U.S. ENVIRONMENTAL PROTECTION AGENCY

OFFICE OF INSPECTOR GENERAL

Operating efficiently and effectively

EPA Does Not Always Adhere to Its Established Action Development Process for Rulemaking

Report No. 21-P-0115 **March 31, 2021**

Report Contributors:

Patrick Gilbride
Erin Barnes-Weaver
Alicia Buchanan
Allison Krenzien
Fred Light
Lumi Mema

Abbreviations

ADP	Action Development Process
ANPRM	Advance Notice of Proposed Rulemaking
C.F.R.	Code of Federal Regulations
CERCLA	Comprehensive Environmental Response, Compensation, and Liability Act
EPA	U.S. Environmental Protection Agency
GAO	U.S. Government Accountability Office
GHG	Greenhouse Gas
NESHAP	National Emission Standards for Hazardous Air Pollutants
NPRM	Notice of Proposed Rulemaking
OAR	Office of Air and Radiation
OCSPP	Office of Chemical Safety and Pollution Prevention
OIG	Office of Inspector General
OLEM	Office of Land and Emergency Management
OMB	Office of Management and Budget
OP	Office of Policy
ORPM	Office of Regulatory Policy and Management
OW	Office of Water
RSC	Regulatory Steering Committee
RTR	Risk and Technology Review
TSCA	Toxic Substances Control Act
U.S.C.	United States Code

Cover Image: Graphic depiction of color-coding used in the report to demonstrate the results of our analysis—variation in the EPA's adherence to its Action Development Process checklist steps ranged from 44 to 100 percent. (EPA OIG graphic)

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U.S. Environmental Protection Agency
Office of Inspector General

21-P-0115
March 31, 2021

At a Glance

Why We Did This Audit

We conducted this audit to determine whether the U.S. Environmental Protection Agency adhered to its Action Development Process for selected rulemakings.

The EPA designed the ADP over 30 years ago to equip rule writers with the tools necessary to write regulations. We developed a checklist to assess 58 Tier 1 and 2 rules with tiering dates from fiscal years 2015 through 2019 for ADP adherence. Tier 1 and 2 rules include four major milestones per the EPA's *Action Development Process: Guidance for EPA Staff on Developing Quality Actions*. For each rule, we reviewed available information in the EPA's ADP Tracker system and requested and reviewed needed documentation from the EPA's Office of Policy and rule leads in program offices.

This audit addresses the following:

- *Operating efficiently and effectively.*

This audit addresses this top EPA management challenge:

- *Complying with key internal control requirements (data quality; policies and procedures).*

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EPA Does Not Always Adhere to Its Established Action Development Process for Rulemaking

What We Found

Based on analysis of the progression of 58 selected rules through the rulemaking process, we found wide variation in the EPA's adherence to its ADP, ranging from 44 to 100 percent. Using a checklist to assess adherence, we found approximately 81 percent adherence, 14 percent nonadherence, and 6 percent undetermined adherence to steps in the rulemaking process.

ADP goals are to deliver actions that are based on sound science, promote economic efficiency, and are implementable and enforceable.

We found variation in ADP adherence by program office, economic significance of the rulemaking, and major milestone. For example, adherence for economically significant rules was 5 percent less than overall adherence to the checklist. Additionally, average adherence for major ADP milestones was less than overall adherence to the checklist. We identified two reasons for nonadherence in the rules evaluated:

- The Office of Policy allowing milestones to be skipped by designating them as "moot," a term or practice not addressed in the *ADP Guidance*.
- The Office of Policy and program offices not maintaining documentation on major milestones in ADP Tracker. We found that 30 of 58 rulemakings contained less than half of major milestone documentation in the system.

Interviewees and notes in ADP Tracker indicated that reasons for designating milestones as moot included expediting rulemaking timelines and considering milestones as unnecessary for specific rulemakings. Missing documentation stemmed from inconsistent program office approaches to data entry, confusion on some items, and a lack of system monitoring by the Office of Policy for data quality. Interviewees said ADP training could be improved, and we found that resource constraints, staff unavailability, and competing demands have not allowed time to conduct formal, in-person training for several years. Key Agency stakeholders said that the ADP should be followed and that the ADP results in consistently high-quality rules when implemented appropriately.

Recommendations and Planned Agency Corrective Actions

We recommend that the Office of Policy annually reinforce the administrator's expectation on following the ADP, including waiver procedures for Tier 1 and 2 actions. We also recommend that the office query rulemaking stakeholders on the use of the moot designation and, if necessary, define and clarify its applicability and expected documentation. Additionally, we recommend that the office define key regulatory decisions and information, to include in the tracking database, and coordinate with program offices on periodic system checks. Finally, we recommend querying EPA staff on the adequacy of training. One recommendation is resolved with corrective actions pending, and four recommendations are unresolved with resolution efforts in progress.

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

THE INSPECTOR GENERAL

March 31, 2021

MEMORANDUM

SUBJECT: EPA Does Not Always Adhere to Its Established Action Development Process for Rulemaking
Report No. 21-P-0115

FROM: Sean W. O'Donnell

TO: Victoria Arroyo, Associate Administrator for Policy
Office of the Administrator

This is our report on the subject audit conducted by the Office of Inspector General of the U.S. Environmental Protection Agency. The project number for this audit was OA&E-FY20-0067. This report contains findings that describe the problems the OIG has identified and corrective actions the OIG recommends. Final determinations on matters in this report will be made by EPA managers in accordance with established audit resolution procedures.

The Office of Policy is responsible for the issues discussed in this report.

In accordance with EPA Manual 2750, your office provided acceptable planned corrective actions and estimated milestone dates for Recommendation 3. This recommendation is resolved with corrective action pending.

Action Required

Recommendations 1, 2, 4, and 5 are unresolved. The resolution process, as described in the EPA's Audit Management Procedures, begins immediately with the issuance of this report. Furthermore, we request a written response to the final report within 60 days of this memorandum. Your response will be posted on the OIG's website, along with our memorandum commenting on your response. Your response should be provided as an Adobe PDF file that complies with the accessibility requirements of Section 508 of the Rehabilitation Act of 1973, as amended. The final response should not contain data that you do not want to be released to the public; if your response contains such data, you should identify the data for redaction or removal along with corresponding justification.

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

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Chapter 1
Introduction

Purpose

The U.S. Environmental Protection Agency Office of Inspector General conducted this audit to determine whether the EPA adhered to its Action Development Process for selected rulemakings.

Top Management Challenge

This audit addresses the following top management challenge for the Agency, as identified in OIG Report No. 20-N-0231, *EPA's FYs 2020–2021 Top Management Challenges*, issued July 21, 2020:

- *Complying with key internal control requirements (data quality; policies and procedures).*

Background

EPA's Regulatory Development

The EPA is one of the most active regulatory agencies in the federal government, and writing regulations is one of the most significant tools the EPA has to protect human health and the environment. An overarching goal in *Working Together: FY 2018–2022 U.S. EPA Strategic Plan* is to have more effective partnerships, including increasing public platforms for meaningful participation in regulatory development. The plan includes strategies for the EPA "to reinvigorate its approach to regulatory development," prioritize meeting statutory deadlines, and ensure that Agency actions are defensible and consistent with its authorities.

Developing environmental regulations is one of the Agency's principal tasks, and much of the EPA's environmental success and organizational credibility is directly linked to the quality of this work. Therefore, it is important for the EPA's actions to be based on sound scientific, economic, legal, and policy analyses and for the Agency to involve the public throughout development.

EPA Action Development Process: Guidance for EPA Staff on Developing Quality Actions (March 2018)

EPA's Action Development Process

The EPA designed the ADP over 30 years ago to equip rule writers with the tools necessary to write regulations. Per the EPA's *Action Development Process: Guidance for EPA Staff on Developing Quality Actions* (dated March 2018), also known as the *ADP Guidance*, the ADP is designed to bring together a diverse group of professionals throughout the Agency to work collaboratively to develop and deliver "agency actions" that are based on sound science, promote economic

efficiency, and are implementable and enforceable. The *ADP Guidance* uses the term "agency actions" to refer to a variety of actions, including proposed rules and final rules signed by the EPA administrator. The Administrative Procedure Act, specifically 5 U.S.C. § 551(4), defines "rule" to mean "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy." For purposes of this report, we refer to Agency actions involving proposed or final rules as "regulatory actions."

The ADP serves as a comprehensive framework to ensure the use of quality information to support EPA actions and an open process for action development. It also provides opportunities for early senior management involvement and provides guidance and direction to staff at key points in the process. Per the *ADP Guidance*, the ADP also relies on collaborative involvement at the staff level across the Agency to ensure that actions are discussed and developed using all the available and appropriate Agency expertise. As such, the ADP encourages using a staff workgroup to share information and draft rulemaking materials. Table 1 describes the five major stages of the EPA's *ADP Guidance*.

Table 1: Five major ADP stages

1	**Tiering the Action.** Agency actions developed through the ADP are assigned to one of four tiers based on the *ADP Guidance* criteria. Tier 1 and 2 actions may require extensive cross-agency involvement, new science, or nonroutine application of existing science or have the potential for precedent-setting implementation issues, policy implications, or economic considerations. The tier determines the complexity of the process that the workgroup will use to develop the action. During development of an action, the lead office may adjust the tiering designation with justification and approval. *Actions include proposed rules, also called a notice of proposed rulemaking, and final rules. If used, an advance notice of proposed rulemaking also follows the ADP at the appropriate tier level.*
2	**Developing the Proposed Rule/Draft Action.** Once the action has been tiered, the lead program office and the convened workgroup begins developing the action.
3	**Requesting Office of Management and Budget Review (if necessary).** Actions deemed significant generally require OMB review under Executive Order 12866, *Regulatory Planning and Review*. This stage involves preparing the action for OMB review and addressing input received as a result of the OMB's review. Executive Order 12866 lists four factors that define a "significant regulatory action," one of which includes economic significance. *A regulatory action is "economically significant" if the OMB determines that the action is likely to have an annual effect on the economy of $100 million or more or adversely affect—in a material way—the economy; a sector of the economy; productivity; competition; jobs; the environment; public health or safety; or state, local, or tribal governments or communities. For all "economically significant" regulations, Executive Order 12866 directs agencies to provide a more detailed assessment of the anticipated benefits and costs of the action, as well as an assessment of the benefits and costs of potentially effective and reasonably feasible alternatives.*
4	**Signing and Publishing an Action in the *Federal Register* and Soliciting and Accepting Public Comments.** This stage includes requesting a signature of the

	appropriate EPA official on proposed and final actions, publishing actions, and soliciting and accepting public comments for proposed rules.
5	**Developing the Final Action.** The workgroup reconvenes to finalize the action. This stage also includes efforts to comply with the Congressional Review Act.

Source: OIG summary of the *ADP Guidance*. (EPA OIG table)

Stages 2 and 5, on proposed and final rules, include four major milestones or key documents that the *ADP Guidance* describes as typically required for Tier 1 or Tier 2 actions. Table 2 shows the relationship between tiering and the development process for the four major milestones called for under the ADP.

Table 2: ADP requirements for four major milestones by tier

	Tier 1	Tier 2	Tier 3
Early Guidance Initial guidance from senior management, including policy priorities and expectations of the workgroup.	Must be addressed	Must be addressed	Optional
Analytic Blueprint A workgroup's plan for conducting analyses to support action development.	Must be addressed*	Must be addressed*	Optional
Options Selection The workgroup identifies significant issues and a range of options to resolve each issue. Senior management then selects the options that would best achieve the goals of the action.	Must be addressed	Must be addressed	Optional
Final Agency Review The last point for internal EPA review of an action. For Tier 1 and 2 actions, final Agency review meetings are held to confirm that all issues have been resolved or elevated for resolution; the action package is ready for OMB, if required, or signature; and all EPA and external requirements have been met.	Must be addressed	Must be addressed	Optional (workgroup closure)

Source: *ADP Guidance*. (EPA OIG table)

*Updated as needed by the workgroup after proposed rule stage.

Though presented as a step-by-step guide, the ADP is not intended to be a rigid process, as the *ADP Guidance* notes that "[f]lexibility is often appropriate during the application of the ADP when developing a quality action." It indicates that the workgroup and senior management should work out details of the process for each action. When needed and appropriate, the workgroup may collectively adjust the process for actions to address timing and sequencing concerns with the addition or deletion of milestones. Individual milestones may be waived if the workgroup agrees that the milestone in question is not needed or that an expedited action development cycle is required to meet critical, time-sensitive commitments, such as court deadlines or the administrator's target dates. The *ADP Guidance* describes the process to waive a milestone.

While approved waivers allow for flexibility in the process, the *ADP Guidance* notes that regulatory actions that meet Tier 1 or Tier 2 criteria should be developed through the Agency's ADP. Additionally, on August 22, 2018, then-Administrator Andrew Wheeler issued a memorandum to all assistant and regional administrators to "reinforce compliance with the ADP to the maximum extent possible as we develop agency actions."

Then-Administrator Wheeler also added:

> Particularly for Tier 1 and 2 actions, I expect that the ADP process will be followed and that all major ADP milestones will be met. I do not intend to waive ADP milestones for Tier 1 rules, which are defined under the ADP as those actions reflecting the Administrator's top priorities and requiring extensive cross-office coordination. As a reminder, requests to waive Tier 1 or Tier 2 milestones generally require the approval of the Associate Administrator for the Office of Policy.

Additionally, the EPA's Scientific Integrity Policy "requires adherence to Agency documents that address the use and characterization of scientific information in Agency policy development, such as EPA's Action Development Process."

Offices Involved in the ADP

As noted above, the ADP is a collaborative process that encourages using a staff workgroup to share information and draft rulemaking documents. As part of the tiering process, the lead office formally charters a workgroup and other interested program offices, including the EPA's Office of Children's Health Protection and regional offices, assign representatives. Additionally, according to the *ADP Guidance*, the following "core" EPA offices should be invited to participate in workgroups for all Tier 1 and Tier 2 actions:

- Office of Policy.
- Office of General Counsel.
- Office of Enforcement and Compliance Assurance.
- Office of Research and Development.

The workgroup chair and members work together to develop an action and represent their office's or region's management positions on issues. The *ADP Guidance* lists several workgroup responsibilities, including ensuring that the documentation of issues raised within the members' individual offices and the views of all workgroup members are heard and considered during workgroup deliberations.

The OP's associate administrator oversees the regulatory process. The OP and its staff within the Office of Regulatory Policy and Management manage the

regulatory development process for the Agency, as well as the day-to-day operations and information systems that underpin the process. The ORPM helps to ensure that the EPA uses the most appropriate analytic information to determine regulatory policy; serves as the liaison to other federal agencies for all actions; and manages the ADP and its infrastructure, such as the tracking systems described below. The ORPM works with program offices as early as possible in the ADP. Additionally, in the context of typical workgroup activities, two OP divisions are particularly active:

- Policy and Regulatory Analysis Division. This division assigns a workgroup member who participates in nearly all tiered actions; serves as the OP's primary point of contact; and provides policy analysis, advice, and a cross-media perspective.

- Regulatory Management Division. This division assigns a desk officer to each program office to serve as the point of contact for management and procedural aspects of ADP-related activities, such as transmitting documents to the OMB for interagency review.

Additionally, the ADP includes a Regulatory Steering Committee to integrate and carry out the operational details of the ADP. The RSC is a standing body with representation from each program office and region; the general counsel; and cross-media offices, such as the Office of Children's Health Protection.

ADP Resources, Tracking, Reporting, and Record Keeping

The OP maintains resources on its online ADP Library to assist with the process, which includes links to guidance, templates, executive orders, and self-paced training materials and webinars. The ADP Library also contains links to information about the ADP Tracker system. The EPA developed ADP Tracker in 2012, which replaced a previous database, to better help the Agency manage and track actions, milestones, workgroups, and workflow. A 2013 memorandum from the RSC chair to all RSC members states that documentation associated with the four major ADP milestones listed in Table 2 must be uploaded into ADP Tracker. The ORPM manages ADP Tracker. Since the EPA is moving away from Lotus Notes-based systems, such as ADP Tracker, the OP plans to launch a replacement, called the EPA Action Management System, in the summer of 2021. The OP has been developing the replacement system since 2016.

Every fall and spring, federal agencies, including the EPA, combine efforts to publish a comprehensive report describing regulations under development or recently completed. These reports are bundled and published as the *Unified Agenda of Federal Regulatory and Deregulatory Actions*. Each agency's contribution is called a semiannual regulatory agenda. Once a year, each agency releases a regulatory plan as a subset of the fall regulatory agenda in accordance with Executive Order 12866. Agencies' regulatory plans describe the most

important regulations that the agencies reasonably expect to propose or finalize during the upcoming fiscal year, and the EPA's website notes that "these are the regulatory actions that embody the core of our regulatory priorities."

ADP Tracker houses key decisions and information on the Agency's rulemakings. The Federal Records Act requires agencies to make and preserve records containing adequate and proper documentation of the agencies' decisions.[1] Guidelines from the National Archives and Records Administration define trustworthy records as being reliable, authentic, integral, and usable. Additionally, Section 6.2 of the EPA's *Interim Records Management Policy* requires the Agency to document the formulation and execution of basic policies and decisions.

The EPA's Records Center confirmed that the ADP Tracker and the anticipated EPA Action Management System are registered information systems and are not designated as official record-keeping systems. According to the OP, the EPA uses other enterprise record-keeping tools to preserve official records.

An official record-keeping system is an "information management system which captures, manages and provides access to records through time" and can be electronic or paper-based, until an appropriate electronic record-keeping system becomes available.

EPA *Interim Records Management Policy* (August 2018)

Responsible Office

The OP is responsible for the issues discussed in this report.

Promising Practices

Desk officers within the OP's Regulatory Management Division noted that their director, after assuming the role in April 2019, developed useful work aids, such as written procedures with screenshots and directions for database tracking. Interviewees also lauded the RSC for providing valuable cross-agency input and information on rulemakings and the Regulatory Management Division's director for working through the RSC to further improve the ADP.

Scope and Methodology

We conducted this performance audit from January 2020 through February 2021 in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objective. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions.

[1] 44 U.S.C. § 3101.

As detailed in Appendix A, we assessed the internal controls necessary to satisfy our audit objective.[2] In particular, we assessed the internal control components and underlying principles—as outlined in the GAO's Green Book—significant to our audit objective. Any internal control deficiencies we found are discussed in this report.

To address our objective, we reviewed relevant statutes, executive orders, and OMB materials on regulatory actions. We reviewed the EPA's 2015 and 2018 *ADP Guidance* and related materials, memorandums, trainings, and websites. We also reviewed materials on the Agency's ADP Tracker system and the EPA Action Management System. To understand different ADP roles and responsibilities, we interviewed OP managers and staff and RSC members. We also interviewed staff in the Office of Research and Development and the Office of Enforcement and Compliance Assurance as these are two of the four core offices designated by the *ADP Guidance* to participate in all Tier 1 and Tier 2 workgroups. We also interviewed staff in the Office of Children's Health Protection and the Office of Congressional and Intergovernmental Relations, as well as the EPA's scientific integrity official.

We used the Agency's *ADP Guidance* to develop a 15-step checklist to assess 58 rules for ADP adherence. We selected Tier 1 or 2 rulemakings from fiscal years 2015 through 2019. For each rulemaking, we reviewed available information in ADP Tracker and requested and reviewed documentation from the OP and rule workgroup chairs or program office points of contact. As needed, we interviewed OP analysts and workgroup chairs or points of contact to ask rule-specific questions to verify information on activities and decisions. We did not perform analysis to determine the statistical significance of any differences we observed.

Appendix B provides additional details on our scope and methodology. Appendix C contains the checklist we developed to assess ADP adherence.

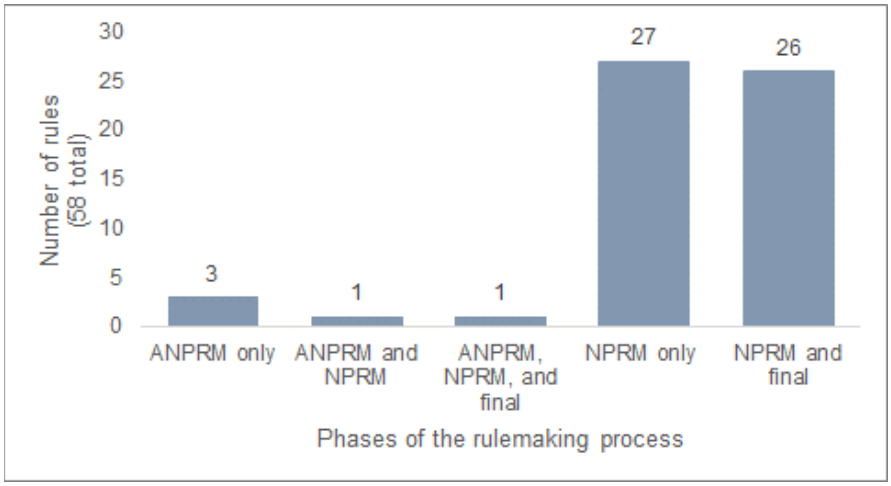
[2] An entity designs, implements, and operates internal controls to achieve its objectives related to operations, reporting, and compliance. The U.S. Government Accountability Office sets internal control standards for federal entities in GAO-14-704G, *Standards for Internal Control in the Federal Government* (also known as the "Green Book"), issued September 10, 2014.

Chapter 2
ADP Adherence Varied and Was Lower for Major Milestones and Economically Significant Rules

We analyzed 58 of the rulemakings designated as Tier 1 or Tier 2 from fiscal years 2015 through 2019 using the 15-step checklist we developed using the *ADP Guidance*. We assessed ADP adherence for each rule based on the rule's progression through the rulemaking process from the time the rule was tiered until January 22, 2020, when we first met with the Agency about this evaluation. For simplicity, we assigned each checklist step equal weight in our analysis. We found wide variation with each individual rule's ADP adherence, ranging from 44 to 100 percent. We determined approximately 81 percent average adherence to checklist steps and 14 percent average nonadherence to checklist steps in the rulemaking process.[3] Average ADP adherence was unable to be determined for 6 percent of checklist steps in the rulemaking process because of a lack of sufficient documentation. Ten rules were 100 percent adherent to our checklist steps. These average adherence values should not be extrapolated to the broader group of all EPA rulemakings.

The number of applicable checklist questions for each rule varied based on the rule's progression through the Advance Notice of Proposed Rulemaking, Notice of Proposed Rulemaking, and final rulemaking phases of the rulemaking process. Out of the 58 rules we reviewed, five had an ANPRM phase, 55 had an NPRM phase, and 27 had a final phase. Most rules we evaluated had only an NPRM phase or an NPRM phase and a final phase. Figure 1 shows which phases the rules we reviewed completed.

Figure 1: Frequency of applicable phases in 58 selected rulemakings



Source: OIG analysis. (EPA OIG graphic)

[3] Totals throughout do not always equal 100 percent because of rounding.

Tables 3 and 4 show those rules with the highest and lowest adherence, ranging from 44 to 100 percent. Appendix D lists the range of checklist step adherence rates for all 58 rules. Because some rules were under development during our audit, information, such as Executive Order 12866 significance or tiering level, may have changed since we initiated our review. Our analysis includes 17 of the 48 EPA actions in the *Fact Sheet: List of Agency Actions for Review* under *Executive Order 13990: Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis.*[4] Five of the 17 rules included in this list are among the ten rules in our sample that were least adherent to the ADP, as noted in Table 4.

Table 3: Rules most adherent to the ADP

Rule title	Program office	OMB significance	ADP adherence*		
			Yes	No	Undetermined
Financial Responsibility Requirements under Comprehensive Environmental Response, Compensation, and Liability Act Section 108(b) for the Petroleum and Coal Products Manufacturing Industry	Office of Land and Emergency Management	Significant	100%	0%	0%
Financial Responsibility Requirements under CERCLA Section 108(b) for the Chemical Manufacturing Industry	OLEM	Significant	100%	0%	0%
Review of Dust-Lead Post-Abatement Clearance Levels**	Office of Chemical Safety and Pollution Prevention	Significant	100%	0%	0%
Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources Reconsideration**	Office of Air and Radiation	Economically Significant	100%	0%	0%
Control of Air Pollution From Aircraft and Aircraft Engines: Proposed Greenhouse Gas Emissions Standards and Test Procedures**	OAR	Significant	100%	0%	0%
Clean Energy Incentive Program Design Details	OAR	Significant	100%	0%	0%

[4] Executive Order 13990 (dated January 20, 2021) directs all executive agencies to review regulations and other agency actions promulgated, issued, or adopted during the preceding four years and consider suspending, revising, or rescinding any that conflict with objectives set forth in the executive order.

Rule title	Program office	OMB significance	ADP adherence*		
			Yes	No	Undetermined
National Emission Standards for Hazardous Air Pollutants: Generic Maximum Achievable Control Technology Standards Residual Risk and Technology Review for Ethylene Production	OAR	Nonsignificant	100%	0%	0%
NESHAP: Integrated Iron and Steel Manufacturing Facilities RTR	OAR	Nonsignificant	100%	0%	0%
Endangerment Finding for Lead Emissions from Piston-Engine Aircraft Using Leaded Aviation Gasoline	OAR	N/A	100%	0%	0%
Clean Water Act 404 Assumption Update Regulation	Office of Water	N/A	100%	0%	0%

Source: OIG analysis. (EPA OIG graphic)

* "Yes" includes percent of checklist items that adhered to the ADP (includes approved waivers); "no" includes percent of checklist items that did not adhere to the ADP (includes moot steps, a term not included in the *ADP Guidance*); and "undetermined" includes percent of checklist items for which ADP adherence was unable to be determined.

** Included in the list of 48 rules to be reviewed under Executive Order 13990.

Table 4: Rules least adherent to the ADP

Rule title	Program office	OMB significance	ADP adherence*		
			Yes	No	Undetermined
Repeal of Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units	OAR	Economically Significant	67%	33%	0%
NESHAP: Coal- and Oil-Fired Electric Utility Steam Generating Units—Reconsideration of Supplemental Cost Finding and RTR**	OAR	Significant	65%	24%	12%
Addition of Certain Per- and Polyfluoroalkyl Substances to the Toxics Release Inventory	OCSPP	Significant	64%	18%	18%
Renewable Fuel Standard Program: Standards for 2020, Biomass-Based Diesel Volumes for 2021, and Other Changes	OAR	Significant	63%	0%	37%
Fuels Regulatory Streamlining	OAR	N/A	63%	13%	25%

Rule title	Program office	OMB significance	ADP adherence* Yes	No	Undetermined
Definition of "Waters of the United States" – Recodification of Preexisting Rule	OW	Economically Significant	57%	24%	19%
Strengthening Transparency in Regulatory Science**	Office of Research and Development	Significant	50%	33%	17%
Modernizing the Administrative Exhaustion Requirements for Permitting Decisions and Streamlining Procedures for Permit Appeals**	Office of General Counsel	Nonsignificant	45%	27%	27%
The Navigable Waters Protection Rule: Definition of "Waters of the United States"**	OW	Significant	44%	31%	25%
The Safer Affordable Fuel-Efficient Vehicles Rule for Model Years 2021-2026 Passenger Cars and Light Trucks**	OAR	Economically Significant	44%	56%	0%

Source: OIG analysis. (EPA OIG graphic)

* "Yes" includes percent of checklist items that adhered to the ADP (includes approved waivers); "no" includes percent of checklist items that did not adhere to the ADP (includes moot steps, a term not included in the *ADP Guidance*); and "undetermined" includes percent of checklist items for which ADP adherence was unable to be determined.

** Included in the list of 48 rules to be reviewed under Executive Order 13990.

We describe below additional details on our analysis of 58 selected rulemakings and adherence rates by program office, economic significance, and major milestone.

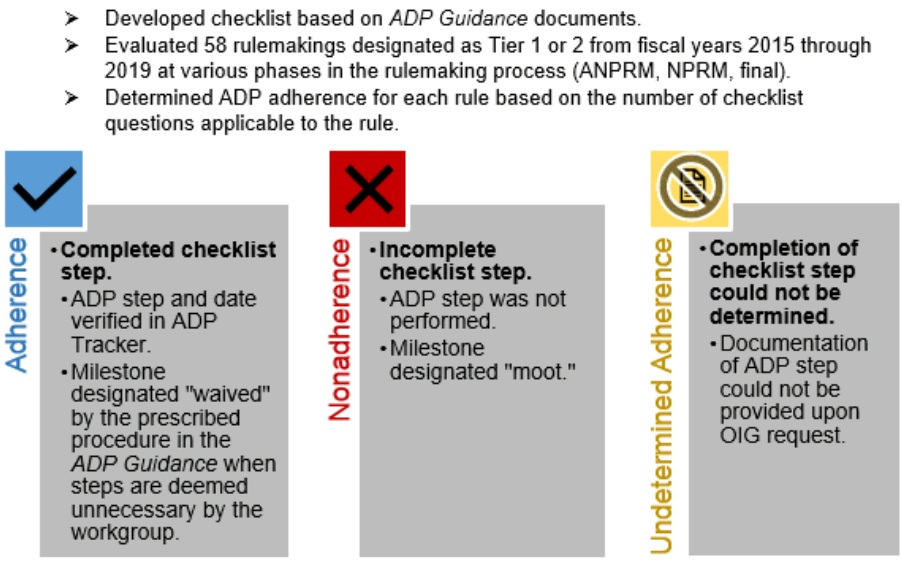
Details on OIG's Checklist and Adherence to Checklist Items

As shown in Figure 2, we defined adherence when we answered applicable checklist items with *yes*, an approved waiver was provided, or a date in ADP Tracker was verified by documentation.[5] We defined nonadherence when at least one item was answered with *no* or "moot," a term not included or defined in the EPA's *ADP Guidance*. Chapter 3 of this report notes additional findings on "moot" designations. We also included an undetermined adherence classification in which at least one item lacked sufficient documentation to determine adherence against the checklist. After several attempts to obtain documentation explicitly confirming adherence from the EPA, we concluded that there was not sufficient evidence to determine adherence for some checklist steps. Reasons for

[5] We could not obtain tiering forms because of mandatory telework during the coronavirus pandemic.

undetermined adherence include incomplete ADP Tracker information and inaccessible digital records because of employees changing positions or leaving the Agency.

Figure 2: Determining ADP adherence

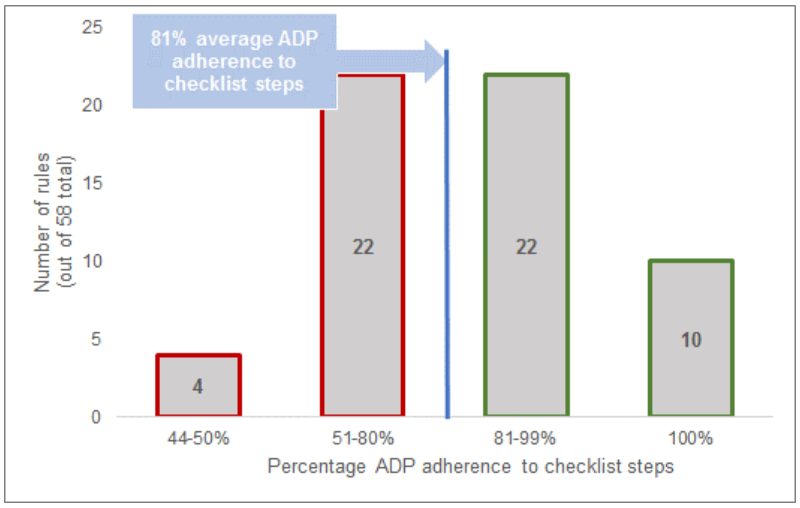


Source: EPA OIG analysis. (EPA OIG graphic)

Workgroup involvement was not included in determining rule adherence. Workgroup chairs completed questionnaires on each rule we reviewed and provided responses regarding workgroup involvement. We determined that the subjectivity of an individual's feeling of inclusion was inappropriate as a basis for assessing adherence rates.

Given the average ADP adherence of 81 percent, we found that 32 rules (55 percent) scored above and 26 rules (45 percent) scored below that average, as shown in Figure 3.

Figure 3: Distribution of rule adherence



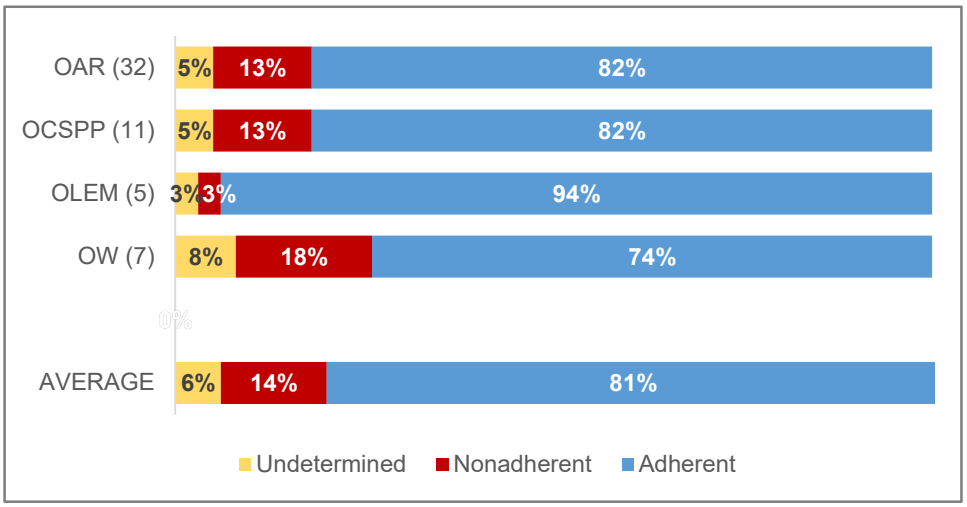
Source: OIG analysis. (EPA OIG graphic)

ADP Adherence Varied by Office, Rule Significance, and Major Milestone

ADP Adherence Varied by Program Office

Rules were developed by multiple program offices, and Figure 4 notes the number of rules within each program office.

Figure 4: Rule adherence by program office



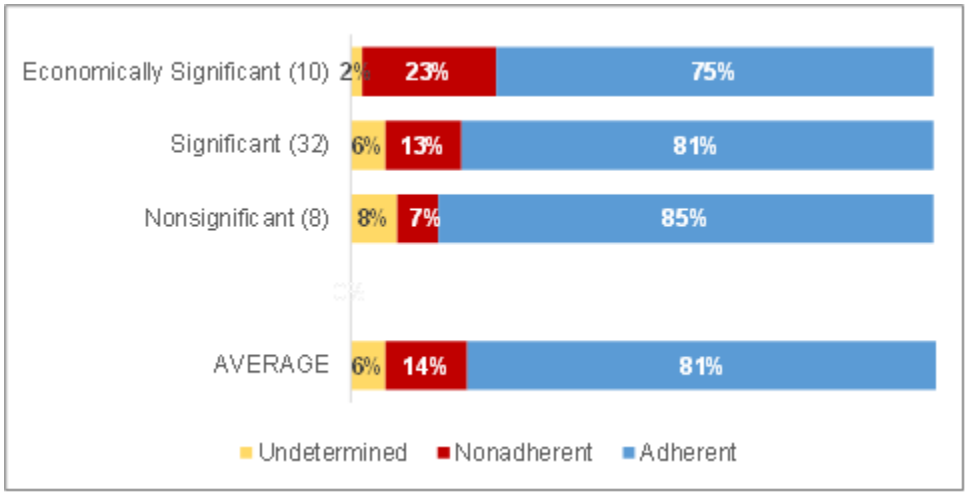
Source: OIG analysis. (EPA OIG graphic)

Note: The OP, the Office of General Counsel, and the Office of Research and Development each had only one Tier 1 or 2 rule from fiscal years 2015 through 2019. These offices are excluded from Figure 4 because of infrequent rulemaking compared to other program offices. Average adherence is based on an analysis of 58 rules progressing through various phases of rulemaking.

Economically Significant Rules Had Lower ADP Adherence

The 58 selected rulemakings included 42 that were classified as significant under Executive Order 12866 and eight that were not significant. The significance level was not yet determined under Executive Order 12866 for eight of the 58 rules. Of the 42 significant rules, ten were economically significant. The significance level is an indicator of the impact of the rulemaking, as noted in Table 1. All ten economically significant rules were Tier 1 in part because they had a large scope, cost, level of impact, or level of public interest. One of the ten economically significant rules was initially Tier 1 but was later reduced to Tier 2. Tier 1 rules may have greater policy impacts and implications and may be supported by precedent-setting applications of new science. We found that adherence was 75 percent for economically significant rules, 81 percent for significant rules, and 85 percent for nonsignificant rules. Nonadherence was 23 percent for economically significant rules, 13 percent for significant rules, and 7 percent for nonsignificant rules. Figure 5 illustrates how ADP adherence varied by significance.

Figure 5: Rule adherence by Executive Order 12866 significance level



Source: OIG analysis. (EPA OIG graphic)

Note: Executive Order 12866 significance levels had not been determined for eight of the 58 rules and are not included. Average adherence is based on an analysis of applicable checklist steps for 58 rules progressing through various phases of rulemaking.

Adherence Lower for Major ADP Milestones

We found that adherence varied by the four major ADP milestones: early guidance, analytic blueprint, options selection, and final agency review. As shown in Table 5, average adherence for major milestones varied from 58 to 72 percent, which was less than the overall ADP checklist adherence of 81 percent. Similarly, average nonadherence varied from 20 to 36 percent, which was greater than overall ADP checklist nonadherence of 14 percent.

Table 5: Average rule adherence by major milestone[a]

Major Milestone	Adherent	Nonadherent	Undetermined
Early Guidance	59%	36%	5%
Analytic Blueprint	72%	21%	7%
Options Selection	58%	30%	3%
Final Agency Review	59%	20%	21%

Source: OIG analysis. (EPA OIG table)

[a] Rules were evaluated based on their progression through the rulemaking process and applicable major milestones.

One reason average milestone adherence may be lower than overall average ADP adherence is that our checklist included steps that the EPA must complete, such as sending a rule to the GAO or Congress before implementation. In contrast, the four major ADP milestones are solely governed by the *ADP Guidance* and are more flexible.

Additionally, interviewees indicated that early administrator involvement outside of the formal milestone meetings may contribute to lower-than-average milestone adherence. For example, a clear action plan and accelerated schedule may make early guidance or options selection meetings redundant. According to the OP, final agency review adherence may be lower because positions provided verbally during these meetings are not always documented. While final agency review is the opportunity for all internal rulemaking stakeholders to comment on the rule before signature and publication, we observed a lack of written positions documenting assistant or regional administrator concurrence or nonconcurrence of the participating office or region for some of these milestone meetings.

Chapter 3
Several Factors Contribute to ADP Nonadherence

Writing and implementing regulations are significant tools that the EPA uses to protect human health and the environment. The EPA designed the ADP to equip rule writers with the tools necessary to write rules through an open process that consistently yields high-quality actions. OIG-assessed ADP adherence ranged from 44 to 100 percent. We also noted lower adherence to the process for economically significant rules and major ADP milestones. We identified two reasons for nonadherence for the rules we evaluated:

- Program offices skipping milestones, without workgroup concurrence, and, as a result, the OP designating milestones as "moot." We noted inconsistent documentation for moot justifications.

- The OP and program offices not maintaining documentation on major milestones in ADP Tracker. We found that 30 of 58 rulemakings contained less than half of major milestone documentation in the system.

Interviewees and notes in ADP Tracker indicated that reasons for designating milestones as moot include expediting rulemaking timelines and considering the milestone as unnecessary for specific rulemakings. Missing documentation in ADP Tracker stemmed from inconsistent program office approaches to data entry, confusion on some items, and a lack of system monitoring by the OP for data quality. Additionally, several interviewees said ADP training could be improved. Given the OP's resource constraints, staff unavailability, and competing demands, as well as requests for shorter, on-demand training, the OP has not conducted formal, in-person training for several years.

Key Agency stakeholders, such as rule workgroup chairs and OP analysts, expressed confusion about the decision-making process in selected rules. In response to our questions on risks to rule quality absent clear direction and communication, all OP analysts and others interviewed indicated that the ADP should be followed. They also shared that rules are consistently high quality when the ADP is implemented appropriately and when the Agency's leadership treats the ADP as necessary and important for quality actions.

Waivers Used for Tier 1 Rules Despite Clear Administrator Direction

When reviewing rules and available documentation in ADP Tracker, we included waivers in our calculations for adherence as the *ADP Guidance* includes a formal waiver process. The ADP allows adjusting the process depending on changing circumstances. According to the *ADP Guidance*, those adjustments should be documented in waivers approved by senior management in cases in which the

workgroup deems that a step is unnecessary. Of the 58 rules analyzed, we noted that the OP associate administrator approved waivers for 20 rules. Additionally, we found no evidence of a requested waiver being disapproved. According to the ORPM director, milestone waivers are nearly always granted by the OP associate administrator, and participating offices typically agree to the waiver.

While the *ADP Guidance* allows for using waivers, then-Administrator Wheeler, in an August 2018 memorandum, said, "I do not intend to waive ADP milestones for Tier 1 rules, which are defined under the ADP as those actions reflecting the Administrator's top priorities and requiring extensive cross-office coordination." The memorandum reiterates the ADP requirements for requesting waivers, suggesting that the administrator's memorandum only spoke to intent and did not prohibit waivers. Even so, of the 20 rules with waivers, seven were Tier 1 rules at some point during the review period, and six of those had at least one waiver approved by the OP after the date of the administrator's memorandum. Notably, of these six waivers, four pertained to milestones that were marked as "completed" and not "waived" in ADP Tracker. During our review, we considered all waivers granted at any point during our scope as adherent if the waivers were requested in accordance with *ADP Guidance*.

Undefined Moot Designations Resulted in Lower Adherence

Moot designations contributed to lower OIG-assessed adherence rates, including for economically significant rules. We found that 14 of 58 rules had milestones designated as moot. It is unclear who is responsible for approving moot designations, though OP desk officers ultimately enter designations, and 13 individual entries for five different rules in ADP Tracker indicated that OP management directed the moot designations. Seven interviewees expressed confusion on the meaning and usage of moot designations, including conflating moot designations with the waiver process, and said the term should not exist in the ADP.

ADP Guidance Does Not Define Moot, Resulting in Confusion on Justifications for Its Use

The *ADP Guidance* does not define or discuss moot designations. We, therefore, included milestones designated as moot in our calculations for nonadherence because the step was not completed, and the waiver process was not followed. Nonadherence because of moot designations occurred in 14 of 58 rules.

The ORPM director said that moot designations occur when circumstances have evolved; for example, if a milestone is overtaken by events, such as an unexpected schedule change, or a policy directive from a political appointee had accomplished the intent of a particular ADP milestone. In such circumstances, the OP determines whether it would be useful to complete a milestone because

previous events made the milestone "moot." OP managers said they use the term in the ADP Tracker system when running reports on upcoming milestones.

Interviewees provided various reasons for using the moot designation, some of which we found overlapped with parameters for seeking waivers, indicating staff confusion on the moot designation. We noted the following circumstances in evaluating ADP Tracker and documents provided by program office staff, as well as from interviews with workgroup chairs and points of contact for rules with moot designations:[6]

- Retroactively designating a milestone as moot. For example, the rulemaking was sent to the OMB for review before completing all major milestones; later, the uncompleted milestones were designated as moot. Eight rules noted this circumstance, and five of those listed OMB review as the event precipitating the moot designation.

- Milestone waived at the NPRM phase and designated as moot for final phase. One rule noted this circumstance.

- ADP Tracker stated that the OP designated the milestone as moot and no further information was provided. Seven rules noted this circumstance.

- Compressed rulemaking schedule. Four rules noted this circumstance.

- Milestone not necessary for the type of rulemaking. For example, in annual rulemakings with quick turnarounds involving frequent conversations with leadership, formal milestones were not necessary. One rule noted this circumstance.

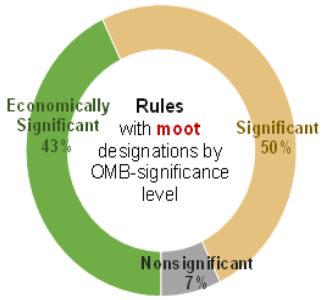
Per the *ADP Guidance*, the formal waiver process could have been followed for at least the last two circumstances, resulting in improved adherence to the process.

[6] When rules had multiple moot justifications, we considered each independent justification when generating the overall list.

Use of Moot Designations Resulted in Lower Adherence, Particularly for Economically Significant Rules

Of the 58 rules analyzed, 14 rules had milestones designated as moot. Additionally, 42 rules were OMB significant, including ten economically significant rules. Of those ten rules, six had at least one moot designation and comprise 43 percent of all rules with moot designations within our selection, as shown in Figure 6. As mentioned earlier, economically significant rules are designated as such because of their potential impact on the economy, the environment, public health, or other factors.

Figure 6: OMB-significance level for rules with moot designations



Source: OIG analysis. (EPA OIG graphic)

According to the ORPM's director, decisions made at the political level result in skipped milestones that OP career staff designated as moot. For example, Agency staff said that in one economically significant rule, its moot designation resulted from decisions or directives by political personnel and were beyond the workgroup's control.

Interviewees Want Clarity on Moot or No Use of Moot Designations

There was confusion regarding the meaning and usage of moot designations among the six OP analysts we interviewed. For example, three analysts suggested that additional guidance and a process for utilizing the moot designation was needed, and two analysts indicated that formally waiving milestones per *ADP Guidance* is a better, more appropriate approach. Workgroup chairs interviewed on selected rulemakings were also unaware of the meaning of moot designations. Two OP analysts and a representative from a core office said that the term should not exist as part of the ADP. While not explicitly supporting the use of moot designations, one interviewee noted that, as a manager of the ADP, it was the OP's prerogative to introduce and accept such designations.

Lack of Documentation in ADP Tracker Hindered Adherence Determinations

The OP uses ADP Tracker to manage all actions that follow the ADP, and ADP Tracker training describes the system as the EPA's database for managing and tracking regulatory documents and information. ADP Tracker system goals include tracking milestones and workflow and managing workgroups. However, we noted missing and inconsistent documentation. Federal and EPA record-keeping requirements apply to regulatory decisions, and a March 2017 administrator memorandum requires program and regional offices to report all

regulatory actions in a management system. Additionally, while a 2013 memorandum to all RSC members generally required program office staff to upload materials associated with four major milestones into ADP Tracker, we found that ADP Tracker contained less than half of major milestone documentation for 30 of 58 rulemakings (52 percent). Our assessment of the EPA's adherence to the ADP was inhibited by poor data quality and a lack of complete documentation in the ADP Tracker database. We also noted issues with ADP Tracker information related to reliability, integrity, usability, and authenticity.

The OP and the EPA's Records Center do not consider ADP Tracker an official records-management system, and the OP's senior leaders said the system was never intended to house "all" information on every rule. Program office staff responsible for entering information into ADP Tracker said that they include different levels of documentation, from dates to uploading decision documents. They also noted challenges in keeping information in the database up-to-date because of turnover and heavy workloads. We also found that the OP does not formally monitor the system for data quality but rather revises dates as necessary when generating reports for the *Semiannual Regulatory Agenda*. We agree that not all information needs to be captured in ADP Tracker. However, the *ADP Guidance*, ADP training, administrator memorandums, and the 2013 RSC memorandum explicitly require tracking information on the four major ADP milestones. This information is used to update the EPA's senior managers, the OMB, and Congress.

Federal and EPA Record-Keeping Requirements Include Regulatory Decisions

Federal employees are required to maintain federal records per the Federal Records Act. Specifically, 44 U.S.C. § 3101 requires the head of every federal agency to "make and preserve records containing adequate and proper documentation of the organization, functions, policies, decisions, procedures, and essential transactions of the agency and designed to furnish the information necessary to protect the legal and financial rights of the Government and of persons directly affected by the agency's activities." National Archives and Records Administration regulations, specifically 36 C.F.R. § 1222.22, state that:

> A record "includes all recorded information … made or received by a Federal agency under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency … as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the United States Government or because of the informational value of data in them."
>
> 44 U.S.C. § 3301(a)

> To meet their obligation for adequate and proper documentation, agencies must prescribe the creation and maintenance of records

> that: . . . (e) Document the formulation and execution of basic policies and decisions and the taking of necessary actions, including all substantive decisions and commitments reached orally (person-to-person, by telecommunications, or in conference) or electronically.

Implementing this regulatory provision, the EPA's *Interim Records Management Policy* states that:

> EPA must properly and adequately document Agency business in accordance with [National Archives and Records Administration] NARA regulations. To meet these obligations, EPA employees and non-employees who manage records must create and maintain records that: . . . Document the formulation and execution of basic policies and decisions and the taking of necessary actions, including all substantive decisions and commitments reached orally (person-to-person, by telecommunications, or in conference) or electronically.

Although ADP Tracker is not an official records-management system, inputs to ADP Tracker document regulatory decisions and actions and, therefore, constitute Agency records. According to EPA Records Schedule 1023, these types of "nonsubstantial rulemaking records" may be closed at the end of the calendar year or upon completion of the relevant action and destroyed 20 years after file closure.

Additionally, EPA and National Archives and Records Administration sources note four components of trustworthy records: reliability, authenticity, integrity, and usability.

OP Should Oversee Data Accuracy in ADP Tracker

The ORPM maintains the ADP Tracker system. While the OP oversees the system as overall process manager for the ADP, the OP shares system data-entry responsibility with program offices. According to the OP's *ADP Tracker Data Entry Responsibilities* guidance, dated August 15, 2013, the lead office developing or revising an action is ultimately responsible for the accuracy, consistency, and completeness of the data in ADP Tracker. If the lead office is unable to update its data in a timely fashion, the OP can update particular data fields when necessary for accurate reporting to the EPA's senior managers, the OMB, Congress, or others. Such OP updates do not negate the lead office's responsibility for overall data integrity, nor does it mean that the OP has assumed ongoing responsibility for the data fields that were updated. Additionally, the OP is responsible for entering process-management data—which are items like moot designations and waiver approvals for which the OP is the decision-maker—and for interacting with the OMB.

In a March 24, 2017 memorandum, then-Administrator Scott Pruitt said that "to both expand and improve our internal mechanisms for information sharing," Agency offices "shall report all regulatory actions in the agency's regulatory management system." He added that "[o]fficials entering information in the system must certify its accuracy and update the information in a timely manner." Per then-Administrator Pruitt, these efforts would help the EPA, "as one of the most active regulatory agencies in federal government," ensure that its policymaking process is of the highest quality. In his August 2018 memorandum on the EPA's internal regulatory development process, then-Administrator Wheeler further emphasized vigilantly on reviewing and updating information in the EPA's regulatory tracking system.

OP senior leaders emphasized the role of the program offices in maintaining documentation on rules. They also noted that the rulemaking docket is the official repository for documentation of substantive decisions made during the rulemaking process, but it does not house information about the four major ADP milestones because these milestones pertain to the EPA's internal process rather than substantive support for rules' contents. Additionally, the ORPM director said that the ADP tracker has the capability to house various documents but that offices are not consistently utilizing that capability. Since the OP is within the Office of the Administrator and it oversees ADP Tracker, the OP is responsible for reinforcing documentation expectations and system capabilities with program offices and periodically monitoring the system for data quality.

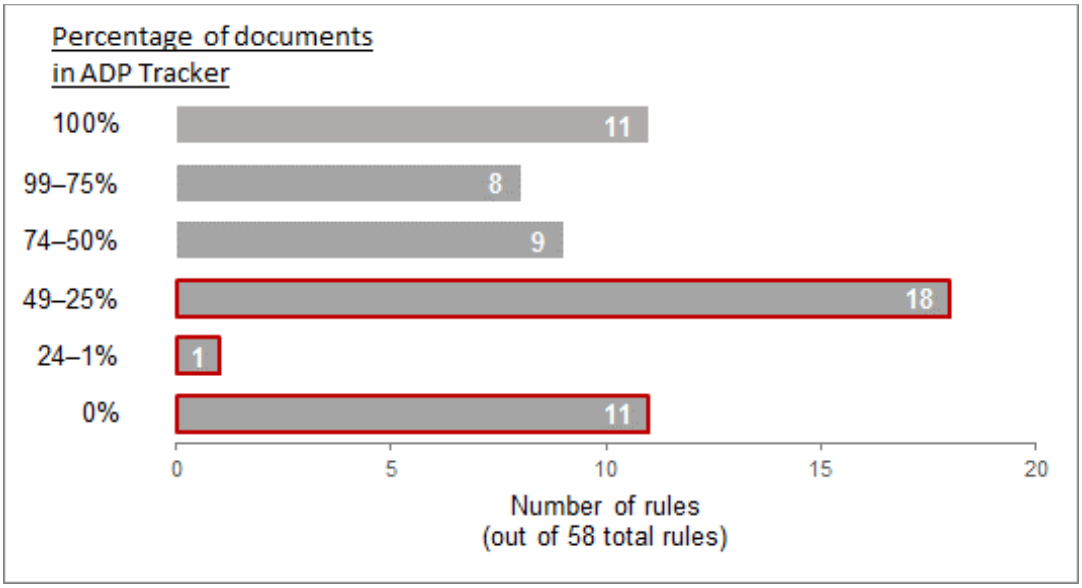
Most Selected Rulemakings Lacked Milestone Documentation in ADP Tracker

As noted above, the 2013 RSC memorandum generally required program office staff to upload materials associated with four major milestones for Tier 1 and Tier 2 actions—early guidance, analytic blueprint, options selection, and final agency review—into ADP Tracker. The 2013 RSC memorandum specified that lead program office staff are required to upload key documents supporting early guidance, analytic blueprints, and options selection, while OP staff are required to upload final agency review summary memorandums. Moreover, some of these same documents were noted as "products of quality actions" in OIG Report No. 13-P-0167, *Efficiency of EPA's Rule Development Process Can Be Better Measured Through Improved Management and Information*, issued on February 28, 2013. See Appendix B for details on this report.

Out of 58 rulemakings, 30 (52 percent) had less than half of major milestone documentation in ADP Tracker (Figure 7). For this analysis, we accepted documentation, such as meeting summary memorandums, decision documents, final agency review memorandums, and any detailed analytic blueprint. We also accepted alternative documentation that provided evidence of the content of

milestone meetings, dates when meetings occurred, and meeting attendees. Incomplete documentation was not accepted as evidence of milestone completion.

Figure 7: Use of ADP Tracker for required documents on major milestones



Source: OIG analysis. (EPA OIG graphic)

Out of the 58 rules we reviewed, five had an ANPRM, 55 had a NPRM, and 27 had a final rulemaking phase. We found the following:

- ANPRM—For the five rulemakings that should have had documentation on key milestones in ADP Tracker, four rulemakings, or 80 percent, had less than half of the required items in the system. *ADP Guidance* notes that ANPRM follows the ADP at the appropriate tier level.

- NPRM—For the 55 rulemakings that should have had documentation on key milestones in ADP Tracker, 29 rulemakings, or 53 percent, had less than half of the required items in the system.

- Final—For the 27 rulemakings that should have had documentation on key milestones in ADP Tracker, 13 rulemakings, or 48 percent, had less than half of the required items in the system.

Our analysis identified 11 rulemakings that had all (100 percent) of required major milestone documentation in ADP Tracker.

Concerns on Trustworthiness of Some Documentation in ADP Tracker

ADP Tracker houses internal decision points on the Agency's rulemakings, and internal stakeholders should be able to rely on the information pertaining to those

decisions. As stated previously, the EPA and the National Archives and Records Administration state that the four components of trustworthy records are reliability, authenticity, integrity, and usability. "Reliability" includes having a full and accurate representation of all transactions, activities, or facts to which the records attest and can be depended upon during subsequent transactions or activities. Information in records must be complete and unaltered to preserve its integrity. Usable information in records must be retrieved, presented, located, and interpreted when needed. "Authentic information" in records can be proven to be what it claims to be, have been created or sent by the persons claiming to have created or sent it, and have been created or sent at the claimed time.

Using the above definition, we identified data quality issues in the ADP Tracker database, including:

- Decisions from the various program offices and the OP were not officially documented and maintained. For example, because of decisions being made at a high-organizational level and a subsequent lack of documentation of those decisions, interviewees were unaware of the ultimate status of milestones reflected in ADP Tracker.

- Information in ADP Tracker was incorrect, missing, or outdated. For example, for the six rules that had waivers after the administrator released his 2018 memorandum, four were not marked as "waived" but rather as "completed." Other areas in ADP Tracker were also mislabeled. Over a dozen rules had discrepancies between dates or milestone status noted in ADP Tracker and actual dates on source documents or status of milestones provided by program offices.

- Confusion from EPA staff, in response to our document request, on whether ADP Tracker accurately showed milestones as waived or as designated moot. For example, one response indicated "waived as moot."

- Difficulty in locating or retrieving requested documentation.

- At least one instance of a milestone backdated to depict subsequent milestones as on track.

EPA staff responsible for entering data into ADP Tracker said that there are few individuals who are responsible for keeping milestones updated in the database. They added that there is at least one office that does not have a dedicated person in that role and that office has struggled to keep up with the ADP data-entry responsibilities. Program office staff responsible for entering data each described varying levels of documentation ranging from entering dates only to uploading decision documents. They also noted challenges in keeping database information updated because of turnover and heavy workloads.

OP staff said that the system always has some outdated data given that hundreds of actions are in development at any given moment and each action has many data fields. OP managers said there is no realistic scenario in which all the data in ADP Tracker are accurate and current. The ORPM's director added that these challenges exist for information management systems generally and are not unique to ADP Tracker.

Interviewees Expressed Support for Using ADP Tracker for Its Fullest Capabilities

Three OP staff we interviewed indicated that ADP Tracker could be better utilized and more accurate and complete. Other interviewees, such as rule workgroup chairs, said they use ADP Tracker inconsistently. Additionally, one RSC member said that the system could include not only dates but also all memorandums, waiver requests, and documentation generated for rulemakings. OP managers said nothing prevents offices from fully utilizing ADP Tracker and that the OP emphasizes this and periodically monitors the system as ADP managers.

The EPA plans to transition from ADP Tracker to the EPA Action Management System during the summer of 2021; however, absent consistent data entry and monitoring for data quality, the new system may include the same types of errors and deficiencies we identified. Rulemaking is fundamental to the Agency's mission. Improved oversight of the tracking database could help the EPA achieve its objectives of efficiently and effectively managing the ADP.

ADP Training Should Be Improved

According to the OP's website, the ORPM manages the EPA's action development and review process and provides comprehensive action development training for EPA staff and managers. The workgroup chairs we interviewed recalled few specific, formal ADP training opportunities and said that most training has been on-the-job and through self-paced training and webinars on the OP's ADP Library. One OP analyst told us that new political appointees used to be briefed on the ADP, but the analyst did not note the status of this training for new political appointees. The OP said that the ORPM director has briefed political appointees and that individual program offices can also provide training within their own organizations or request that the OP provide training. The OP previously held a formal, in-person, three-day training course for staff at least annually, but that training has not been held in several years because of resource constraints, staff unavailability, and competing demands. OP managers added that there have been requests from EPA staff to move away from more formal training in Washington, D.C., to online, module-style training.

In our analysis of 58 rules and through our interviews, we noted situations that demonstrate, in part, the impact of not having training, including:

- The OP staff needing to remind workgroups of what to do to comply with the ADP. One OP analyst said most workgroup chairs are not familiar with the ADP process.

- Cross-media offices, which are invited to participate in workgroups for all Tier 1 and Tier 2 actions, may be perceived as less important than other offices and their input may not always be appropriately considered during rulemakings. For example, staff and managers we interviewed in the Office of Children's Health Protection said that their office is often forgotten or left out of the process. Both the OIG and the GAO have reported on the need to consider children's health in rulemaking (Appendix B).

- EPA staff did not fully document some ADP milestones.

- As noted above, interviewees were confused on the difference between waivers and moot designations.

Given the significance of rulemaking as one of the EPA's primary tools to protect human health and the environment, familiarity with the ADP is critical for the Agency's success in achieving its mission. The ADP is a complex process involving many different internal stakeholders; steps; and a myriad of considerations, such as executive orders to consider children's health and environmental justice impacts. The EPA relies on staff to develop high-quality rules to accomplish their missions. Training could help provide consistent ADP application and give Agency staff the breadth and depth of knowledge it takes to develop quality actions.

Conclusion

As the Agency notes in its *ADP Guidance*, much of the EPA's environmental success and organizational credibility are directly linked to the quality of the EPA's active regulatory work. Taking action to address ADP nonadherence, confusion on milestone designations, tracking system documentation, and training could enhance the credibility of the Agency's rulemaking process. Regulations that are based on sound science, promote economic efficiency, and are implementable and enforceable allow the EPA to achieve its mission to protect human health and the environment.

Recommendations

We recommend that the associate administrator for Policy:

1. On an annual basis, reinforce the expectation that the Action Development Process will be followed for all regulatory actions, including procedures to waive milestones for Tier 1 and Tier 2 actions.

2. Query key internal rulemaking stakeholders, such as the Regulatory Steering Committee, workgroup chairs, and Office of Policy staff, on the use of the moot designation and determine whether the designation is necessary and appropriate. If a decision is made to use the moot designation, define moot, clarify its applicability, and institute documentation requirements for using the moot designation in the Action Development Process.

3. Define for program offices the key regulatory decisions and information that offices are expected to include in the Action Development Process tracking database.

4. In coordination with program offices, develop a plan to improve oversight of the Action Development Process tracking database that includes periodic assessments or system checks to verify that the database includes identified key regulatory decisions and information.

5. Query EPA staff, through Regulatory Steering Committee representatives, on the adequacy of existing Action Development Process training and revise training methods and reallocate resources for training as needed.

Agency Response and OIG Assessment

While the Agency agreed with our recommendations and provided corrective actions and completion dates for all recommendations, more specific details are required to resolve recommendations. Specifically:

- Recommendation 1 previously stated, "On an annual basis, reinforce the EPA administrator's expectation that the Action Development Process will be followed for all regulatory actions, including procedures to waive milestones for Tier 1 and Tier 2 actions." We struck reference to the EPA administrator given the change in administration. In its response, the OP said that the incoming administrator "will issue a memo affirming the importance of the Action Development Process." Additionally, per our recommendation, the OP as ADP managers should annually reinforce adherence to the process and waiver procedures. This recommendation is unresolved pending clarity on the OP's annual efforts to reinforce the ADP in addition to the new administrator's memorandum.

- The OP's planned corrective action partially addresses Recommendation 2 on querying internal rulemaking stakeholders but does not address specific steps we noted once a decision is made regarding the use of moot designations. The estimated completion date in the OP's response is unclear whether it is for the first part or the full recommendation. As such, this recommendation is unresolved.

- Recommendation 3 is resolved with corrective actions pending. We note, however, that our recommendation is not dependent on development of the EPA Action Management System and that key information should be defined for ADP Tracker if the transition to the new system extends beyond the OP's estimated completion date.

- The OP's planned corrective actions for Recommendation 4 to "initiate a discussion" on a plan does not meet the intent of our recommendation to "develop a plan" that includes periodic assessments or system checks to verify that the ADP tracking database includes identified key regulatory decisions and information. As such, this recommendation is unresolved.

- Recommendation 5 is unresolved pending evidence of the OP's training survey results and training plan adjustments.

Additionally, the OP provided general feedback on the content of the draft report for our consideration. While we acknowledge that the *ADP Guidance* is an internal document and represents an expected, but not mandatory, process for developing EPA regulatory actions, we also note that the ADP is the Agency's decades-old process for developing regulatory actions and that decisions and actions resulting from ADP milestones are regulatory decisions.

The OP's response also noted that ADP Tracker is not a record-keeping system. We agreed and reiterate, however, that ADP Tracker includes records of the Agency's regulatory decisions and major milestones. Therefore, the designation of ADP Tracker as an information tracking system has no bearing on whether information input to that system includes records nor on the retention schedule applicable to those records.

Finally, the OP's response included comments on the methodology used for this report. For example, due to the inconsistent data entry, we could not solely rely on ADP Tracker information on milestone meetings. The Agency correctly asserts that if there was no documentation of such a meeting occurring, we did not consider it as adhering to the ADP. We did consider a range of documentation as appropriate when assessing ADP milestone adherence. The OP also notes that it is within the administrator's discretion to provide direction outside the context of the formal ADP milestone meetings. We agree and noted the importance of documenting these decisions as part of the Agency's established process for developing quality actions. The Agency's full response to our draft report is in Appendix E.

Status of Recommendations and Potential Monetary Benefits

RECOMMENDATIONS						
Rec. No.	Page No.	Subject	Status[1]	Action Official	Planned Completion Date	Potential Monetary Benefits (in $000s)
1	26	On an annual basis, reinforce the expectation that the Action Development Process will be followed for all regulatory actions, including procedures to waive milestones for Tier 1 and Tier 2 actions.	U	Associate Administrator for Policy		
2	27	Query key internal rulemaking stakeholders, such as the Regulatory Steering Committee, workgroup chairs, and Office of Policy staff, on the use of the moot designation and determine whether the designation is necessary and appropriate. If a decision is made to use the moot designation, define moot, clarify its applicability, and institute documentation requirements for using the moot designation in the Action Development Process.	U	Associate Administrator for Policy		
3	27	Define for program offices the key regulatory decisions and information that offices are expected to include in the Action Development Process tracking database.	R	Associate Administrator for Policy	9/30/21	
4	27	In coordination with program offices, develop a plan to improve oversight of the Action Development Process tracking database that includes periodic assessments or system checks to verify that the database includes identified key regulatory decisions and information.	U	Associate Administrator for Policy		
5	27	Query EPA staff, through Regulatory Steering Committee representatives, on the adequacy of existing Action Development Process training and revise training methods and reallocate resources for training as needed.	U	Associate Administrator for Policy		

[1]C = Corrective action completed.
R = Recommendation resolved with corrective action pending.
U = Recommendation unresolved with resolution efforts in progress.

Appendix A

Internal Control Assessment

This table identifies which internal control components and underlying principles are significant to our audit objectives.

Which internal control components are significant to the audit objectives?		Which internal control principles are significant to the audit objectives?	
X	**Control Environment** The foundation for an internal control system. It provides the discipline and structure to help an entity achieve its objectives.	X	1. The oversight body and management should demonstrate a commitment to integrity and ethical values.
		X	2. The oversight body should oversee the entity's internal control system.
			3. Management should establish an organizational structure, assign responsibilities, and delegate authority to achieve the entity's objectives.
			4. Management should demonstrate a commitment to recruit, develop, and retain competent individuals.
		X	5. Management should evaluate performance and hold individuals accountable for their internal control responsibilities.
X	**Risk Assessment** Management assesses the risks facing the entity as it seeks to achieve its objectives. This assessment provides the basis for developing appropriate risk responses.	X	6. Management should define objectives clearly to enable the identification of risks and define risk tolerances.
		X	7. Management should identify, analyze, and respond to risks related to achieving the defined objectives.
		X	8. Management should consider the potential for fraud when identifying, analyzing, and responding to risks.
		X	9. Management should identify, analyze, and respond to significant changes that could impact the internal control system.
X	**Control Activities** The actions management establishes through policies and procedures to achieve objectives and respond to risks in the internal control system, which includes the entity's information system.	X	10. Management should design control activities to achieve objectives and respond to risks.
		X	11. Management should design the entity's information system and related control activities to achieve objectives and respond to risks.
		X	12. Management should implement control activities through policies.
X	**Information and Communication** The quality information management and personnel communicate and use to support the internal control system.		13. Management should use quality information to achieve the entity's objectives.
		X	14. Management should internally communicate the necessary quality information to achieve the entity's objectives.
			15. Management should externally communicate the necessary quality information to achieve the entity's objectives.
X	**Monitoring** Activities management establishes and operates to assess the quality of performance over time and promptly resolve the findings of audits and other reviews.	X	16. Management should establish and operate monitoring activities to monitor the internal control system and evaluate the results.
		X	17. Management should remediate identified internal control deficiencies on a timely basis.

Source: Based on internal control components and principles outlined in GAO-14-704G, Standards for Internal Control in the Federal Government (also known as the "Green Book"), issued September 10, 2014.

Appendix B

Detailed Scope and Methodology

Rule Review Checklist and Selected Rulemakings

We used the *ADP Guidance* to develop a 15-step checklist to assess selected rulemakings for ADP adherence, repeating some steps for applicable phases of the rulemaking process, such as ANPRM, NPRM, and final, for a total of 38 checklist items to assess. Appendix C contains the checklist we used to assess ADP adherence.

We used two rules to test our checklist methodology—one randomly selected from the OAR and one randomly selected from the group of OCSPP, OLEM, and OW rules. Our selected rulemakings originally included 86 Tier 1 and Tier 2 rules tiered during fiscal years 2015 through 2019 or from October 1, 2014, through September 30, 2019. We excluded the proposed rule "Repeal of Emission Requirements for Glider Vehicles, Glider Engines, and Glider Kits," 82 Fed. Reg. 53442 (November 16, 2017), which the OIG had audited per a congressional request, resulting in 85 rules for analysis. This group included high-profile rules explicitly subject to the ADP per the *ADP Guidance* and a mix of in-process and completed rules to illustrate different stages of the ADP. Because some rules were ongoing during our audit:

- We did not review any documents on our selected rulemakings developed after January 22, 2020, when we first met with the OP about this topic.
- Information, such as Executive Order 12866 significance or tiering level, may have changed since we initiated our audit.

The *ADP Guidance* was updated in 2015 and again in 2018 with minor changes. Therefore, when creating the checklist and evaluating the rules, the team made no distinction between the versions. The checklist focuses on items that were consistent between the two versions.

Items included in the checklist are:

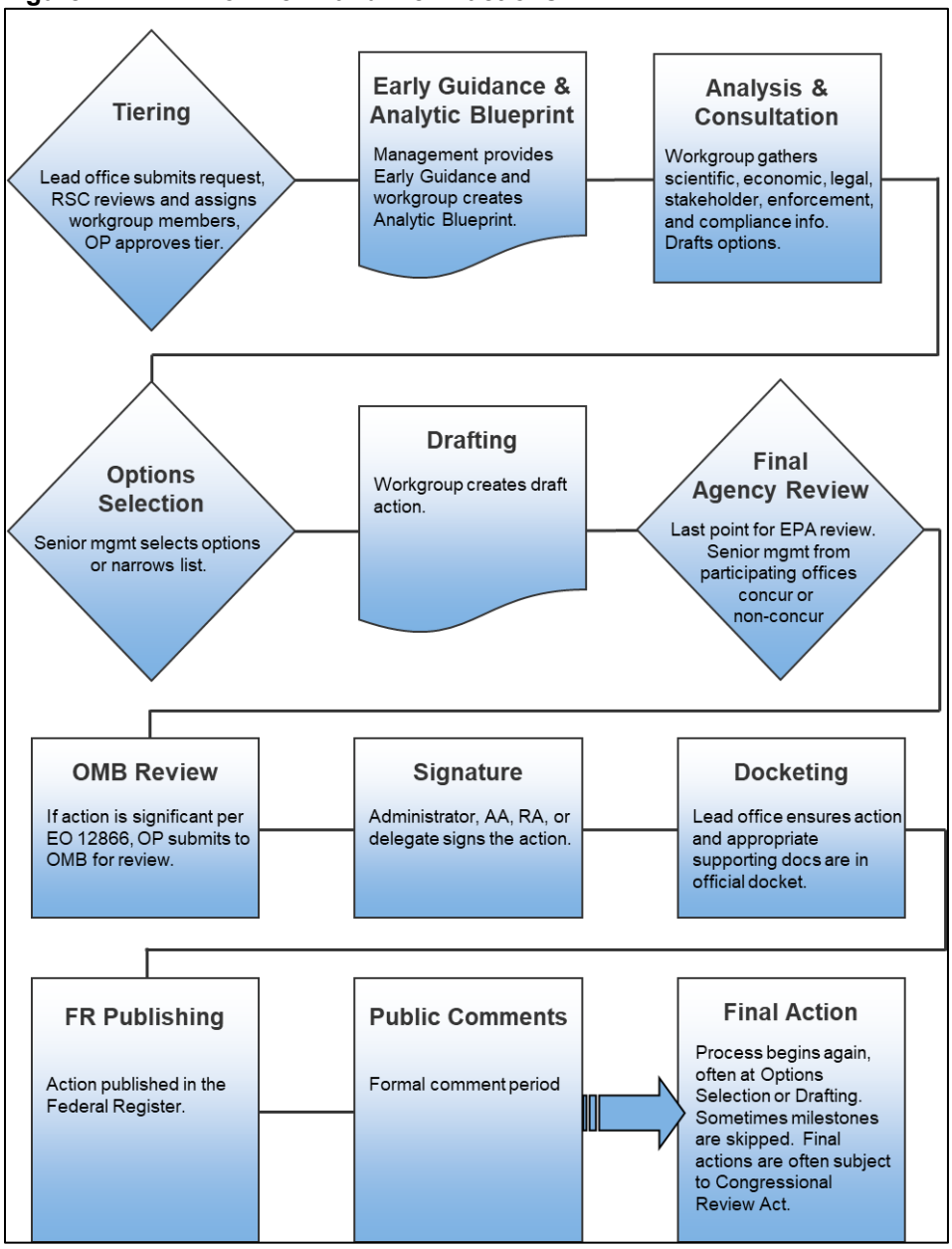
- Significant milestones or milestones required for all Tier 1 and Tier 2 rulemakings, such as tiering, early guidance, and options selection as described in Tables 1 and 2 in Chapter 1.

- Areas of concern in the ADP from prior OIG work, such as workgroup involvement and analytic blueprint development.

- ADP steps to comport with OMB and other regulatory requirements, such as an appropriate signing official and submission to Congress and the GAO, before the rule takes effect.

More information on the items above is described in the following flowchart (Figure A-1) that depicts the EPA's ADP for Tier 1 and Tier 2 actions.

Figure A-1: ADP for Tier 1 and Tier 2 actions



Source: EPA ADP Library process flowchart "General Process for Tier 1 & 2 Proposed Rules." (EPA graphic)

After requesting the supporting documentation for the checklist items from either the OP or program offices, we learned that some items were too burdensome to provide, time limitations did not allow for sufficient OIG review, or hard-copy documents could not be retrieved from EPA headquarters because of the coronavirus pandemic. Therefore, we decided not to pursue

collecting the supporting documentation and we excluded corresponding checklist items, resulting in the final 15-step checklist we used for our analysis.

After completing initial checklists on each of the 85 rulemakings, we developed three criteria to exclude a group of rules from our summary analysis. Criteria included:

- The only milestone that occurred before January 22, 2020, was tiering and a workgroup may or may not have been formed.
- The rulemaking was withdrawn or canceled from the regulatory agenda before ANPRM (if applicable) or being published in the *Federal Register* during NPRM.
- The rulemaking was a minor wording change or extension of effective date.

Using these exclusion criteria, the full checklist and summary analysis applied to 58 rules. Appendix D lists both the rules we analyzed and those we excluded.

For each selected rulemaking, we reviewed available information in ADP Tracker and requested and reviewed needed documentation from the OP and rule workgroup chairs or points of contact. As needed, we interviewed OP analysts and workgroup chairs or points of contact to ask rule-specific questions to verify information on activities and decisions. We did not perform analysis to determine the statistical significance of any differences we observed, and average percent adherence values should not be extrapolated to all EPA rulemakings.

Throughout our audit, we noted inaccurate or incomplete information in ADP Tracker for our selected rulemakings. We also heard concerns from interviewees about the accuracy and completeness of information in ADP Tracker. Chapter 3 of this report summarizes shortcomings we noted with the EPA's ADP Tracker system. We used ADP Tracker information to the extent we could, though not solely (except to determine the tiering date of an action as we could not access tiering forms because of the coronavirus pandemic), and we sought as much additional documentation as practicable outside of ADP Tracker to support our findings and conclusions.

Prior Audit Coverage

We reviewed prior relevant reports issued by our office and the GAO, including:

- OIG Report No. 20-P-0047, *EPA Failed to Develop Required Cost and Benefit Analyses and to Assess Air Quality Impacts on Children's Health for Proposed Glider Repeal Rule Allowing Used Engines in Heavy-Duty Trucks*, issued on December 5, 2019. The OIG found that the EPA did not follow the ADP in developing the proposed Glider Repeal Rule, nor did it meet Federal Records Act requirements. The OIG noted that, according to EPA managers and officials, then-Administrator Pruitt directed that the Glider Repeal Rule be promulgated as quickly as possible and that he directed the OAR to develop the proposed rule without conducting the analyses required by the executive orders. The OIG found that the lack of analyses caused the public to not be informed of the proposed rule's benefits, costs, potential alternatives, and impacts on children's health during the public comment period. Among other recommendations, the OIG recommended that the EPA document decisions, including substantive decisions reached orally; comply with

applicable record-keeping and docketing requirements, including those found in the Federal Records Act; and comply with both the EPA's *Interim Records Management Policy* and the *ADP Guidance*. The Agency agreed to implement corrective actions to address two of the three recommendations. As of September 30, 2020, the third recommendation remains unresolved.

- OIG Report No. 13-P-0167, *Efficiency of EPA's Rule Development Process Can Be Better Measured Through Improved Management and Information*, issued on February 28, 2013. The OIG found that the EPA had limitations in rulemaking documentation and guidance, and the Agency was unable to evaluate the efficiency of the rulemaking process or identify delays in its rulemaking activities. Some limitations included tracking and documentation, which challenged the Agency's ability to monitor, evaluate, and assure the efficiency of EPA rulemaking. The OIG found that the EPA's database for creating and tracking rules was sparsely populated and did not contain the necessary documents or information to allow the team to complete its review. The OIG found program offices were not adequately utilizing the Agency's database because of a lack of standardized procedures from the OP describing who was responsible for uploading the developmental documents to the databases used to manage the ADP process. The OIG recommended that the associate administrator for OP establish guidance, maintain database documentation, and track resources to enhance the Agency's ability to determine the efficiency of the rulemaking process. Corrective actions were completed for all three of the report's recommendations.

- GAO-18-22, *Federal Regulations: Key Considerations for Agency Design and Enforcement Decisions*, dated October 19, 2017. The GAO found that the EPA's procedures require that enforcement officials participate in ADP rule-drafting groups for rules involving "precedent-setting policy implications" and "extensive cross-agency participation." The GAO also found that the Office of Enforcement and Compliance Assurance's training and guidance materials encouraged rule writers to incorporate compliance principles, such as clarity, consistency, and transparency, into their decision-making and consider how regulatory design choices can influence later compliance and need for enforcement. The report made no recommendations.

- GAO-13-254, *Environmental Health: EPA Has Made Substantial Progress but Could Improve Processes for Considering Children's Health,* dated August 12, 2013. The GAO found that the EPA could not be assured that it had thoroughly addressed risks to infants and children because the Agency neither systematically evaluated nor consistently documented how it considered children's health risks in rulemaking. The GAO also found that the EPA had not taken the steps necessary to improve the Office of Children's Health Protection's ability to use the rulemaking system efficiently to identify actions involving children's health, such as which regulatory workgroups would be appropriate for staff participation. The EPA agreed with the GAO's recommendation that the EPA require lead program offices to document their decisions in rulemakings and other actions regarding how health risks to children were considered. According to the GAO's website, the corrective actions have been implemented.

Appendix C

OIG Checklist Used to Assess ADP Adherence

Item*	Question Number	Question Wording
General		
1	Q1	When was the rulemaking tiered?
2	Q2	Was a workgroup formed for the rulemaking?
3	Q5	Were executive orders and applicable analyses addressed in the rulemaking's preamble?
4	Q15	Was the final rule submitted to the Congress and the GAO before it took effect?
ANPRM		
5	Q3(A)	Did an early guidance meeting or approved waiver occur?
6	Q4(A)	Was an analytic blueprint developed?
7	Q6(A)	Did an options selection meeting or approved waiver occur?
8	Q7(A)	Was a final Agency review meeting held for the rulemaking?
9	Q8(A)	At the final Agency review, were the written positions of the AAs/RAs represented to the workgroup chair, RSC representative, and the appropriate Regulatory Management Division desk officer?
10	Q9.1(A)	If one nonconcurrence occurred and no agreement was reached on how to proceed, did the lead office include the comments in the Action Memorandum with an explanation of why it could not satisfactorily address them?
11	Q9.2(A)	If more than one nonconcurrence occurred and no agreement was reached on how to proceed, did OP alert the regulatory policy officer about the nonconcurrence?
12	Q10(A)	Was the rulemaking signed by the appropriate EPA official?
13	Q11(A)	What was the date the docket was made publicly available?
14	Q12(A)	Was the docket made publicly available no later than the date of issuance/publication of the action?
15	Q13(A)	Did the published rulemaking include instructions on when, where, and how to submit public comments?
16	Q14(A)	Prior to final rule, did the workgroup consider significant public comments relevant to the proposed rule or draft action submitted during the comment period (including new information prompting reconsideration of options or supporting material)?
NPRM		
17	Q3(N)	Did an early guidance meeting or approved waiver occur?
18	Q4(N)	Was an analytic blueprint developed?
19	Q6(N)	Did an options selection meeting or approved waiver occur?
20	Q7(N)	Was a final Agency review meeting held for the rulemaking?
21	Q8(N)	At the final Agency review, were the written positions of the AAs/RAs represented to the workgroup chair, RSC representative, and the appropriate Regulatory Management Division desk officer?
22	Q9.1(N)	If one nonconcurrence occurred and no agreement was reached on how to proceed, did the lead office include the comments in the Action Memorandum with an explanation of why it could not satisfactorily address them?
23	Q9.2(N)	If more than one nonconcurrence occurred and no agreement was reached on how to proceed, did OP alert the regulatory policy officer about the nonconcurrence?
24	Q10(N)	Was the rulemaking signed by the appropriate EPA official?
25	Q11(N)	What was the date the docket was made publicly available?
26	Q12(N)	Was the docket made publicly available no later than the date of issuance/publication of the action?
27	Q13(N)	Did the published rulemaking include instructions on when, where, and how to submit public comments?

Item*	Question Number	Question Wording
28	Q14(N)	Prior to final rule, did the workgroup consider significant public comments relevant to the proposed rule or draft action submitted during the comment period (including new information prompting reconsideration of options or supporting material)?
Final		
29	Q3(F)	Did an early guidance meeting or approved waiver occur?
30	Q4(F)	Was an analytic blueprint developed?
31	Q6(F)	Did an options selection meeting or approved waiver occur?
32	Q7(F)	Was a final Agency review meeting held for the rulemaking?
33	Q8(F)	At the final Agency review, were the written positions of the AAs/RAs represented to the workgroup chair, RSC representative, and the appropriate Regulatory Management Division desk officer?
34	Q9.1(F)	If one nonconcurrence occurred and no agreement was reached on how to proceed, did the lead office include the comments in the Action Memorandum with an explanation of why it could not satisfactorily address them?
35	Q9.2(F)	If more than one nonconcurrence occurred and no agreement was reached on how to proceed, did OP alert the regulatory policy officer about the nonconcurrence?
36	Q10(F)	Was the rulemaking signed by the appropriate EPA official?
37	Q11(F)	What was the date the docket was made publicly available?
38	Q12(F)	Was the docket made publicly available no later than the date of issuance/publication of the action?

* Any item could have been considered “N/A” depending on the rule. Rulemakings were only evaluated against items that applied to an individual rulemaking.

Appendix D

Adherence of Selected Rulemakings

Table D-1 lists the rules we reviewed and range of adherence, nonadherence, and undetermined adherence. We categorized the table by applicable rulemaking phase, from the time of rule tiering through January 22, 2020.

Table D-1: Reviewed rules and level of adherence

Rule title	Program office	OMB significance*	ADP adherence**		
			Yes	No	Undetermined
ANPRM phase only					
Methylene Chloride; Commercial Paint and Coating Removal Training, Certification and Limited Access Program	OCSPP	Significant	92%	8%	0%
Increasing Consistency and Transparency in Considering Costs and Benefits in the Rulemaking Process	OP	Significant	70%	30%	0%
Addition of Certain Per- and Polyfluoroalkyl Substances to the Toxics Release Inventory	OCSPP	Significant	64%	18%	18%
ANPRM and NPRM phases					
Control of Air Pollution from New Motor Vehicles: Heavy-Duty Engine Standards	OAR	Nonsignificant	93%	7%	0%
ANPRM, NPRM, and final phases					
Repeal of the Clean Power Plan; Emission Guidelines for GHG Emissions from Existing Electric Utility Generating Units; Revisions to Emission Guideline Implementing Regulations	OAR	Economically Significant	74%	26%	0%
NPRM phase only					
Financial Responsibility Requirements under CERCLA Section 108(b) for the Petroleum and Coal Products Manufacturing Industry	OLEM	Significant	100%	0%	0%
Financial Responsibility Requirements under CERCLA Section 108(b) for the Chemical Manufacturing Industry	OLEM	Significant	100%	0%	0%
Review of Dust-Lead Post-Abatement Clearance Levels	OCSPP	Significant	100%	0%	0%
Control of Air Pollution From Aircraft and Aircraft Engines: Proposed GHG Emissions	OAR	Significant	100%	0%	0%

Rule title	Program office	OMB significance*	ADP adherence**		
			Yes	No	Undetermined
Standards and Test Procedures					
Clean Energy Incentive Program Design Details	OAR	Significant	100%	0%	0%
Endangerment Finding for Lead Emissions from Piston-Engine Aircraft Using Leaded Aviation Gasoline	OAR	N/A	100%	0%	0%
Clean Water Act 404 Assumption Update Regulation	OW	N/A	100%	0%	0%
Trichloroethylene; Rulemaking under Toxic Substances Control Act Section 6(a); Vapor Degreasing	OCSPP	Economically Significant	92%	8%	0%
N-Methylpyrrolidone; Regulation of Certain Uses under TSCA Section 6(a)	OCSPP	Significant	92%	8%	0%
CERCLA Financial Responsibility Requirements: Electric Power Generation, Transmission, & Distribution Industry, Petroleum & Coal Products Manufacturing Industry, & Chemical Manufacturing Industry	OLEM	Significant	91%	9%	0%
Peak Flows Management	OW	N/A	86%	14%	0%
Designating perfluorooctanoic acid and perfluorooctanesulfonic acid as CERCLA Hazardous Substances	OLEM	Significant	86%	0%	14%
Trichloroethylene Use in Dry Cleaning and Aerosol Degreasing –TSCA Section 6(a)	OCSPP	Significant	85%	15%	0%
Renewables Enhancement and Growth Support Rule	OAR	Significant	83%	17%	0%
NESHAP: Miscellaneous Organic Chemical Manufacturing RTR	OAR	Significant	83%	0%	17%
Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source Category	OW	Economically Significant	82%	18%	0%
Pesticides; Agricultural Worker Protection Standard; Revision of the Application Exclusion Zone Requirements	OCSPP	Significant	82%	18%	0%
Increasing Consistency and Transparency in Considering Benefits and Costs in the	OAR	N/A	80%	0%	20%

Rule title	Program office	OMB significance*	ADP adherence**		
			Yes	No	Undetermined
Clean Air Act Rulemaking Process					
NESHAP: Organic Liquids Distribution (Non-Gasoline) RTR	OAR	Nonsignificant	77%	8%	15%
Review of the National Ambient Air Quality Standards for Particulate Matter	OAR	N/A	75%	25%	0%
Clean Water Act Section 404(c) Regulatory Revision	OW	N/A	75%	25%	0%
Treatment of Biogenic Carbon Dioxide Emissions under the Clean Air Act Permitting Programs	OAR	N/A	86%	14%	0%
Revisions to the Prevention of Significant Deterioration and Title V GHG Permitting Regulations and Establishment of a GHG Significant Emission Rate for GHG Emissions Under the Prevention of Significant Deterioration Program	OAR	Significant	69%	31%	0%
Decabromodiphenyl Ether; Regulation of Persistent, Bioaccumulative, and Toxic Chemicals Under TSCA Section 6(h)	OCSPP	Significant	69%	8%	23%
Fuels Regulatory Streamlining	OAR	N/A	63%	13%	25%
Strengthening Transparency in Regulatory Science	Office of Research and Development	Significant	50%	33%	17%
Modernizing the Administrative Exhaustion Requirements for Permitting Decisions and Streamlining Procedures for Permit Appeals	Office of General Counsel	Nonsignificant	45%	27%	27%
NPRM and Final Phases					
Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources Reconsideration	OAR	Economically Significant	100%	0%	0%
NESHAP: Generic Maximum Achievable Control Technology Standards RTR for Ethylene Production	OAR	Nonsignificant	100%	0%	0%
NESHAP: Integrated Iron and Steel Manufacturing Facilities RTR	OAR	Nonsignificant	100%	0%	0%

Rule title	Program office	OMB significance*	ADP adherence**		
			Yes	No	Undetermined
Implementation of the 2015 National Ambient Air Quality Standards for Ozone: State Implementation Plan Requirements	OAR	Significant	95%	5%	0%
Clean Water Act Hazardous Substances Spill Prevention	OLEM	Nonsignificant	95%	5%	0%
NESHAP: Site Remediation RTR	OAR	Nonsignificant	93%	7%	0%
Supplemental Finding that it is Appropriate and Necessary to Regulate Hazardous Air Pollutants from Coal- and Oil-Fired Electric Utility Steam Generating Units	OAR	Significant	91%	9%	0%
Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources Review	OAR	Significant	87%	13%	0%
Procedures for Evaluating Existing Chemical Risks under the TSCA	OCSPP	Significant	82%	18%	0%
Renewable Fuel Volume Standards for 2019 and Biomass-Based Diesel Volume for 2020	OAR	Economically Significant	82%	18%	0%
Review of Standards of Performance for GHG Emissions from New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units	OAR	Significant	81%	19%	0%
Prevention of Significant Deterioration and Nonattainment New Source Review: Project Emissions Accounting	OAR	Significant	80%	20%	0%
Model Trading Rules for GHG Emissions from Electric Utility Generating Units Constructed on or Before January 8, 2014	OAR	Significant	83%	17%	0%
Municipal Separate Storm Sewer System General Permit Remand Rule	OW	Significant	77%	14%	9%
Renewable Fuel Volume Standards for 2017 and Biomass-Based Diesel Volume for 2018	OAR	Economically Significant	77%	23%	0%
Renewable Fuel Volume Standards for 2018 and Biomass-Based Diesel for 2019	OAR	Economically Significant	77%	23%	0%

Rule title	Program office	OMB significance*	ADP adherence**		
			Yes	No	Undetermined
Modifications to Fuel Regulations to Provide Flexibility for E15; Modifications to Renewable Fuel Standard Renewable Identification Number Market Regulations	OAR	Significant	77%	5%	18%
Procedures for Prioritization of Chemicals for Risk Evaluation under the TSCA	OCSPP	Significant	76%	24%	0%
Amendments to Implementing Regulations for Reviewing and Acting on Clean Air Act Section 111(d) State Plans	OAR	Nonsignificant	76%	6%	18%
Methylene Chloride; Regulation of Paint and Coating Removal for Consumer Use Under TSCA Section 6(a)	OCSPP	Significant	73%	18%	9%
Repeal of Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units	OAR	Economically Significant	67%	33%	0%
NESHAP: Coal- and Oil-Fired Electric Utility Steam Generating Units--Reconsideration of Supplemental Cost Finding and RTR	OAR	Significant	65%	24%	12%
Renewable Fuel Standard Program: Standards for 2020, Biomass-Based Diesel Volumes for 2021, and Other Changes	OAR	Significant	63%	0%	37%
Definition of "Waters of the United States" – Recodification of Preexisting Rules	OW	Economically Significant	57%	24%	19%
The Navigable Waters Protection Rule: Definition of "Waters of the United States"	OW	Significant	44%	31%	25%
The Safer Affordable Fuel-Efficient Vehicles Rule for Model Years 2021-2026 Passenger Cars and Light Trucks	OAR	Economically Significant	44%	56%	0%

Source: OIG analysis. (EPA OIG table)

*According to publicly available sources such as reginfo.gov.

** "Yes" includes percent of checklist items that adhered to the ADP (includes approved waivers), "no" includes percent checklist items that did not adhere to the ADP (includes moot steps), and "undetermined" is unable to determine ADP adherence due to a lack of documentation.

Table D-2 lists the rules excluded from analysis and the reason for their exclusion.

Table D-2: Rules excluded from analysis and criteria for exclusion

Rule title	Program office	Applicable exclusion criteria*
Federal Plan Requirements for GHG Emissions from Electric Utility Generating Units Constructed on or Before January 8, 2014	OAR	2
Development of Significant Impact Level for Ozone in Prevention of Significant Deterioration Regulations	OAR	2
NESHAP for Coke Ovens: Pushing, Quenching, and Battery Stacks	OAR	2
Emission Guidelines for the Existing Oil and Natural Gas Sector	OAR	2
Standards of Performance for Glass Manufacturing Plants	OAR	1
Reconsideration of Standards of Performance and Emission Guidelines for Municipal Solid Waste Landfills	OAR	1
Renewable Fuel Standard Program: Modification of Statutory Volume Targets	OAR	2
Review of Primary National Ambient Air Quality Standards for Ozone	OAR	1
On-Highway Heavy-Duty Trailers: Review of Standards and Requirements	OAR	1
NESHAP: Generic Maximum Achievable Control Technology II - Cyanide Chemicals Manufacturing RTR	OAR	1
NESHAP: Primary Magnesium Refining RTR	OAR	1
NESHAP: Primary Copper Smelting RTR	OAR	1
NESHAP: Carbon Black Production RTR	OAR	1
NESHAP: Generic Maximum Achievable Control Technology Standards for Spandex Production RTR	OAR	1
NESHAP: Semiconductor Manufacturing RTR	OAR	1
NESHAP: Flexible Polyurethane Foam Fabrication Operations RTR and Flexible Polyurethane Foam Production and Fabrication Area Sources Technology Review	OAR	1
NESHAP: Refractory Products Manufacturing RTR	OAR	1
NESHAP: Mercury Cell Chlor-Alkali Plants RTR	OAR	1
NESHAP: Chemical Manufacturing Area Source Technology Review	OAR	1
Advancing Clean Aircraft Engines and Reforming Particulate Matter Test Procedures Under Clean Air Act Section 231	OAR	1
Pesticides; Certification of Pesticide Applicators Rule; Reconsideration of the Minimum Age Requirements	OCSPP	2
Pesticides; Certification of Pesticide Applicators Rule; Extension of Effective Date	OCSPP	3
Polychlorinated Biphenyls; Reassessment of Use Authorizations for Polychlorinated Biphenyls in Small Capacitors in Fluorescent Light Ballasts in Schools and Daycares	OCSPP	2

Rule title	Program office	Applicable exclusion criteria*
Extension of Compliance Date for TSCA Reporting of Chemical Substances When Manufactured or Processed as Nanoscale Materials	OCSPP	3
Pesticides; Agricultural Worker Protection Standard; Reconsideration of Several Requirements	OCSPP	2
Water Resources Reform Development Act Farm Amendments to the Spill Prevention Control and Countermeasures Rule	OLEM	1
Effluent Limitations Guidelines and Standards for the Construction and Development Point Source Category; Correcting Amendment	OW	3

Source: OIG analysis.

*Applicable exclusion criteria:

1. The only milestone that occurred before January 22, 2020, was tiering and a workgroup may or may not have been formed.
2. The rulemaking was withdrawn or canceled from the regulatory agenda before ANPRM (if applicable) or being published in the *Federal Register* during NPRM.
3. The rulemaking was a minor wording change or extension of effective date.

Agency Response to Draft Report

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

OFFICE OF POLICY

MEMORANDUM

SUBJECT: Response to the Office of Inspector General Draft Report, Project No. OA&EFY20-0067, "*EPA Does Not Always Adhere to Its Established Action Development Process,"* dated February 1, 2021

FROM: Vicki Arroyo, Associate Administrator
Office of Policy

Arroyo, Victoria Digitally signed by Arroyo, Victoria Date: 2021.03.02 17:33:42 -05'00'

TO: Patrick Gilbride, Director
Environmental Research Programs Directorate
Office of Audit and Evaluation

Thank you for the opportunity to respond to the issues and recommendations in the subject draft audit report. Following is a summary of the U.S. Environmental Protection Agency's overall response, along with its position on each of the report's recommendations. We have provided high-level corrective actions and estimated completion dates.

AGENCY'S OVERALL RESPONSE

The events and issues outlined in the draft report occurred over the past several years, before the arrival of the new senior leadership at EPA. My colleagues and I support the purpose and goals of EPA's internal Action Development Process (ADP), particularly that EPA's regulatory actions should be developed with input from across the agency and based on sound policy, analytical, and scientific foundations. Many people from the incoming senior leadership team, including those joining the Administrator's Office and major program offices, have already been briefed on the ADP and the important role it plays.

The IG's report identifies some concerning examples of process deviations, including conclusory determinations by political leadership in the last Administration that preempted robust engagement through the ADP process. New leadership at EPA understands the importance of adhering to the ADP process to inform development of sound policy and is committed to correcting any deficiencies that occurred in the past.

While we agree that process improvements can be made and we are generally supportive of the recommendations in the draft report, we have some concerns about the report's methodology and content. For example, the ADP Guidance is an internal guidance document that outlines the expected process for developing EPA regulatory actions. These internal guidelines, however, are not the same as mandatory requirements, and the ADP was never intended to result in a rigid checklist to determine "adherence." In fact, the guidance itself sets out expectations for an internal process that is deliberately designed to be flexible and accommodate many of the needs and contingencies of regulatory action development.

The draft report presents ADP Tracker as a records management system. However, ADP
Tracker was never designed to be one, it is not used as one, and it is not designated as one by EPA's Records Center. In fact, under the retention schedule that applies to ADP Tracker, entries in the system are disposable and can be deleted when no longer needed for business purposes.
This is important context for the nature and type of information stored in ADP Tracker. Similarly, ADP Tracker is not designed or intended to include or preserve information regarding substantive decisions related to rulemaking. Those decisions, and any analysis and justification for them, are properly stored in official recordkeeping systems and in the official docket for the rule. Finally, the information in ADP Tracker is generally internal, deliberative, and predecisional, making it distinct from information contained in the public docket that would facilitate public participation in rulemaking. The absence of specific documentation in ADP Tracker related to individual internal rule development steps is not a sign of agency recordkeeping shortcomings and does not speak to the adequacy of the substantive record for an individual rule.

Further, EPA has some concerns regarding methodological issues in the draft report. It is not possible, for instance, to verify that adherence values for individual rules, as defined in the report, are correct. It is also not clear exactly what criteria would lead to a designation of adherence, nonadherence, or undetermined for a specific rule milestone, or what level of documentation would be sufficient to show adherence. This is important for understanding the report because it appears that if a rule development meeting happened as expected, but some paperwork related to the meeting is not contained in ADP Tracker, that would be deemed as not "adhering" to the ADP. Finally, it should be noted that EPA, with OIG agreement, did not conduct an exhaustive search for requested

documentation or records, for example, in the case where the originator of the information is no longer at the Agency. Even if it were determined, by some established criteria, that documentation for an internal procedural meeting was insufficient, that would not support more sweeping statements in the draft report regarding possible adverse effects on litigation and enforcement, the compromise of e-government transactions, or the impairment of program operations.

The report makes assertions about the level of adherence for different rule types. But with the uncertainty in how adherence was defined and applied, the amount of undetermined adherence, and in many cases the small number of rules in different subcategories, it is likely that apparent differences in the level of adherence for different rule types are not meaningful, and certainly are not indicative of any larger set of EPA rules. This issue should be corrected or at least acknowledged, since it impacts much of the content and analysis in the draft report.

While current EPA leadership will strive to use the ADP as designed and acknowledges that doing so has many advantages, the formal meetings outlined in the ADP are not the sole way that policy direction can be conveyed by the senior leadership of the agency. One of the goals of the ADP is to ensure the senior leadership of the agency can provide direction at key moments during rule development. However, it is also within the Administrator's discretion to provide rule development instructions outside of the usual ADP framework when necessary. External events, such as the vacatur of a rule, can result in very explicit policy direction. In these and other circumstances, policy level direction has been provided or predetermined and it would be duplicative and unnecessary to then hold the corresponding ADP milestone meeting. Although these relatively rare circumstances are not discussed in the current ADP Guidance, portraying the lack of a particular milestone meeting as inherently inappropriate is misleading, and implies that the Administrator is precluded from offering direction outside the confines of a few formal meetings described in internal guidance.

The draft report also implies that some waivers, which are explicitly allowed under the ADP, were somehow inappropriately granted because the waiver requests occurred after a previous Administrator stated in a memo that he did not intend to waive milestones for certain rules. This is an inappropriately rigid reading of the memo, as it only speaks to intent. In fact, the same memo reiterates, consistent with the ADP Guidance, that any waivers require the approval of the Office of Policy Associate Administrator. While the OIG draft report directly quotes this prior Administrator memo, this crucial context, which is in the very next sentence of the memo being quoted, is omitted from the draft report. As we contemplate having the new Administrator affirm the ADP and express his intent to follow it to the maximum extent possible, such a memo should not preclude the agency from using the flexibilities already included in the ADP.

Thank you for reviewing the Action Development Process. We agree that the process serves as a strong foundation for developing actions that protect human health and the environment and fully support its use across the Agency.

AGENCY'S RESPONSE TO DRAFT AUDIT RECOMMENDATIONS

No.	Recommendation	High-Level Corrective Action(s)	Est. Completion Date
1	On an annual basis, reinforce the EPA administrator's expectation that the Action Development Process will be followed for all regulatory actions, including procedures to waive milestones for Tier 1 and Tier 2 actions.	The incoming EPA Administrator or other senior political official will issue a memo affirming the importance of the Action Development Process.	Q3, FY21
2	Query key internal rulemaking stakeholders, such as the Regulatory Steering Committee, workgroup chairs, and Office of Policy staff, on the use of the moot designation and determine whether the designation is necessary and appropriate. If a decision is made to use the moot designation, define moot, clarify its applicability, and institute documentation requirements for using the moot designation in the Action Development Process.	Office of Policy staff will discuss internally and with the Regulatory Steering Committee the use of the moot designation to clarify its current use and inform a decision as to whether it or some other designation should be formally incorporated into the ADP Guidance.	Q3, FY21
3	Define for program offices the key regulatory decisions and information that offices are expected to include in the Action Development Process tracking database.	The Office of Policy will provide information to the Regulatory Steering Committee that clarifies the appropriate information to be entered into EAMS as part of the transition from ADP Tracker.	Q4, FY 2021
4	In coordination with program offices, develop a plan to improve oversight of the Action Development Process tracking database that includes periodic assessments or system checks to verify that the database includes identified key regulatory decisions and information.	The Office of Policy will initiate a discussion with the Regulatory Steering Committee about the development of such a plan.	Q3, FY2021
5	Query EPA staff, through Regulatory Steering Committee representatives, on the adequacy of existing Action Development Process training and revise training methods and reallocate resources for training as needed.	The Office of Policy surveyed the Regulatory Steering Committee in October 2020 about training needs and is adjusting future ADP training to be responsive to the input received.	Q2, FY2021

CONTACT INFORMATION

If you have any questions regarding this response, please contact the Office of the Administrator's Audit Follow-up Coordinator, Michael Benton, at benton.michael@epa.gov or 202-564-2860.

Attachment

cc: William Nickerson, Office of Policy
Erin Barnes-Weaver, Program Manager, OIG
Andrew LeBlanc, Agency OIG Follow-Up Coordinator, Office of the Comptroller
Michael Benton, Audit Follow-Up Coordinator, Office of the Administrator
Marc Vincent, Audit Follow-Up Coordinator, Office of Air and Radiation
Janet Weiner, Audit Follow-Up Coordinator, Office of Chemical Safety and Pollution Prevention Gwendolyn Spriggs, Audit Follow-Up Coordinator, Office of Enforcement and Compliance Assurance
Shanquenetta Anderson, Audit Follow-Up Coordinator, Office of General Counsel
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