scoring process, including Phase 2 of the FBIC DWTP with funding of \$572,700. EPA's funds were used for a pre-fabricated metal building, drinking water modules, and electrical panels. Construction on Phase 2 ran from August to November 2009, and the plant went operational in March 2010. Complying with drinking water standards for tribal water systems was one of the key challenges listed by the EPA in its fiscal year 2011 annual performance report.

¹ One Region 8 staff person said that the EPA had the plan and specification review comments done as a courtesy to the U.S. Department of Agriculture-Rural Development. The agency also said the comments were done as a courtesy to the FBIC.

² Staff in Region 8's Montana Operations Office said that, after receiving the EPA's comments, any implementation decisions would be made by the FBIC.

Scope and Methodology

We performed our review from November 2012 to April 2013 in accordance with generally accepted government auditing standards. Those standards require that we plan and perform our review to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our objectives. We believe the evidence obtained provides a reasonable basis for our findings and conclusions presented in this report.

We reviewed relevant regulations, agreements, policies and procedures pertaining to the DWIG-TSA ARRA funding, including the interagency agreement between the EPA and the Indian Health Service, the March 2009 DWIG-TSA program guidance for projects funded using ARRA, and other relevant program guidance. Concerning EPA's responsibility under SDWA, we limited our regulatory review to 40 CFR Parts 141 and 142 to understand EPA's authority for the plan and specification comments provided to the FBIC. We also reviewed the comments by Rural and Tribal Environmental Solutions as well as EPA enforcement information on FBIC's SDWA compliance. We interviewed staff from the EPA Region 8's Montana Operations Office, Region 8's Denver office, the Office of Water, the Rural and Tribal Environmental Solutions engineer, the U.S. Department of Health and Human Services-Indian Health Service, and the U.S. Department of Agriculture-Rural Development.

Results of Review

Although the EPA followed applicable criteria in awarding and monitoring funds provided for the FBIC DWTP, we found that the EPA believed—based on an incorrect interpretation of its authority under the SDWA—that it could not require tribes to address plan and specification review comments prior to awarding funds. While our review only covered the FBIC DWTP, this limitation could impact other tribal drinking water projects. The EPA's Office of Water issued DWIG-TSA program guidance for projects funded using ARRA on March 10, 2009. The guidance provided guidelines for the management and oversight of appropriated ARRA funds and also noted congressional and administration mandates to move funds quickly.³ Per the guidance, to identify projects for the interagency agreement between the EPA and the Indian Health Service, EPA regions were to consult with their tribes and Indian Health Service areas to identify shovel-ready drinking water infrastructure projects that would be under contract or construction within 12 months of the date of enactment. These projects also needed to meet the selection criteria established in the EPA's DWIG-TSA program guidelines dated October 1998. The 1998 guidelines allowed the regions to elect to use the Indian Health Service Sanitary Deficiency System to help select projects.

For ARRA, Region 8 elected to use the Sanitary Deficiency System list as the methodology to select projects for funding through the interagency agreement and, per regional guidance, Region 8 notified tribes of this process. The FBIC DWTP ranked the highest among Region 8 projects to receive ARRA funding, and Region 8 staff said they could not skip over a project for

³ The decision memo accompanying the EPA's interagency agreement with the Indian Health Service noted that "ARRA requires commencing expenditures and activities as quickly as possible consistent with prudent management" and that the accelerated project schedule would not allow for each region to solicit grant proposals and negotiate detailed work plans within the required time.

funding on the list given the region's communications to the FBIC on the ARRA project selection process. Region 8 staff said they could not consider plan and specification review comments—such as the 2007 comments from Rural and Tribal Environmental Solutions—in awarding funds given limitations on the agency's role under Part 141. While Part 142 includes a provision that states or tribal governments with primacy assure that the design and construction of water system facilities will be capable of compliance with the state primary drinking water regulations (i.e., plan and specification review authority), Region 8 staff said that Part 142 does not apply to the EPA as Part 141 does not contain a parallel provision on plan and specification. As a result, even though Region 8 discussed its concerns with the FBIC on the facility's design based on the Rural and Tribal Environmental Solutions review, Region 8 staff said the FBIC and its contractor were able to proceed with construction planning even though it only addressed some but not all of the EPA's concerns.

Outside of ARRA, Region 8's annual method to identify projects—as described in its April 2009 program guidelines—includes using a project proposal form and all supporting information to consider project eligibility. However, according to Region 8 staff, “all supporting information” would not have included the plan and specification review comments. Region 8 staff said that, in most cases, they do not receive plan and specification comments – if at all – until after project funding, and we confirmed this in Region 8's annual program guidelines for 2009. Thus, regardless of whether special or annual appropriations (ARRA DWIG-TSA or annual DWIG-TSA) are involved, for water infrastructure projects where tribes do not have primacy, Region 8 staff said that they did not believe they had the authority to require the tribe to address the EPA's concerns in the plan and specification review comments. Although the FBIC DWTP went operational in March 2010, it continues to be out of SDWA compliance. Specifically, the DWTP fails to meet Disinfection Byproducts Rule where disinfectants like chlorine react with naturally-occurring source water materials and create byproducts that, if consumed in excess of the EPA's standards over many years, may lead to increased health risks. Additionally, the Indian Health Service continues to provide funding to the plant in an effort to bring it into compliance.

The limitation identified in this review could impact other tribal drinking water projects. Staff in the EPA's Office of Water indicated that several regions have said that addressing plan and specification review comments is authority EPA should have. Staff noted that federal agencies have spent funds fixing problems previously identified in plan and specification reviews.

Recommendation

We recommend that the assistant administrator, Office of Water:

1. Reexamine its interpretation that, in tandem, 40 CFR Parts 141 and 142 prevent the agency from requiring tribes to address plan and specification review comments. If the determination is still that this limitation exists, pursue a regulatory or guidance change to address it.

Agency Comments and OIG Evaluation

The EPA agreed with the recommendation and confirmed that the agency can require tribes to address plan and specification review comments prior to being awarded a grant. Language to reinforce this statement will be included in the DWIG-TSA guidelines currently under revision. Appendix A includes the agency's response to our draft report. We believe the agency's actions, when implemented, should address the recommendation.

Action Required

Your response to the draft report included a proposed corrective action and completion date. The recommendation is open with corrective action underway. We have no objections to the further release of this report to the public. We will post this report to our website at <http://www.epa.gov/oig>.

Because other federal agencies contributed greater funding to the FBIC DWTP than the EPA, we plan to notify the OIGs for the U.S. Department of Agriculture and the U.S. Department of Health and Human Services.

If you or your staff have any questions regarding this report, please contact Rich Eyermann, acting assistant inspector general for audit, at (202) 566-0565 or Eyermann.Richard@epa.gov; or Patrick Gilbride, director for risk and program performance audits, at (303) 312-6969 or Gilbride.Patrick@epa.gov.

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	4	Reexamine its interpretation that, in tandem, 40 CFR Parts 141 and 142 prevent the agency from requiring tribes to address plan and specification review comments. If the determination is still that this limitation exists, pursue a regulatory or guidance change to address it.	O	Assistant Administrator, Office of Water	3/31/2014		

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's Official Draft Report Comments

(Received June 4, 2013)

MEMORANDUM

SUBJECT: Response to OIG's Draft Report/Project No. OA-FY13-0076: *Limitations on EPA's Authority Under the SDWA Resulted in Unaddressed Concerns at a Tribal Drinking Water Plant*

FROM: Nancy K. Stoner /s/ **Original Signed by Michael Shapiro for:**
Acting Assistant Administrator

TO: Arthur A. Elkins, Jr.
Inspector General

Thank you for the opportunity to respond to the issues and recommendation in the subject audit report. Following is a summary of the U.S. EPA's overall position, along with its position on the report's recommendation. We have provided a high-level intended corrective action and estimated completion date. For your consideration, we have included a Technical Comments Attachment to supplement this response.

AGENCY'S OVERALL POSITION

The agency concurs with the one recommendation detailed in the report.

AGENCY'S RESPONSE TO REPORT RECOMMENDATIONS

Agreements

No.	Recommendation	High-Level Intended Corrective Action(s)	Estimated Completion by FY
1	Reexamine the interpretation of 40 CFR Parts 141/142 and that it prevents the Agency from requiring tribes to address plan and specification review comments. If the determination is still that this limitation exists, pursue a regulatory or guidance change to address it.	The EPA confirmed that the Agency can require tribes to address plan and specification review comments prior to being awarded a grant. Language to reinforce this statement will be included in the Drinking Water Infrastructure Grants- Tribal Set Aside Guidelines currently under revision.	FY14Q2

CONTACT INFORMATION

If you have any questions regarding this response, Michelle Schutz, Associate Branch Chief of Drinking Water Protection Division at (202) 564-7374.

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