

MEMORANDUM

SUBJECT: Enhancing Planning and Communication Between the EPA and the States in Civil Enforcement and Compliance Assurance Work

FROM: Susan Parker Bodine
Assistant Administrator

TO: Regional Administrators

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

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

Background

The EPA’s 2018–2022 Strategic Plan identifies cooperative federalism as a fundamental priority for the agency with a stated objective of enhancing shared accountability between the EPA and state co-regulators in the implementation of federal environmental programs.² Administrator Wheeler issued a memorandum on October 30, 2018, that complemented and modernized earlier EPA statements on EPA and state roles.³ That memorandum outlined four key principles relevant to the enforcement of federal environmental laws: (1) general deference to the states in state-implemented programs, consistent with the EPA’s oversight responsibilities; (2) effective communication between the EPA and the states; (3) clear standards of review and predictable processes; and (4) a clear process for elevating issues.⁴

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

² See U.S. Environmental Protection Agency, Working Together: FY 2018–2022 U.S. EPA Strategic Plan at 25 (Feb. 12, 2018).

³ See Memorandum from Andrew R. Wheeler, Acting Administrator, Principles and Best Practices for Oversight of Federal Environmental Programs Implemented by States and Tribes (Oct. 30, 2018). See also Memorandum from William D. Ruckelshaus, Administrator, EPA Policy on Oversight of Delegated Environmental Programs (Apr. 4, 1984).

⁴ See Wheeler at 2.

1 In a complementary process, the EPA and the Environmental Council of the States (“ECOS”) convened
2 an EPA-ECOS Compliance Assurance Workgroup in September 2017 to develop practical procedures to
3 advance cooperation between EPA and state enforcement offices.⁵ The EPA-ECOS Workgroup published
4 a consensus-based series of recommendations in August 2018 that touched on all four principles in the
5 2018 Wheeler memorandum.

6 The EPA also issued interim guidance on January 22, 2018, related to enhancing planning and communi-
7 cation between EPA regions and the states.⁶ That guidance signaled that the EPA would update and final-
8 ize EPA-state enforcement planning and communication guidance based on input from EPA regions,
9 states, and the EPA-ECOS Workgroup.

10 After considering the 2018 Wheeler memorandum, the EPA-ECOS Workgroup recommendations, and
11 input received on the interim and draft final policies, I am now issuing this final planning and communi-
12 cation policy.⁷

13 **I. PERIODIC JOINT WORK PLANNING**

14 Cooperative, periodic, and early joint planning and regular communication between the EPA and states is
15 essential to promote enhanced, shared accountability between federal and state enforcement authorities.
16 A “no surprises” principle is the foundation of joint work planning and will minimize the misunderstand-
17 ings that can be caused by the lack of regular, bilateral communication. With increased EPA cooperation
18 and transparency, the EPA expects the states to respond in kind. A break-down in two-way communication
19 between a state and the EPA should be elevated to senior management in both organizations. The overall
20 goal of joint planning is the sharing of enforcement responsibilities with a clear agreement on EPA and
21 state roles in individual inspections and formal enforcement actions. Such agreements cannot be reached
22 if the EPA or a state is unaware of the actions of the other. Where agreement cannot be achieved, the
23 matter should be elevated within the EPA and the state for resolution under the issue-elevation procedures

⁵ Workgroup members included geographically- and politically-diverse state director-level representatives from Alaska, California, Missouri, New Jersey, Ohio, and Tennessee, and Deputy Regional Administrator-level representatives from EPA Regions 1, 2, 3, 7, and 8. The Workgroup was co-chaired by the Director of the Nebraska Department of Environmental Quality and the OECA Deputy Assistant Administrator. *See* <https://www.ecos.org/documents/final-report-of-the-ecos-epa-compliance-assurance-workgroup>.

⁶ *See* Memorandum from Susan Parker Bodine, Assistant Administrator for the Office of Enforcement and Compliance Assurance, Interim OECA Guidance on Enhancing Regional-State Planning and Communication on Compliance Assurance Work in Authorized States (Jan. 22, 2018).

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

1 in Section III. Periodic joint work planning should at a minimum include strategic planning, joint inspec-
2 tion planning, and joint formal enforcement planning.⁸

3 **A. Joint planning participants**

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

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

17 In addition to these day-to-day discussions, the senior management in each region should meet—prefer-
18 ably in person—with their counterparts in a state, including, as appropriate, the EPA Regional Adminis-
19 trator and Secretaries or Commissioners of state environmental agencies. The frequency of these meet-
20 ings and the participants should be appropriate to the needs and styles of the specific region-state rela-
21 tionship. These meetings should include a jointly-prepared agenda and supporting materials circulated
22 sufficiently in advance to allow for full preparation and participation.

23 **B. Strategic planning**

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

31 **C. Joint inspection planning**

32 EPA regions and the states should work together to identify which inspections the EPA or a state will
33 perform, consistent with the guidelines in Section II. Inspection planning will avoid duplicate efforts,
34 improve efficiency, reduce unnecessary burdens on the regulated community, and could provide EPA
35 regions and states with more flexibility in setting and adjusting inspection targets and Compliance Moni-
36 toring Strategies. Cooperative inspection planning also helps the EPA meet its oversight responsibilities

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

1 to ensure compliance with federal statutes. The following best practices should be followed in the joint
2 inspection planning process.

3 1) EPA regions and states should communicate as they develop their separate inspection priorities and
4 commitments and should work together as appropriate on joint inspection priorities and commitments.

5 a) EPA regions and the states should avoid duplicative or overlapping inspections that would lead
6 them to inspect the same facility for the same regulatory requirements within a year. Multiple
7 inspections by the EPA and the states may, however, be appropriate for complex sites where the
8 inspections will focus on different regulatory requirements or where the EPA and a state agree that
9 multiple inspections serve a valuable purpose.

10 b) EPA regions and the states should exchange and discuss their targeting rationales and draft inspec-
11 tion plans as early as possible. This should be more than a simple exchange of planned inspection
12 lists for informational purposes. Instead, this discussion should create a shared understanding be-
13 tween EPA regions and the states of the purpose and objectives of their respective inspections.

14 c) EPA regions should provide states with advance notice of inspections, especially because inspec-
15 tion plans tend to be dynamic and it might have been some time since the planned inspection was
16 discussed. This type of coordination requires EPA regions and states to reach agreements regarding
17 confidentiality and whether or when facilities are to be provided notice of inspections.

18 2) EPA regions and states should invite each other to participate in inspections where there is value in
19 both entities participating.

20 3) The inspection planning process should make the best use of both EPA and state resources and exper-
21 tise. EPA regions and states should discuss how they will use their combined resources to meet na-
22 tional inspection coverage expectations under applicable Compliance Monitoring Strategies and stat-
23 utory requirements and should consider the use of alternative compliance monitoring strategies where
24 appropriate.

25 4) Consistent with the “no surprises” principle, in investigations where the EPA has the lead, EPA regions
26 should share information requests with a state concurrently with sending them to the recipient.

27 **D. Joint enforcement planning**

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

31 1) The EPA should communicate with states when the EPA believes that an enforcement action is war-
32 ranted in a state. The communication should include a review of the EPA’s observations and findings
33 from inspections and other case development techniques. The communication should include a dis-
34 cussion whether the enforcement action should be federal, state, or joint, and the type of action to be
35 taken. In these communications, the EPA should expect the state to respond quickly and clearly so that

- 1 a federal, state, or joint enforcement action may proceed in a timely way, though the state’s response
2 does not need to be in writing.
- 3 2) Where a state proposes to take the lead to address noncompliance identified by the EPA, the state and
4 the EPA should discuss state-specific authorities and procedures and how the claims made and relief
5 sought in an enforcement action taken by a state will—as appropriate for the circumstances of the
6 violation—remedy the noncompliance and deter similar violations, including civil penalties as appro-
7 priate.
- 8 3) Where the EPA is taking an enforcement action in a state, the EPA should notify the state before
9 notifying the facility.
- 10 4) Joint enforcement planning should include regular, bilateral updates on the progress and outcomes of
11 selected actions (e.g., National Compliance Initiative actions, new areas of state implementation, “pri-
12 ority state assists,” or important cases discussed during joint work planning).
- 13 5) The EPA and the states should remain mindful of the requirements of confidentiality in enforcement
14 actions—breaches of confidentiality will diminish the ability to work cooperatively. It may not be
15 possible for the EPA to share details of a planned enforcement action where a confidentiality agree-
16 ment with the state is not executed and where differences in freedom of information and evidentiary
17 rules would make case-sensitive information vulnerable to release.
- 18 6) If the need arises for additional enforcement or compliance actions after making joint planning deci-
19 sions in an action, the EPA and the state should discuss the appropriate lead agency for these additional
20 actions.⁹
- 21 7) Ongoing cooperation and assistance between the EPA and the states is encouraged.
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⁹ Joint work planning has been proceeding under the January 2018 interim guidance for more than a year. In the increasingly rare situation where an action has not gone through that or a similar prior process and the state or the EPA seeks a change in the lead agency for an enforcement action, a decision on changing the lead will be made only after consultation among the state’s Secretary or Commissioner, the Regional Administrator, and the Assistant Administrator for the Office of Enforcement and Compliance Assurance. Changes in lead should be memorialized in writing and should include the requirement that the EPA and the state will periodically discuss the progress of the case. To minimize delays in returning an entity to compliance, the likelihood that the EPA will agree to a mid-course change in case lead from the EPA to a state will decrease as EPA case development becomes more advanced.

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

2 The EPA will generally defer to a state as the primary implementer of inspections and enforcement in
3 authorized programs. The EPA, however, retains concurrent enforcement authority and so there are spe-
4 cific situations where the EPA may choose to take direct action after following the processes in Section I.¹⁰
5 Examples of situations that could warrant EPA involvement include the following.

6 1) **Joint work planning or specific situations where the state requests that the EPA take the lead.**
7 Using the processes described in Section I, the EPA may provide enforcement assistance as requested
8 by a state or may take the lead in an enforcement action, sub-program, sector, or geographic area under
9 an EPA-state work-sharing arrangement.

10 2) **Violations that are part of a National Compliance Initiative.** The EPA and the states should discuss
11 work-sharing and how to make the best collective use of EPA and state resources and expertise to
12 achieve the goals of the National Compliance Initiatives (“NCIs”). NCIs will be defined as a subset of
13 cases in a program area where the EPA has determined that national consistency and federal assistance
14 in achieving compliance are important to the protection of public health and the environment. While
15 NCIs are intended to address widespread noncompliance problems, such problems may not be present
16 in each jurisdiction nor a priority for each state. States are not obligated to participate in NCIs, although
17 the EPA welcomes their participation. The EPA is expected to take the lead in some of the specific
18 enforcement actions identified as NCI actions to apply and maintain its expertise, to ensure con-
19 sistency, and to promote a level playing field, while at the same time inviting individual states to join
20 in a judicial case as it relates to facilities in that state. If a state proposes to take the lead in an NCI
21 case, the EPA should defer to a state that agrees to seek compliance and enforcement outcomes con-
22 sistent with EPA-led resolutions elsewhere in the nation. States are expected to share with the EPA
23 the specifics of outcomes of NCI enforcement actions where a state takes the lead. The EPA region
24 should provide OECA with a list of facilities where the joint planning process results in a state taking
25 the lead for an enforcement action that falls under an NCI.

26 3) **Emergency situations or situations where there is substantial risk to human health or the envi-**
27 **ronment.** In consultation and coordination with the state, the EPA may take direct action or supple-
28 ment state enforcement resources in these circumstances.

29 4) **Situations where a state lacks adequate equipment, resources, or expertise.** While the states have
30 built capable environmental enforcement programs, the EPA may take the lead in a case where the
31 state does not have the equipment, resources, or expertise necessary to enforce an aspect of an author-
32 ized statutory program. The EPA should defer more to a state that has demonstrated greater compli-
33 ance assurance capability and may defer less to a state that continues to have difficulty improving

¹⁰ See Wheeler at 3 (“States and tribes have the primary role in state- and tribal-implemented federal programs, and the EPA will generally defer to states and tribes in their day-to-day activities. At the same time, the EPA remains responsible and accountable to the President, the Congress and the public for upholding the rule of law . . . and ensuring that federal statutes are consistently . . . enforced.”).

1 compliance. In cases where less deference may be warranted, the EPA and the state should consider
2 working jointly on an enforcement action to build state capacity.

3 5) **Situations involving multi-state or multi-jurisdictional interests or interstate impacts.** The EPA
4 should take the lead in cases addressing noncompliance at facilities owned or operated by the same
5 entity in multiple states to ensure consistency and a level playing field, while at the same time inviting
6 individual states with affected facilities to join the case. Similarly, the EPA may take the lead in en-
7 forcement actions addressing significant cross-boundary impacts affecting other states or nations to
8 ensure that cross-boundary impacts from noncompliance are resolved equitably.

9 6) **Significant noncompliance that the state has not timely or appropriately addressed.** The EPA
10 may take an enforcement action where a state is not taking timely and appropriate action.

11 7) **Serious violations for which the EPA’s criminal enforcement authorities may be needed.** Because
12 only a handful of states have active environmental criminal enforcement programs, most environmen-
13 tal criminal investigations are performed by the EPA in consultation and cooperation with local law
14 enforcement authorities.

15 8) **State enforcement program review inspections.** The EPA has a responsibility under the federal en-
16 vironmental statutes to conduct a limited number of inspections to verify the efficacy of authorized
17 enforcement programs.¹¹

18 9) **Situations that involve enforcement at federal and state owned or operated facilities.** The EPA
19 may take the lead or assist a state in an enforcement action at a federally owned or operated facility.
20 The EPA may also take the lead in an enforcement action against a state owned or operated facility
21 where there are conflicts internal to the state that make state enforcement less effective.

22 **III. PROCESS FOR THE ELEVATION OF ISSUES**

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

- 25 1) Issues should be resolved whenever possible at the EPA and state career management level.
- 26 2) If career management cannot resolve an issue, the matter should be elevated [within thirty days] for
27 resolution by regional and state senior management.
- 28 3) If following elevation within the region and the state there remains a dispute between the Regional
29 Administrator and the State Secretary or Commissioner, the matter should be elevated [within sixty
30 days] to the Assistant Administrator for the Office of Enforcement and Compliance Assurance for a
31 decision.

¹¹ This policy does not address the situation where a state has not addressed State Review Framework deficiencies adequately. Communications regarding these deficiencies should take place within the structure of that program.