



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

MAR 12 2012

MEMORANDUM

SUBJECT: Inspector General's (OIG) December 9, 2011 Evaluation Report, Project No. OPE-FY10-0022, "EPA Must Improve Oversight of State Enforcement"

FROM: Robert Perciasepe
Deputy Administrator

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TO: Arthur A. Elkins, Jr.
Inspector General

We appreciate the opportunity to review and comment on the Office of Inspector General's (OIG) December, 2011 Evaluation Report entitled: "EPA Must Improve Oversight of State Enforcement" (Project No. OPE-FY10-0022). We again thank you for tackling this challenging topic, which is critically important to the protection of human health and the environment and to achieving compliance, as states are on the "front line" of implementing federal environmental laws.

Summary Comments

EPA agrees with the overall finding that state enforcement performance varies widely across the country and that there are steps EPA can and should take to strengthen oversight and address longstanding state performance issues. As we stated in our response to the draft Report, we strongly support making performance information publicly available in an easy-to-understand format to improve both federal and state government performance.

Although we agree with the overall conclusion that state performance is uneven, we are concerned that the specific assessments of state performance in the report are not accurate. Because the report relies on a very narrow range of data – which is, as we explained to the IG, both incomplete and ambiguous – the conclusions it reaches on specific state performance are not well supported. The public may therefore be misled about state performance, because the report contains both inaccurately positive and inaccurately negative assessments of specific state performance. We appreciate the desire to use simple metrics to answer complex questions, but



do not think it advances the discussion of the important issues raised by this report to publish state performance information that can be so readily dismissed as not authoritative.

The principal concern with the Report remains the limited number of oversimplified metrics, and the associated methodology relied on by the OIG to assess state performance. The methodology used by the IG - averaging performance by and across programs using a small number of ambiguous metrics - oversimplifies what should be examined by a more comprehensive review process. Fair evaluation of a state enforcement program requires a thorough analysis of multiple factors considered within the context of a state's overall compliance and enforcement performance. The issues surrounding the use of the metrics and methodology utilized by the IG make the more detailed state-specific conclusions problematic. The results presented by the IG in the Report are not sufficiently robust to accurately distinguish varying levels of performance. We are disappointed the IG did not accept our comments regarding the significant challenges of accurate state oversight.

To improve state performance, EPA has enthusiastically embraced and is actively promoting "Next Generation Compliance," a new paradigm for the enforcement program that utilizes information and field technology to help identify, address and publicly report compliance issues and information. Next generation compliance activities include electronic reporting, use of new technologies in the field, and building implementation strategies into our rules that incentivize and increase compliance. These approaches will help improve government performance in implementing environmental programs and in conducting oversight of state environmental enforcement programs.

Apart from concerns about accuracy, the snapshot approach to assessing state performance also does not include important and relevant information about trends over time. States that are moving in a positive direction deserve both recognition and a different oversight response. EPA recognizes that improving state performance often requires extended time and effort. While a state at any given moment may not meet EPA expectations, states that are actively working to improve their programs should be recognized for those efforts. States that achieve continuous improvement toward addressing and correcting specific performance issues should not be characterized as poor performers without acknowledging their progress, especially in this difficult budgetary environment. EPA remains concerned that publicizing results or conclusions based on these limited metrics provides an incomplete and erroneous picture of state performance and could have the unintended consequence of moving states toward a more simplistic, and less protective, enforcement program.

Because the IG reviewed data only through 2009, the report also does not reflect work that has happened since that time. We appreciate the IG's responding to our request that post-2009 work at least be referenced in the report, even if not included in any of the data presented.

Methodology, Metrics and Data

Each of the three metrics used by the IG are ambiguous when used to rate performance. The IG metrics lack a full accounting of the limitations of each metric and fail to consider the context around the metric and the data itself. By rolling up the three metrics to reach individual state

program conclusions, even in a comparative way, the IG arrived at significantly different conclusions than those of EPA based on the use of broader, more in-depth analyses (such as those in the State Review Framework (SRF)). In addition, rolling up metrics across programs compounds the inaccurate or erroneous conclusions reached by the IG.

The metrics and data selected by the IG focus almost exclusively on major facilities and inspections. This is problematic because it ignores inaccurate or incomplete universe information, cumulative and/or locally significant impacts of smaller facilities, negotiated alternative monitoring plans and trade-offs, and new, emerging ways to determine compliance. Another significant shortcoming of the IG's methodology is the reliance on the percentage of inspections resulting in the identification of significant noncompliance (SNC)/high priority violations (HPV). This metric does not recognize issues associated with under-reporting (e.g., exclusion of SNC/HPVs identified via other compliance monitoring activities), or differences in how SNC/HPV are determined, and does not consider whether identified noncompliance is addressed.

Finally, by relying solely on the analysis of formal enforcement that includes penalties, the IG ignores formal enforcement actions that do not include penalties and informal actions that do assess penalties (including Administrative Penalty Orders as currently defined in the NPDES program). In addition, the IG's use of formal penalty actions does not attempt to determine whether these actions require the facility to return to compliance.

As we stated in our response to the draft Report, EPA's regions were unable to replicate the OIG data pulls. The OIG researchers misunderstood some of the data, leading to inaccurate statements regarding the meaning and significance of EPA's data on state enforcement. While some of these inaccuracies have been corrected, many remain in the final Report. The final Report also still contains misleading statements about, or does not acknowledge significant instances of, state oversight by EPA, e.g., the Agency's response to a 2001 petition to withdraw the Louisiana NPDES program, the Agency's reaction to program performance issues in Illinois, and EPA's review and approval of the NPDES permitting program in Alaska.

Even though EPA agrees with the overarching premise of the Report that state performance is inconsistent across the country and that regional oversight can improve, the issues listed in this response and in our response to the draft Report cause us to question many of the state-specific conclusions in this report. For more detailed information about our concerns, please refer to EPA's response to the draft Report.

Recommendation 1: Give OECA authority for all nationwide enforcement resources and workforce allocation.

EPA does not agree that centralizing resources and workforce allocation will address the concerns raised by the Inspector General concerning the lack of national consistency in state performance and regional oversight. This recommendation would not substantially change the control OECA has over the national workforce compared to what currently exists. OECA already exercises significant central authority of enforcement resources and workforce allocation. OECA exercises this authority by providing national direction through the Strategic

Plan, the National Program Managers Guidance and the Annual Commitment System process, and by holding regular meetings and calls with regions to discuss performance and oversight. The degree of control over a dispersed workforce anticipated under this recommendation would not be substantially changed from what currently exists and would not lead to the improvements envisioned by the Inspector General.

The value of local, on-the-ground knowledge and of the day-to-day ongoing work between the regions and states to identify and resolve state environmental and performance issues should not be underestimated. The need for national consistency must be balanced with applying this local knowledge to support tailored intervention. Centralized control could actually diminish EPA's ability to effectively interact with the states on specific issues.

EPA is, however, taking broad measures to improve state performance and regional oversight. At the request of the Deputy Administrator, EPA developed a Key Performance Indicator on state oversight. Information on regional and program state oversight practices will be gathered and analyzed, and recommendations will be provided to the Deputy Administrator on their adequacy and needed improvements. Another management improvement includes the review of the Memoranda of Agreement for the CWA NPDES program by OECA and the Office of Water to ensure that MOAs provide appropriate direction and do not pose barriers to good performance or EPA action. EPA also will continue to utilize the ever-increasing amount of data from e-reporting and other available information sources to develop comparison data on state performance and ensure national consistency in how regions target actions for needed improvements.

Recommendation 2: Cancel outdated guidance and policy documents, and consolidate and clarify remaining guidance into EPA documents that are publicly and easily accessible on the EPA Civil Enforcement website.

EPA has a repository of current compliance and enforcement documents that serve as the basis for the State Review Framework (SRF) and that ultimately drives state performance on its OTIS SRF web site, accessible only to federal and state regulators. EPA agrees to review its public web site and distinguish current compliance and enforcement documents that affect state oversight from obsolete documents.

Recommendation 3: Establish clear and consistent national enforcement benchmarks throughout CAA, CWA, and RCRA guidance and policies so that EPA's enforcement expectations are clear and consistent for state governments and the regulated community.

EPA agrees that clear national enforcement expectations are important. EPA envisions that the movement towards implementation of the "Next Generation" new paradigm for the enforcement program - based on electronic reporting, use of technology to gather information about compliance, increased transparency and the use of new implementation approaches in rules to improve compliance - provides the opportunity to get beyond the current data and metrics limitations and the past focus on major facilities. The CWA Action Plan and the NPDES e-reporting proposed rule, when final, will open up new ways to look at both facility and government performance. As we move in this direction, EPA is revising many policies and

guidance that direct the national enforcement program, which will result in changing expectations for state programs. For example, we are currently initiating a national dialogue about crediting compliance monitoring activities beyond inspections and investigations that accomplish facility-specific compliance determinations. This is necessary due to the expanding universe of regulated sources and the diminishing level of federal and state resources, and is possible due to technological advances. It will be important to ensure that expectations reflect these program changes and are clearly communicated.

OECA's current national expectations are articulated out in numerous compliance and enforcement guidance and policies. OECA will ensure these documents are clearly identified and easily accessible to regions and states through OTIS and EPA's our web site. As policies or guidance change, OECA will ensure these sites are up to date.

OECA will also refine and streamline the State Review Framework metrics, which help drive performance, with input from regions and states. EPA does not agree to codify guidance applicable to state enforcement programs in rules.

Recommendation 4: Establish a clear and credible escalation policy for EPA intervention in states that provides steps that EPA will take when states do not act to ensure that the CAA, CWA, and RCRA are enforced.

EPA agrees to develop an escalation policy to address state performance issues. As we stated in our response to the draft Report, the purpose of escalation is to resolve performance issues and improve state programs. We do not agree that EPA's first or only response to state performance issues should always be for EPA to initiate an enforcement action. Our goal is to work to strengthen state performance so that the state administers a strong enforcement program. Moreover, a state's enforcement program cannot be viewed in isolation from the performance of a state's delegated or authorized program as a whole. The ability to run an effective state enforcement program is dependent upon strong and enforceable standards and permits. While program withdrawal is an important, necessary and useful oversight tool, it is not the goal of escalating oversight. The environmental laws of this country clearly envision states in the forefront of day-to-day program implementation.

Recommendation 5: Establish procedures to reallocate enforcement resources to intervene decisively when appropriate under its escalation policy.

EPA has a number of options available for implementing its escalation policy. For example, EPA will explore utilizing state grant funds to directly implement programs if appropriate. If EPA actions are necessary to focus attention on state performance issues or deal with short-term problems, OECA will work with individual regions to adjust expectations and commitments for other enforcement-related work. In key enforcement program areas, EPA will utilize decisive, deliberate action to focus attention on the performance issues.

Recommendation 6: Develop a state performance scorecard to publicly track state enforcement activities and results from year to year.

EPA agrees to develop and make publicly available state performance dashboards for the CWA, CAA and RCRA to track state enforcement activities from year to year.

Conclusion

EPA agrees that state enforcement performance varies significantly and that regional oversight can be improved. We agree with the recommendations in this Report that seek to update enforcement guidance and policy, clarify expectations, develop an escalation policy to address inadequate state performance, and develop state performance dashboards to make information about state enforcement activities easy-to-understand and thus more available to the public.

We also want to emphasize the significant steps we have already taken to improve national consistency in the enforcement program across regions and states by:

- Developing and improving the State Review Framework (SRF);
- Making SRF metrics and documents public;
- Developing a state performance dashboard for the CWA NPDES program;
- Discussing state performance at national meetings with regions and states;
- Having state oversight as a top priority goal for enforcement, and
- Working with regions to identify steps to address state performance issues.

EPA acknowledges the limitations on establishing meaningful measures for evaluating performance and is pursuing a new paradigm for enforcement through the CWA Action Plan and "Next Generation Compliance," using 21st Century technology in both IT and monitoring to improve government and facility performance. Once e-reporting, the use of new technologies in compliance monitoring, increased transparency and new compliance strategies in our rules are in place, we are confident we will be better able to evaluate performance. Until that time, we need to be cautious about putting too much weight on the limited metrics for which we do have data. We need to avoid the unintended consequences that occur when making inaccurate, misinterpreted or confusing data available to the public – such as creating pressure on states to reduce standards or to take actions that may be less protective of public health and the environment.

EPA will continue to actively seek more complete data and better measures to help us do a better job of portraying the complexities of state performance to the public and holding states accountable. This is a process of continual learning and improvement, where results may not be evident for a number of years. Regardless, it is critically important that we take realistic steps now if we are to achieve the goals of nationally consistent state performance and regional oversight.

Should you have any questions or concerns regarding this response, please contact OECA's Audit Liaison, Gwendolyn Spriggs, at 202-564-2439.

Attachment

Corrective Action Plan
“EPA Must Improve Oversight of State Enforcement,”
Report Number 12-P-0113 (December 9, 2011)

Recommendation	Lead Office	Corrective Action	Target Date	Corrective Action
1. Give OECA authority for all nationwide enforcement resources and workforce allocation.	OECA	1	10/31/12	OECA will gather and analyze information on regional and program state oversight practices and make recommendations to the Deputy Administrator on their adequacy and needed improvements.
2. Cancel outdated guidance and policy documents, and consolidate and clarify remaining guidance into EPA documents that are publically and easily accessible on the EPA Civil Enforcement Website.	OECA	2	1/31/2013	OECA will review its public web site and distinguish current compliance and enforcement documents that affect state oversight from obsolete documents and make them easily accessible.
3. Establish clear and consistent enforcement benchmarks throughout CAA, CWA, and RCRA guidance and policies so that EPA’s enforcement expectations are clear and consistent for state governments and the regulated community.	OECA	3-1	4/30/2012	OECA will refine its SRF metrics.
		3-2	1/30/2013	OECA will ensure national performance expectations are clearly identified and ensure these documents are readily accessible on OTIS and EPA’s public website.
4. Establish a clear and credible escalation policy for EPA intervention in states that provides steps that EPA will take when states do not act to ensure that the CAA, CWA and RCRA are enforced.	OECA	4	9/30/2012	OECA will develop an escalation strategy to address state enforcement performance issues.
5. Establish procedures to reallocate enforcement resources to intervene decisively when appropriate under its escalation policy.	OECA	5	9/30/2012	OECA will evaluate if state grant funds can be used by EPA to improve program performance.
6. Develop a state performance scorecard to publically track state enforcement activities and results from year to year.	OECA	6	9/30/2012	Publish publically available state performance dashboards for the CAA, CWA, and RCRA to track state enforcement activities year to year.