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

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OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

MEMORANDUM

SUBJECT: Interim OECA Guidance on Enhancing Regional-State Planning and Communication on Compliance Assurance Work in Authorized States

FROM: Susan Parker Bodine
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TO: Regional Administrators

Introduction and Scope

The U.S. Environmental Protection Agency's FY2018-2022 Strategic Plan establishes both *cooperative federalism* (Goal 2) and *compliance with the law* (Objective 3.1) as fundamental priorities for the agency. In particular, Objective 2.1 states that the EPA will: "Improve environmental protection through shared governance and enhanced collaboration with State, tribal, local, and federal partners using the full range of compliance assurance tools." In using our compliance assurance tools, Objective 3.1 stresses the need to maintain a level playing field, stating that noncompliance with the law "unfairly tilts the field of economic competition in favor of those that skirt the law."

To help develop these priorities, the EPA and ECOS formed the ECOS-EPA Workgroup on State & Federal Collaboration in Compliance Assurance that kicked off in September 2017 (hereinafter "the Compliance Assurance Collaboration Workgroup"). This workgroup is expected to develop principles and best practices for State and EPA collaboration in inspections and enforcement, work planning and implementation, National Enforcement Initiatives, and outcome and performance measurement.

Today's Interim Guidance is being issued in order to immediately begin the movement toward a more collaborative partnership between the EPA and authorized States, with the expectation that this Interim Guidance will be updated after the Compliance Assurance Collaboration Workgroup has finished its work. It applies to all EPA compliance assurance activities, such as inspections and enforcement, in authorized State environmental programs (coordination with other state agencies and Tribal governments is also encouraged).[1]

[1] This Interim Guidance is consistent with the principles of the U.S. EPA Deputy Administrator's 1986 *Revised Policy Framework for State/EPA Enforcement Agreements*, but with an updated emphasis on cooperative federalism. The 1986 Revised Policy already incorporates a great deal of flexibility. The EPA will exercise that flexibility in support of cooperative federalism. This Interim Guidance should be regarded as the starting point for EPA and State collaboration while it is in effect. The agency has not decided if and/or how the 1986 *Revised Policy* Framework should be revised or updated.

Periodic Joint Work Planning

1) Each Region should meet, preferably in-person, with the senior leadership in each of its States, as appropriate and agreed-upon, based on needs and styles of the specific State-Regional relationship.

   a) As a practical matter, discussions of specific inspections and enforcement actions are likely to occur at the career management level among States and Regions. This means Regions should have procedures in place for ensuring senior Regional leadership have the information and the procedures for keeping the State's political leadership informed of the nature of work sharing arrangements and collaboration between the State and the EPA on compliance assurance work and issues, such as any high profile inspections and enforcement actions that are planned (based on the considerations discussed in paragraph 2 of this section). This communication up and down the management chain within EPA Regions and the States is critical for maintaining a collaborative relationship with "no surprises." Such communications may vary to meet the needs of individual Regions and States, but the key consideration is that the procedures for communicating up and down are known and implemented.

2) At these meeting(s) and/or conference calls, the Region and the State should discuss and share information on at least these important topics:

   a) The environmental compliance problems and needs in the State, the compliance assurance priorities for the State and the Region, and how the combined resources of the State and the EPA could be used to effectively address these needs and ensure a level playing field.
   b) The Region and the State could share lists of facilities planned to be inspected in that year or quarter (depending on the planning time line), and discuss who should do those inspections. If lists of planned inspections are exchanged, there should be a common understanding between the Region and the State concerning if/when a facility will be informed of the inspection in advance.
   c) EPA Regions and States should provide explanations of why specific facilities are proposed for inspection so that they can engage in a meaningful discussion about the value and need for the inspections, priorities, and capacity. This is not simply exchanging lists of planned inspections for informational purposes.
   d) How the Region and State will use their combined resources to meet national inspection coverage expectations per applicable Compliance Monitoring Strategies, and whether an alternative compliance monitoring approach is appropriate.
   e) Any planned program audits (e.g., per the State Review Framework), and the results of any program audits that suggest a State program deficiency. EPA findings should be considered preliminary until the State has had an opportunity to review and respond. The Region should provide the State with an opportunity to address a confirmed deficiency within a reasonable time frame before taking any direct action arising out of the audit (except where public health or the environment would be harmed without expeditious action).

State Primacy in Authorized Programs

1) With respect to inspections and enforcement, the EPA will generally defer to authorized States as the primary day-to-day implementer of their authorized/delegated programs, except in specific situations. The EPA believes that exceptions to this general practice should be identified through close communication and involvement of upper management of both agencies.

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2) Examples of the types of situations that could warrant EPA involvement in individual inspections and enforcement following close communication and involvement of upper management of both agencies include, but are not limited to:

   a) Program audits indicate a need for the EPA to fill a gap until the State program deficiency is addressed.
   b) Emergency situations or, situations where there is significant risk to public health and the environment.
   c) Significant noncompliance that the State has not timely or appropriately addressed.
   d) Actions that require specialized EPA equipment (e.g., infrared camera) and/or expertise.
   e) Federal and State owned/operated facilities.
   f) Actions to consistently address widespread noncompliance problems in a sector/program (such as the National Enforcement Initiatives[2]), to address companies with facilities in multiple States, or where there are cross-boundary impacts affecting other States, tribes, or nations.
   g) Program oversight inspections.
   h) Responses to State requests for assistance in a specific situation, or broader work-sharing arrangements in which the EPA takes the lead in particular sub-programs, sectors, or geographic areas.
   i) Serious violations that need to be investigated and addressed by the EPA's criminal enforcement program.

3) Where the EPA identifies violations at a facility, but the State requests that it take the lead for remedying the violations, the Region should defer to the State except where the EPA believes that some EPA involvement is warranted (as described in paragraph 2, above). Such matters should be discussed between upper management of both agencies. If the State takes over the lead on such a case, the Region and the State should have a clear understanding of what the EPA considers to be a timely and appropriate response and the Region should document this understanding with the State. Regions should keep a record of these decisions and periodically assess how well this is working.

4) In a circumstance where senior leadership in the Region and State do not agree on a particular matter (such as, the appropriate enforcement response to a violation, whether there is a violation, or how federal law or EPA policy should be interpreted or implemented), the matter should be elevated to the OECA Assistant Administrator for a decision. This elevation is important to ensure a consistent national program among States and the EPA and a level playing field for regulated entities.

Evaluation of this Interim Guidance and Limitations

1) By September 28, 2018, Regions should provide OECA with a progress report on their work in following this Interim Guidance, including their views on how well it is working and areas for improvement. In July 2018, OECA will provide the Regions with a format for this progress report.

[2] EPA engagement with the States on the current NEI strategies will likely include: (1) implementing a standard way to solicit State input into prioritization of facilities for attention within the NEI strategies; (2) continuing to offer training to States for a particular NEI strategy; (3) routinely inviting States to participate on NEI inspections; and (4) supporting opportunities for interested States to address noncompliance such that violations are addressed consistent with national expectations with progress and results reported to EPA. Going forward, the EPA will enhance State engagement in identifying potential changes to the current NEIs and the next round of NEIs.

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2) OECA will solicit State views on how well the guidance is working and areas for improvement.

3) In FY2019, the EPA will review this Interim Guidance and update it as appropriate based on input from the Regions in their progress reports and recommendations, input from state, federal, tribal and local compliance partners, and work-products from the Compliance Assurance Collaboration Workgroup.

4) This Interim Guidance is intended for use by EPA personnel and does not create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officers, or any person. This Interim Guidance is not intended to supersede any statutory or regulatory requirements or agency policy. Any inconsistencies between this Interim Guidance and any statute, regulation, or policy should be resolved in favor of the relevant statutory or regulatory requirement, or policy document. The EPA may revise, replace or discontinue this Interim Guidance at any time.

cc: Lawrence Starfield, Principal Deputy Assistant Administrator, OECA
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