



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

December 10, 2020

OFFICE OF  
THE ADMINISTRATOR

**MEMORANDUM**

**SUBJECT:** National Permitting Oversight Policy

**FROM:** Henry Darwin  
Assistant Deputy Administrator and Chief Operating Officer

**TO:** General Counsel  
Assistant Administrators  
Inspector General  
Chief Financial Officer  
Associate Administrators  
Regional Administrators

The permits issued by the U.S. Environmental Protection Agency as well as those issued by approved, authorized or delegated state, territorial, tribal and local authorities (hereinafter, “permitting authorities”) must meet the applicable requirements under the *Clean Air Act*, *Clean Water Act*, *Resource Conservation and Recovery Act* and *Safe Drinking Water Act*.<sup>1</sup> In addition, both the EPA and permitting authorities should be making permitting decisions in a timely manner.<sup>2</sup> To evaluate whether we are meeting these objectives, the EPA is establishing this national policy to standardize and improve over time the EPA’s process for oversight of permits and permitting authorities. This policy creates a consistent and transparent data-driven framework to guide the EPA’s oversight responsibilities, inform adjustments in oversight and identify opportunities for the EPA’s National Programs to assist permitting authorities.

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<sup>1</sup> Although each statute establishes its own goals, standards and requirements, the broad statutory frameworks for the permitting programs covered by this policy are found in Sections 165, 173, and 502 of the *Clean Air Act* (42 U.S.C. §§ 7475, 7503, and 7661a), Section 402 of the *Clean Water Act* (33 U.S.C. § 1342), Section 3006 of the *Resource Conservation and Recovery Act* (42 U.S.C. § 6926), and Section 1422 and Section 1425 of the *Safe Drinking Water Act* (42 U.S.C. §§ 300h and 300h-4).

<sup>2</sup> The EPA is not setting a timeliness goal for permits issued by other permitting authorities. However, permit timeliness data will be used to frame a discussion as to whether the permitting processes being used by a permitting authority could benefit from process improvement efforts like lean management or from augmenting resources (e.g. staff training or greater access to technical expertise). These efforts may be undertaken by the permitting authority alone, or jointly with assistance from the EPA.

This policy builds on the criteria outlined in related EPA memoranda issued on October 30, 2018 (*Principles and Best Practices for Oversight of Federal Environmental Programs Implemented by States and Tribes*), and on August 30, 2016 (*Promoting Environmental Program Health and Integrity: Principles and Best Practices for Oversight of State Permitting Programs*).

### Applicability

This policy applies to the periodic review of permitting programs and to the real time review of permits as they are being developed and issued by the EPA and other permitting authorities under the following programs: CAA New Source Review and Title V, CWA National Pollutant Discharge Elimination System, RCRA (Subtitle C) and SDWA Underground Injection Control.

### Authorities

Many federal environmental statutes allow states, territories, tribes and local agencies to be designated as the primary permitting authorities.<sup>3</sup> As a result, the vast majority of states, and some territories, tribes and local agencies have taken on these authorities and are now responsible for issuing most of the environmental permits nationwide under the CAA, CWA, RCRA and SDWA.

While the EPA generally defers to permitting authorities in their day-to-day permitting activities, the EPA remains responsible for performing oversight to ensure permits and permitting programs conform with the applicable laws and regulations. In conducting its permitting oversight obligations, the EPA should also evaluate nation-wide program consistency, fairness, efficiency and effectiveness.<sup>4,5</sup> The EPA's regular oversight of permits and permitting programs is designed to identify and resolve emerging issues collaboratively with the permitting authority long before they pose a significant risk to the effectiveness of the program. In this way, the EPA and the permitting authorities can avoid invoking procedures to withdraw program delegation, authorization or approval.<sup>6</sup>

Details of specific commitments between the EPA and permitting authorities are commonly described in Memoranda of Agreement<sup>7</sup> that originated at the time of program delegation/authorization/approval and are updated as necessary. In addition, annual or biannual commitments for specific outputs may be included in Performance Partnership Agreements,

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<sup>3</sup> See 42 U.S.C. §§ 7410(a)(2)(C), 7502(c)(5), and 7661a(d); 33 U.S.C. § 1342(b); 42 U.S.C. § 6926(b); and 42 U.S.C. §§ 300h-1(b) and 300h-4(a).

<sup>4</sup> See 42 U.S.C. §§ 7410(c), 7413(a)(5), 7575(a)(2), 7477, and 7661a(b) & (i); 40 CFR §§ 51.165, 51.166, 70.9 and 70.10; 33 U.S.C. §§ 1342(c) & (d); 40 CFR §§ 123.64 and 123.44; 42 U.S.C. §§ 6926(b) & (e); 40 CFR §§ 271.19, 271.22 and 271.23; and 42 U.S.C. §§ 300h-1(b), 300h-4(a), (b), & (c); and 40 CFR § 145.33.

<sup>5</sup>The EPA recognizes that some federal environmental statutes allow states, tribes and local governments to be more stringent than the federal program minimums. See 42 U.S.C. § 7416; 33 U.S.C. § 1370; 42 U.S.C. § 6929; and 42 U.S.C. § 300h-2(d).

<sup>6</sup>See 42 U.S.C. §§ 7410(c), 7410(k)(5), and 7661a(i); 40 CFR §§ 52.21(a) and 70.10; 33 U.S.C. § 1342(c); 40 CFR § 123.64; 42 U.S.C. §§ 6926(e); 40 CFR §§ 271.22 and 271.23; and 42 U.S.C. §§ 300h-1(c) and 300h-4(c); and 40 CFR §§ 145.33 and 145.34.

<sup>7</sup> See 40 CFR §§ 71.10, 123.24, 271.8, and 145.25.

Performance Partnership Grants or workplans associated with Assistance Agreements. This policy is intended to supplement and provide guidance when updating these various agreements.

## **POLICY FOR EVALUATION OF ENVIRONMENTAL PERMITTING**

This policy establishes a data-driven framework to identify emerging issues, track trends, inform National Program workplans and guide periodic adjustments to the oversight of individual permitting authorities (also referred to as differential oversight). This policy describes how the EPA will use information on permit quality, permit timeliness and program integrity, as well as the effectiveness of past oversight, to inform decisions on the EPA's future oversight of permitting programs.<sup>8</sup> While the EPA has employed differential oversight through the years, the EPA has not systematically assessed whether that oversight ensures that both the EPA and permitting authority resources are being applied where they are most needed.

### Real-Time Feedback to Permitting Authorities

As part of this policy, the EPA is renewing its commitment to providing timely and clear feedback to permitting authorities during the real time review of permits.

To avoid unnecessary delays during the permit review process, the EPA encourages permitting authorities to share pre-public notice permits with the EPA.<sup>9</sup> Within agreed-upon timeframes for review, the EPA will make best efforts to provide feedback prior to the start of public review.

In many cases feedback appropriately occurs through informal communication – via e-mail or phone. However, when making formal comments, the EPA should expressly distinguish between those based on statutory or regulatory requirements (by citing to relevant legal authorities) and those based on guidance, professional judgment or other recommendations (by stating that they are provided as suggestions only).

### Annual Permitting Authority Check-in

This policy establishes and details the general expectation for an annual check-in between the EPA and the permitting authority that will serve as the cornerstone of the oversight/evaluation process. The annual check-in should be an open dialogue resulting in a shared understanding between the EPA and the permitting authority regarding the EPA's oversight approach for the subsequent year. This is intended to ensure transparency and facilitate the identification of opportunities for the EPA to improve its oversight activities and best support the permitting

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<sup>8</sup> Periodic changes to the EPA's oversight are intended through the implementation of this policy. Factors that may result in a reduction of oversight include program maturity, experienced permitting staff, high-quality timely permits and advanced planning to handle changes in workload, regulations or processes. Factors that may result in additional oversight include insufficient permit quality, lack of program maturity, lack of staffing resources, permit backlogs, novel technical or regulatory issues, permitting authority request for additional assistance or feedback or anticipation of highly controversial permits.

<sup>9</sup> Where additional record items are shared, such as the application and the statement of basis, it is recommended that all documents be shared in an electronic format for ease in sharing.

authority. In order to align with existing processes and interactions, the EPA and the permitting authority should work together to choose an appropriate time and venue (including remote options) for the annual check-in.

The parties may also mutually agree to skip the annual check-in, but both must understand that if there is no annual check-in meeting there will be no adjustment to the EPA's oversight of the permitting authority for the upcoming year. The EPA will base its decision on whether to propose skipping a meeting based upon its review of permitting metrics and information from the previous year (as described in the next section). Any agreement to skip the annual check-in and maintain the current nature of the EPA's oversight must be documented in writing (including informal written communication, such as email). Regardless of whether a check-in is conducted, the permitting metrics from the previous year will be shared with the permitting authority, and they will be provided to the appropriate National Program to enable evaluation of national trends in the corresponding programs.

For permits issued by the EPA, the annual check-in will take place between the National Program or another Regional Office designated by the National Program and the respective EPA Regional Office.

### Pre-Assessment

In advance of the annual check-in, the EPA will collect and summarize data on the previous year's oversight and permitting activities. The metrics to be gathered as part of the pre-assessment include data related to the EPA's oversight conducted, the EPA's oversight timeliness, permit quality, permit timeliness and permit program integrity. The core set of metrics for the data to be compiled and shared with the permitting authority in advance of the annual check-in are included as an appendix to this policy.<sup>10</sup> The appendix also includes program-specific metrics and adjustments to the core metrics for each national permitting program.

### Discussion of Last Year

In general, the following questions (using the data collected as part of the pre-assessment) are intended to assist the discussion related to the previous year:

#### **EPA Oversight Conducted:**

- How were permits chosen for real-time review?
- How many and what type (focus, scope) of reviews were conducted?

#### **EPA Oversight Timeliness:**

- Are there agreed-upon timeframes for the EPA to report back on oversight results?
- How consistently were those timeframes met or exceeded?

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<sup>10</sup> The EPA may revisit metrics to be used as part of the annual check-in from time to time to further improve oversight effectiveness and efficiency.

**Permit Quality<sup>11</sup>:**

- How often were issues found during the EPA's review of permits?
- Did the EPA identify any significant concerns regarding consistency with statutory or regulatory requirements, clarity of permit conditions, technical basis or enforceability of permits?
- What were the scope and pervasiveness of those issues?
- Does the permitting authority include compliance and enforcement staff in the review of permits before they are issued?
- Are the statements of basis or factsheets associated with permits sound?

**Permit Timeliness:**

- Does the permitting authority track the time from permit application to decision (i.e. issuance or denial)?
- Has the permitting authority set a timeliness goal for making permitting decisions? If so, what is the goal?
- How well is the permitting authority performing against its goal, if one exists?
- Does the permitting authority have a permit application backlog (i.e. applications older than the timeliness goal)?
- Is the permitting authority making progress in reducing its backlog or is its backlog growing?

**Permit Program Integrity:**

- Are there trends in performance or staffing that signal improvement, steady performance or a potential risk to program integrity?
- Does the permitting authority have sufficient and effective structures/procedures to administer the permitting functions (e.g. public participation, administrative/judicial appeals and any other requirements set forth in statutes or rules)?
- Has the permitting authority adopted the necessary EPA rules and regulations to implement the permitting program?
- Does the permitting authority have a process for addressing permit quality and timeliness issues when they are identified?

**Oversight Results:**

- What corrective actions were taken based on the EPA's reviews?
- What issues remain?

While trends in permit quality and timeliness can signal whether a permitting program is improving, remaining steady or declining in performance, trends in staffing, expertise and workload may be leading indicators of emerging concerns. Discussion of these trends, as well as sharing other permitting authority priorities, issues and concerns, can be used to identify where assistance or additional tools may be needed, and whether they can be provided internally by the

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<sup>11</sup> Not all programs provide real time (prior to issuance) review of draft permits as a standard practice. Absent real time review of draft permits in a given year, permit quality will be assessed based upon other data sources, such as recent periodic program reviews, feedback from enforcement personnel or other reviews or audits conducted.

permitting authority, through or with assistance from the EPA, or through collaboration with other permitting authorities.

Using the data collected, the EPA will assess whether adjustments in oversight for the upcoming year are appropriate, and if trends indicate the need for national policies, guidance, tools or training. Oversight adjustments can include the number or scope of real-time draft permit reviews, the timing or focus of comprehensive or other program reviews or both.<sup>12</sup> Oversight adjustments may be prompted by reviews associated with a specific permitting authority or by wider trends or emerging issues.

### Discussion of Next Year

After a review of the prior year's performance, the annual check-in will include a discussion of the following for any oversight changes to be made for the subsequent year:

#### **Upcoming Year's Outlook:**

- Workload, including an overview of permits the permitting authority expects to issue, and which of those are anticipated to be most significant or controversial;
- Staffing levels or other resource issues that may affect permitting authority operations;
- Non-permitting priorities affecting permit operations;
- Current or emerging scientific, technical or regulatory issues;
- General needs (including requested support from the EPA); and
- Adjustments in engagement between the EPA and the permitting authority (if needed).

#### **Anticipated EPA Oversight:**

- The types of permits, if any, the EPA anticipates reviewing in real-time, how the specific permits for review will be selected and the EPA's timeliness goal for permit review;
- Any other planned oversight and the EPA's timeliness goal for reporting results of that oversight to the permitting authority;
- Any anticipated changes in oversight as compared to the prior year; and
- The rationale for any changes.

### Annual Documentation

Every year, the EPA will summarize and document the results of this process, even in instances when both parties agreed to waive the check-in. That documentation will include the metrics, a description of the anticipated oversight for the upcoming year and any other agreements or commitments made. The EPA will share the documentation with the permitting authority to assure mutual understanding. As appropriate, information from this process will also be considered in existing planning processes (e.g. annual workplans such as PPAs/PPGs).

Key data on performance and oversight will be compiled nationally and analyzed for anomalies as well as emerging issues of regional or national concern. By compiling information on permit program integrity nationwide, the EPA National Programs will be able to identify

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<sup>12</sup> Oversight adjustments can also include the rate or scope of real-time permit administrative record reviews.

national or regional concerns that could be more efficiently addressed through the deployment of more broadly applicable tools. These national-level data will also be provided to the regions to inform discussions about improvements in oversight effectiveness and efficiency over time.

Attachment

cc: Administrator

Associate Deputy Administrator

Assistant Deputy Administrator

Chief of Staff

Deputy General Counsel

Deputy Assistant Administrators

Acting Deputy Inspector General

Acting Deputy Chief of Staff

Deputy Associate Administrators

Associate Assistant Administrators

Deputy Regional Administrators

Regional Mission Support Division Directors

Regional Mission Support Division Deputy Directors

|                     | EPA Oversight Conducted   | EPA Oversight Timeliness   | Permit Quality   | Permit Timeliness  | Permit Program Integrity  |
|---------------------|---|--|--|--|---|
| <b>CORE METRICS</b> | <p>Ratio of <b>Permits Reviewed</b> to Total Number of <b>Permits Eligible for Review</b></p> <p>Date of Most Recent <b>Full Program Review</b> (if applicable)</p> <p>Date of Most Recent <b>Annual Check-In Meeting</b> with Permitting Authority</p> | <p>Agreed Upon <b>Timeframe for EPA Review</b></p> <p>Ratio of Number of <b>EPA Reviews Exceeding Timeframe</b> to Total Number of <b>Permits Reviewed</b></p> <p><b>Average Time for EPA Review</b></p> | <p>Ratio of Permits Receiving <b>EPA Comments</b> to Total Number of <b>Permits Reviewed</b></p>   | <p><b>FOR NEW PERMITS:</b></p> <p>Permitting Authority <b>Permit Timeframe Goal</b> for issuing permit (if any)</p> <p>Ratio of <b>Permits Issued within Permit Timeframe Goal</b> to Total <b>Number of Permits Issued</b></p> <p>Number of <b>New Permits in Backlog</b></p> <p>If the Permitting Authority has not set a <u>Permit Timeframe Goal</u> the <u>Permit Timeliness metric will be:</u></p> <p><b>Average Time</b> for Permitting Authority to issue permits</p> <p><b>FOR PERMIT RENEWALS:</b></p> <p>Number of <b>Permit Renewals in Backlog</b></p> | <p>Number of <b>Unresolved Issues</b> from Full Program Review or Annual Check-in</p> <p>Number of <b>Permitting-Related Authorities Not Yet Implemented</b> by the Permitting Authority</p>  |
| Notes:              | <p><b>Permits Reviewed</b> includes both new permits and renewals reviewed in real time, and does not include those that are part of a Full Program Review</p> <p>Each program to define <b>Full Program Review</b></p>                                 | <p>Each EPA Region (by program and/or authority as appropriate) to define the <b>Timeframe for EPA Review</b>, including when the clock starts and stops</p>   | <p>Each program to define <b>EPA Comments</b> which may include categories of comments (e.g., comments resulting in substantive changes, enforceable comments, positive comments, verbal comments, etc.)</p> | <p><b>Permit Timeframe Goal</b> is the time between application receipt and permit issuance (excluding any appeals). Permitting Authorities to set their own goal unless defined otherwise (e.g., Air permits)</p> <p><b>New Permits in Backlog</b> is the number of permit applications currently</p>   | <p>Each program to define <b>Unresolved Issues</b></p> <p><b>Permitting-Related Authorities Not Yet Implemented</b> are those rules, regulations and standards associated with the permitting program that cannot be included in permits because they have either not been adopted by the Permitting Authority or approved by EPA</p> |



|  | EPA Oversight Conducted | EPA Oversight Timeliness | Permit Quality | Permit Timeliness  | Permit Program Integrity |
|--|-------------------------|--------------------------|----------------|--|--------------------------|
|  |                         |                          |                | <p><i>exceeding the Permit Timeframe Goal</i></p> <p><b>Permit Renewals in Backlog</b> is the number of existing permits administratively continued pending a renewal decision by the Permitting Authority</p> |                          |

**Program Specific Adjustments to Core Metrics**

|                     | EPA Oversight Conducted  | EPA Oversight Timeliness | Permit Quality | Permit Timeliness   | Permit Program Integrity |
|---------------------|--|--------------------------|----------------|---|--------------------------|
| <b>AIR TITLE V</b>  | <p><b>Permits Reviewed</b> includes permits reviewed in whole or in part, those reviewed informally prior to the public comment period and those reviewed during public comment period</p> <p><b>Permits Eligible for Review</b> = total number of permits issued over the previous year</p> |                          |                | <p><b>Permit Timeframe Goal</b> = 18 months from receipt of a complete permit application</p> |                          |
| <b>AIR PSD/NNSR</b> | <p><b>Permits Reviewed</b> includes permits reviewed in whole or in part, those reviewed informally prior to the public comment period and those reviewed during public comment period</p> <p><b>Permits Eligible for Review</b> = total number of permits issued over the previous year</p> |                          |                | <p><b>Permit Timeframe Goal</b> = 12 months from receipt of a complete permit application</p> |                          |

**Program Specific Adjustments to Core Metrics**

|              | <b>EPA Oversight Conducted</b>   | <b>EPA Oversight Timeliness</b>  | <b>Permit Quality</b>  | <b>Permit Timeliness</b>  | <b>Permit Program Integrity</b>  |
|--------------|--|--|--|---|--|
| <b>NPDES</b> | <p><b>Permits Reviewed</b> are for compliance with CWA and NPDES regulations</p> <p><b>Full Program Review</b> = Permit Quality Review (PQR)</p>                               | <p><b>Timeframe for EPA Review</b> is typically identified in the EPA/state MOA</p>  | <p><b>EPA Comments</b> = requested substantive changes to permit requirements/fact sheet with a direct effect on permit requirements or enforceability. Does not include typos or minor changes.</p> | <p><b>Permits in Backlog</b> include existing individual and general permits past their expiration date and awaiting reissuance</p> | <p><b>Unresolved Issues</b> = number of unresolved “essential action items” identified during the PQR or annual check-in</p>   |
| <b>UIC</b>   | <p>UIC does not currently perform regular real time permit reviews</p> <p><b>Full Program Review</b> = Comprehensive Program Evaluation (CPE)</p>                              | <p>UIC does not currently perform regular real time permit reviews</p> <p><b>SUBSTITUTE METRICS:</b><br/>Was annual check-in report provided within 90 days from the end of a performance period? (Y/N)</p> <p>When a CPE is conducted, were EPA recommendations provided within agreed upon timeframes? (Y/N)</p> | <p>UIC does not currently perform regular real time permit reviews. Instead, the review of permit quality, basis and content is documented in CPE reports</p>  | <p><b>ADDITIONAL METRIC:</b><br/>Ratio of permit applications received to the total number of permit actions issued</p>             | <p><b>ADDITIONAL METRICS</b><br/>Number of wells with alleged aquifer contamination reported</p> <p>Number of wells with violations reported</p> <p>Were annual data submitted timely? (Y/N)</p> |
| <b>RCRA</b>  | <p><b>Permits Reviewed</b> includes permits reviewed in whole or in part</p> <p><b>Permits Eligible for Review</b> = total number of permits issued over the previous year</p> | <p>Agreed Upon <b>Timeframe for EPA Review</b> can be by category</p>  | <p><b>EPA Comments</b> = 40 CFR § 271.19 Enforceable comments</p> <p><b>ADDITIONAL METRIC:</b><br/>Number of permits that benefitted from national RCRA permitting priorities</p>                    | <p><b>Permit Timeframe Goal</b> for can vary by category</p>  |  |