




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

JUN 22 2010

MEMORANDUM

SUBJECT: Interim Guidance to Strengthen Performance in the NPDES Program

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TO: Regional Administrators
Deputy Regional Administrators
Regional Enforcement Directors
Regional Enforcement Coordinators
Regional Water Division Directors

This memorandum is to initiate actions outlined in the Clean Water Act (CWA) Action Plan aimed to focus our NPDES planning and resources on the most significant sources of water quality impairment and ensure consistent enforcement across states that maintains a fair and level playing field for the regulated community and all Americans.

The Office of Enforcement and Compliance Assurance and the Office of Water together are asking the regions to work with each of their states partners to identify water quality priorities at the national, regional and state level and to use those priorities to guide the investment of our limited resources toward addressing the most significant water quality problems and the most serious violations. Where states are experiencing significant resource reductions, regions and states should engage in discussions about how to get the most important work done by exploring work-sharing and other creative approaches. Planning should include data analysis and targeting efforts, and address opportunities for improvement identified in permit and enforcement reviews.

This memorandum also directs the regions to work with states to resolve long-standing issues that create barriers to implementing significant aspects of the NPDES permit program or to identifying serious violations and taking appropriate enforcement actions sufficient to achieve compliance, deter others from violating the law, and making



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it more expensive to violate the law than to comply. This may include where a state has not regularly taken actions to protect water quality, where a state program has not taken action in particular regulated sectors that have a significant impact on water quality, or where a permit quality or enforcement program review has identified significant issues that a state has not taken steps to remedy that affects their ability to maintain the integrity of the NPDES program. These actions would be taken in addition to regularly occurring oversight activities.

The goal is to emphasize the value of deterrence and to establish a minimal national consistency by taking actions across the country so that no one state is singled out. It is not about states that are struggling now due to budget constraints but that otherwise run a credible program. Regions are asked to focus oversight resources to the most pressing performance problems in states. Actions taken to address the performance issues should work toward the goal of demonstrably improving state performance.

These steps from the CWA Action Plan are among the first to be implemented, hence the title "Interim Guidance." As the new approaches being explored under the Action Plan are developed, additional changes to our oversight of state programs may be needed. These steps are directed at improving our overall protection of the environment and the public, and will start us on the path toward fulfilling the vision of the Action Plan for FY2011 and beyond.

Interim Guidance on Strengthening EPA and State Performance and Oversight

I. Introduction

This Interim Guidance directs EPA regions and states to immediately implement two actions designed to strengthen performance in the Clean Water Act National Pollutant Discharge Elimination System (NPDES) program.

- First, expand NPDES annual planning to include consideration of enforcement and permitting in an integrated way, using data and analyses from other CWA programs (such as water quality standards, assessment and monitoring), and working together with states to ensure that planned activities combine to improve water quality and that our limited resources address the most serious problems.
- Second, EPA regions across the country should take action where states have demonstrated long-standing problems with their permit quality or enforcement programs to demonstrate the deterrent value of enforcement, ensure a fair and level playing field across states, and equal protection for all citizens.

II. Background

On October 15, 2009, EPA issued a Clean Water Act (CWA) Action Plan (the Action Plan) designed to improve permitting and enforcement efforts aimed at addressing major stressors on water quality. These actions were deemed necessary because, while EPA and states have made notable improvements to water quality since the enactment of the CWA, there are still too many water quality problems facing communities from an expanding universe of regulated sources, and too many violations that go unaddressed by both federal and state regulators.

EPA and states share joint accountability for assuring compliance with environmental laws and regulations and for protecting human health and the environment. Congress envisioned cooperative implementation of its laws by EPA and authorized states, with states developing state standards, issuing the majority of permits and conducting the majority of inspections and enforcement actions, and EPA developing national standards, programs, policies, guidance, conducting inspections and enforcing in situations of national interest, and overseeing state programs. Recent analyses of data have shown that the way EPA and the states have been operating has not led to the level of environmental or compliance improvements needed. EPA's oversight of state programs has focused on how well states have addressed the largest direct discharge facilities that have continuing problems. In spite of that attention, compliance with environmental laws and federal and state performance are not what they need to be to maximize the contribution of enforcement to improving water quality. The impact of a larger number of smaller, more dispersed sources has created new and growing challenges to our efforts to protect water resources and human health. Managing this diverse universe becomes more difficult in

view of the current economic status of many of the states, and calls for us to work together in a strategic manner to address the most important threats.

The Action Plan commits us to revamp federal and state enforcement to tackle sources posing the biggest threats to water quality regardless of their size, and to vigorously enforce against unpermitted and illegal discharges. It commits us to address the unevenness of state enforcement efforts across the country in order to provide equal protection to all Americans, protect the environment and public health as part of a strong economic recovery and ensure a level playing field for businesses that do comply with the law. The Action Plan commits EPA to establish clear expectations for state performance, hold states consistently accountable and, where EPA implements programs, to set the same expectations for itself. Finally, the Action Plan commits EPA to provide more complete, accurate, and timely information to the public to enlist them as a powerful ally to press for stronger accountability from the regulated community.

III. Critical Short Term Actions

The Action Plan discusses two key actions that are important to do now as we plan for FY2011 to quickly begin to improve state performance and oversight.

1. Develop a joint annual CWA NPDES work plan

EPA and states together engage in annual planning to develop work plans to achieve stated goals. Currently, there is considerable variability region-to-region and state-to-state in how annual planning is conducted and what is included. Enforcement often is not a part of these planning discussions, therefore many of these annual plans lack a strategic look at how permitting and enforcement need to work together to maximize improvements to and protection of water quality.

This guidance establishes the expectation that every region and state will conduct a joint CWA annual planning process for FY2011 that leads to the development of a comprehensive and strategic annual work plan that:

- a. Incorporates the permitting and enforcement program elements of the regional and state water quality programs, utilizing available information on water quality standards, water quality monitoring and assessment in the planning process.
- b. Identifies and discusses national, regional and state priorities for NPDES permitting and enforcement, based on analysis of available data for major and nonmajor permittees, wet weather sources, water quality and results from permit quality and state enforcement program reviews.
- c. Considers the enforceability of existing permits, evaluates pollutant sources that most seriously impact water quality, and prioritizes permits, inspections and enforcement actions to minimize water quality impacts from these sources.

- d. Addresses NPDES program performance expectations for regions and states communicated through the FY2011 NPM Guidance for both OW and OECA, as well as other program-specific guidance.
- e. Identifies how major stressors as identified in this planning process will be addressed by available resources.
- f. Puts on the table all available mechanisms to get work done, such as federal and state work sharing (e.g., focus EPA response where state has not been responsive, where EPA has a national interest, where the sector or problem is complex, or where a state has a significant workload and can not address high priority problems) or innovative approaches to compliance monitoring or addressing violations, etc.

Where regions and states have already initiated their planning process for FY2011, OECA and OW ask that if permitting and enforcement were not integrated in those discussions, the region and state hold additional discussions to ensure the development of a comprehensive and strategic annual plan. These discussions should be part of the Section 106 work plan planning process. Where state do not include NPDES permitting and enforcement activities in their Section 106 grant work plan, regions and states should still hold these discussions and develop an agreement on what the most significant problems are and what steps the state and region intend to carry out to address those problems.

The primary purpose of this integrated planning is to make sure that permitting and enforcement are working together to achieve the water quality goals of the CWA, and to direct limited resources towards addressing the most pressing problems.

2. Take regional actions to raise the bar for state performance

Where states have demonstrated long-standing problems with significant aspects of their permitting or enforcement programs, regions across the country should object to permits or take direct enforcement actions¹ in those states to ensure a fair and level playing field and equal protection for all citizens. These actions would be taken in addition to regularly occurring oversight activities.² Instances that warrant regional action include:

- Where a state has exhibited a widespread and long-standing failure to identify serious violations and take enforcement actions with penalties, sufficient to:
 - a. Achieve compliance;
 - b. Deter others from violating the law; and
 - c. Make it more expensive to violate the law than to comply.

¹ OECA has been holding discussions with each region about state performance as a part of a round of regional planning meetings. There will be additional follow-up to clarify expectations for regions for addressing state performance issues in the enforcement program.

² See “Central Tenets of the National Pollutant Discharge Elimination System (NPDES) Permitting Program” for general guidance on when EPA regions should consider objecting to individual permits. This memorandum is asking regions to object to individual permits specifically as a means of calling attention to long standing programmatic issues.

- Where a state has regularly failed to take actions to protect water quality, or where a state program has failed to act in particular regulated sectors that have a significant impact on water quality (e.g., CAFOs or stormwater construction).
- Where a permit quality or enforcement program review has identified significant issues that a state has not moved to remedy within a review cycle, indicating an overall lack of ability to maintain the integrity of the NPDES program.³

Regions should focus oversight resources to the most pressing performance problems in states. Actions taken to address the performance issues listed above should work toward the goal of demonstrably improving state programmatic performance. EPA continues to have other interests in taking actions in authorized states, including inspections, investigations and cases with a national interest, or site-specific instances where objecting to individual or general facility permits or taking enforcement actions are necessary to protect water quality or achieve CWA objectives.

In addition, as part of the CWA Action Plan, EPA commits to working with states to establish performance criteria for permitting and enforcement programs as part of a longer term effort, once new approaches to NPDES implementation have been determined.

IV. Actions to Initiate Longer Term Change

Additional steps are identified in the Action Plan that can be initiated by regions and states now. These actions will serve to move us in the direction of the new approach envisioned by the CWA Action Plan. Regions and states are asked to incorporate these activities into how they do business in **FY2011 and beyond**.

- **Targeting** to identify the most serious sources of pollution and the most serious violations is strongly encouraged at both the state and federal levels. Targeting should drive the development of annual compliance monitoring (CM) plans that take advantage of the flexibility available in EPA's existing CWA Compliance Monitoring Strategy to ensure the most significant facilities are getting inspected and monitored. The CM plans should be shared between regions and states to ensure there is no unintended or unnecessary duplication of effort.
- **Routine and regular meetings should be held between the region and state to discuss progress** towards meeting the annual commitments, and how the state has been performing overall in the NPDES program. At a minimum, these meetings (or conference calls) should include annual planning with a review of end-of-year results and a mid-year check-in, though more frequent communications are encouraged. These meetings should begin to include a holistic discussion of

³ Significant issues found in Permit Quality Reviews are tracked as Tier I action items in the OWM data base. Significant recommendations for improvement found in the State Review Framework (SRF) enforcement review are found in the SRF Tracker.

attainment of annual water quality, permitting and enforcement goals and expectations.

- **Regular reviews of state performance** should be done to ensure fair and consistent protection of human health and the environment. Results of current permit quality and enforcement reviews should be aligned and considered together to ensure that permits are protective and enforceable and that violations of permits get addressed in an appropriate manner.

V. How will these actions get implemented?

- FY 2011 NPM Guidance for OW and OECA
- FY2011 annual PPA, PPG or Section 106 state grant NPDES work plans and OECA compliance monitoring plans
- Regular reviews of performance (permits and enforcement).
- Best practices and sharing of innovative approaches

Regions and states are asked to integrate these actions into FY2011 planning processes and to submit a summary of the regional and state negotiated work plans to OECA and OW by August 31, 2010. A format and additional guidance on this reporting will be provided. The summaries will be reviewed and discussed at the Assistant Administrator and Regional Administrator level in September 2010. This discussion will focus on what the work plans, compliance monitoring strategies and work share agreements promise for FY2011. They will include identification of what worked well in the planning process, what did not work well, innovative approaches, actions taken by regions, and how we can continue to move our collective efforts in the direction outlined by the CWA Action Plan.

VI. Conclusion

These actions should help drive our programs in the direction of ensuring that the most serious pollution sources and violations get the attention they deserve, and that both federal and state programs are being held accountable for their performance. Implementing the concept of shared accountability for the environment and human health through these steps should result in a stronger partnership between EPA and states. These short term actions will help to pilot and test the direction of the Action Plan, and will provide lessons for us as we move toward the more long-term change envisioned in the CWA Action Plan.