

# **Final Report of the ECOS-EPA Compliance Assurance Workgroup**

**Version 1.0, August 23, 2018**

## **1. Introduction and Workgroup Charge**

The Environmental Council of the States (ECOS) began the Cooperative Federalism 2.0 initiative in June 2017 to improve the working relationship between state environmental agencies and the U.S. Environmental Protection Agency (EPA). Shortly afterwards, ECOS and EPA established a joint Compliance Assurance Workgroup to find ways to improve the state-federal relationship in the context of compliance assurance. Nebraska Director of Department of Environmental Quality Jim Macy and EPA's Office of Enforcement and Compliance Assurance (OECA) Deputy Assistant Administrator Patrick Traylor co-lead this group, which includes senior leaders from EPA and other states.

The workgroup focused on four areas:

- 1) Articulating principles underlying a cooperative federal-state relationship when seeking compliance assurance in states with delegated program authority.
- 2) Exploring ways to enhance EPA's National Enforcement Initiatives program, which focuses EPA resources on national noncompliance problems.
- 3) Identifying principles and examples of best practices for improving communication, planning, and coordination between states and EPA regions on compliance assurance activities.
- 4) Identifying the current measures that states and EPA use and how these measures impact the coordinated work on compliance assurance, and making recommendations for how to better align/improve measures.

This document summarizes the workgroup's output on these areas. It describes several best practices that can improve federal-state partnerships and lead to better compliance and more efficient resource use.

## **2. The Workgroup's Impact So Far**

This workgroup has already improved EPA-state collaboration on compliance assurance in two ways:

In January 2018, OECA Assistant Administrator Susan Bodine issued Interim Guidance on "Enhancing Regional-State Planning and Communication on Compliance Assurance Work in Authorized States." Informed by the Compliance Assurance Workgroup's early discussions in Fall 2017, the guidance document instructs EPA staff to "immediately begin the movement toward a more collaborative partnership between the EPA and

authorized states.” The memo also sets a “no surprises” expectation, under which EPA staff should not commence an enforcement action within a state that has delegated program enforcement authority without first contacting that state.

This workgroup’s input and recommendations also directly influenced recent OECA decisions concerning EPA’s National Enforcement Initiatives (NEIs). In August 2018, OECA will change the name of the NEIs to the National Compliance Initiatives (NCIs) to emphasize that the agency’s goal is compliance, and that many tools—not just enforcement—can help reach that goal. EPA is increasing engagement with interested states and tribes in the selection and implementation of these initiatives. OECA is working with states on implementing existing NEIs and on developing new NCIs for the FY2020 – FY2023 cycle.

### **3. Adopting the Doctrine of Subsidiarity as an Organizing Principle**

The workgroup offers the doctrine of *subsidiarity* as an interpretative tool for addressing the statements in *Cooperative Federalism 2.0*.

Subsidiarity is the organizing principle that matters should be handled by the least centralized authority with the capability to achieve resolution. Determinations regarding capability are essential to application of the principle of subsidiarity. When evaluating the relative capability of centralized and decentralized authorities, it is important to consider their relative financial and enforcement resources, responsiveness to equity concerns, technical expertise, and political will to foster compliance and correct noncompliance.

Applying the concept of subsidiarity can advance efficient and effective resolution of matters by bringing to bear the localized expertise of a decentralized authority that is capable of performing environmental enforcement tasks. Subsidiarity helps to ensure that the central authority focuses its efforts on performing functions that it alone can accomplish, such as delegating and auditing programs, implementing programs where there is no decentralized authority, and providing leadership on cross-jurisdictional issues. Examples of where states may have lesser capabilities include: (1) serious violations for which EPA’s criminal enforcement program is needed; (2) addressing noncompliance in a sector or at facilities in multiple states, where there are cross-boundary impacts affecting other states or other actions involving national interests; (3) actions requiring specialized EPA equipment; (4) emergency situations or situations where there is significant risk to public health or the environment; and (5) significant noncompliance that the state has not timely or appropriately addressed. The workgroup discussed the idea that EPA would defer more to a state that has demonstrated greater compliance assurance capability in a delegated or authorized program, and defer less to a state that continues to have difficulty

improving compliance. In cases where less deference may be warranted, the state and EPA should consider working jointly on a compliance matter to build state capacity (e.g., in cases where EPA has greater access to emerging technologies used for inspections).

**4. Principles and Examples of Best Practices for Improving Communication, Planning, and Coordination Between States and EPA Regions on Compliance Assurance Activities**

The workgroup identified the following principles for states and EPA regions to consider in improving communication, planning and coordination of compliance assurance activities.

After describing each of the four principles below, the workgroup has listed several examples of best practices to help a state and EPA region implement that principle. The workgroup does not recommend that every state and EPA region adopt all of these practices, especially where a state and its EPA regional office agree the relevant principle already guides their relationship. In fact, implementing all of these practices could be counterproductive. Thus, the workgroup encourages each state and region to customize and implement the appropriate set of practices to meet their needs.

**Principle 1:** Effective state/EPA regional partnerships require open, regular, and early discussions on inspection and enforcement priorities and planning; a “no surprises” approach to communication and coordination; and robust enforcement programs that correct noncompliance and deter noncompliance. Where states and their EPA regional offices indicate they have strong partnerships, there is also a clear understanding and consensus regarding state and regional roles in the inspection and enforcement processes.

**Examples of Best Practices:**

- 1) EPA regions and states should meet on an agreed-upon, regular schedule to discuss and plan enforcement and inspection activities. Meetings should:
  - a) Involve staff and managers with sufficient seniority appropriate to the agenda to make sure communication channels are open and to resolve disputes in a timely manner.
  - b) Include discussions about inspection targeting to make sure the states and EPA regions understand the purpose and objectives of their respective inspections.
  - c) Follow agendas that EPA regions and states develop in advance to make sure that the meetings are efficient and to give participants adequate time to prepare.
- 2) When a state and an EPA regional office disagree about how well they are coordinating with each other on inspection and enforcement work, they

should try to resolve these disagreements and improve future coordination. If a state and EPA regional program are unable to resolve disagreements, it is best to elevate the issue to the state environmental commissioner and the EPA's Regional Administrator.

**Principle 2:** States and EPA regions should work together to plan inspections so as to avoid duplicated effort, improve efficiency, and reduce unnecessary burdens on the regulated community. Involving states earlier in inspection planning provides states and EPA regions with more flexibility in setting and adjusting inspection targets and Compliance Monitoring Strategies. But early state involvement does not diminish EPA's oversight responsibilities, nor its accountability for meeting national environmental goals and ensuring compliance with federal statutes.

**Examples of Best Practices:**

- 1) Each state and EPA region should work together to identify situations where a state may require EPA assistance with inspections. These might include:
  - a) Public health and environmental emergencies;
  - b) Significant noncompliance that a state has not addressed in a timely or appropriate manner;
  - c) Cross-state initiatives;
  - d) Instances where a state lacks adequate resources or expertise;
  - e) Matters of national interest;
  - f) Matters involving multiple jurisdictions; and
  - g) Oversight inspections in which EPA is performing audit functions.
- 2) States and EPA regional offices should communicate as they develop their separate inspection priorities and commitments, and should work together as appropriate on joint inspection priorities and commitments. Both should recognize that priorities and commitments may evolve during the year.
  - a) In general, states and EPA regions should seek to avoid duplicative or overlapping inspections that would lead them to inspect the same facility for the same regulatory requirements within a short time period. Multiple inspections by states and EPA regions may be appropriate for complex sites, where the inspections will focus on different regulatory requirements or facility operations, or where a state and EPA agree that multiple inspections serve a valuable purpose.
  - b) States and regions should exchange and discuss their draft inspection plans and targeting rationales as early as possible to facilitate the

effective use of collective resources. EPA regions should provide states with advance notice of inspections, especially since inspection plans tend to be dynamic. This type of coordination requires states and EPA regions to reach agreements regarding confidentiality and the proper timing of when facilities are provided notice of inspections.

- 3) EPA regional offices and states should invite each other to participate in inspections where there is value in both entities participating.
- 4) Where states and EPA regions co-implement an inspection plan, they should do so in ways that make the best use of each entity's expertise and resources to protect public health and environmental quality.
- 5) EPA regions and states should consider use of alternative compliance monitoring strategies where appropriate.
- 6) EPA regions should share planned information requests with states in advance, along with the purpose, goals and objectives of those requests.

**Principle 3:** Continued communication and engagement throughout the enforcement processes and timely response/follow-up help foster a better federal-state relationship.

**Examples of Best Practices:**

- 1) States and EPA regions should identify clear expectations and understandings on which enforcement cases EPA will pursue and which cases states will pursue.
- 2) To ensure a level playing field, EPA regions and states should work together to ensure consistent minimum requirements for state enforcement programs. States are free to go beyond federal requirements to protect public health and environmental quality.
- 3) EPA regions should engage states when EPA makes enforcement determinations in states with authorized programs. This could include a review of observations and findings from inspections and discussion of whether to take state, federal, or joint action, and the type of action.
- 4) Where EPA has decided to take enforcement action, it should notify the state before notifying the facility. Absent confidentiality concerns, the region should update the state on the progress of such actions as appropriate.

**Principle 4:** EPA can increase states capacity to contribute to national enforcement and compliance efforts by sharing tools and technologies and by training state inspectors.

### **Examples of Best Practices:**

- 1) EPA regions and states should share technology to mutually improve their inspection and enforcement activities. A few examples of recent technology advances include:
  - a. A Geospatial Measurement of Air Pollution project (GMAP) that allows EPA and a state to share pollution data and create inspection target lists.
  - b. A RCRA inspection targeting platform based on SharePoint and Qlik visualization that allows state and EPA inspectors to target and sign up for inspections. This decreases duplication and increases collaboration by providing real time updates on facilities targeted for inspection.
- 2) Continue to share training resources to build state inspection capacity.
  - a. EPA regions should identify opportunities to share regional inspection expertise through training. This is particularly important for certain kinds of industries where state employees may lack technical expertise.
  - b. Coordinate co-training events between the EPA region and state for field staff, including providing web-based options, to allow greater participation in training while minimizing travel costs.

### **5. Workgroup Recommendations on National Enforcement Initiatives**

For more than 20 years, EPA has employed the National Enforcement Initiatives (NEIs) to focus its enforcement and compliance resources on the most serious and widespread environmental violations and on sectors or programs where EPA's expertise, authority, or resources are particularly valuable. Over the years, the NEIs have helped to dramatically increase compliance and reduce pollution. The NEIs reflect the need to focus EPA resources on problems that demand a national approach, not any criticism of state or tribal enforcement programs.

EPA reviews the NEIs every three years to see if any changes are appropriate. EPA is starting such a review in 2018. The workgroup helped OECA develop three recommended changes, all of which EPA has agreed to implement:

- a) **Emphasize compliance assurance tools beyond enforcement.** To emphasize that the NEI aims to increase compliance through more than just enforcement, EPA will change its name from the National *Enforcement* Initiative to National *Compliance* Initiative (NCI). EPA will work with states to ensure that NCIs employ the full range of appropriate compliance assurance tools, ranging from general compliance

assistance to inspections to informal and formal enforcement actions. Formal enforcement is likely to remain an important tool in the NCIs as it is often the only tool to address serious violations and create general deterrence.

- b) **Engage earlier and more continuously with states in the NCI selection, development, and implementation process.** EPA will engage states early and often in choosing or changing initiatives. EPA will also invite states to help develop NCI implementation strategies, identify the appropriate mix of tools, and develop measurable goals. EPA will invite states with authorized programs to participate in NCIs by, for example, conducting inspections and enforcement actions, and will work with states to develop a framework for this kind of participation.

State participation in the NCIs is voluntary. Participation may vary by specific NCI depending on state interest, state authorization status, state capacity, and whether the widespread noncompliance problem is present in the state.

- c) **Expand the NCI cycle to four years to better align with the Agency's National Program Guidance cycle.** The next NCI cycle will begin in FY2020 and continue through the end of FY2023.

## **6. Moving Towards Outcome and Performance Metrics**

EPA generally monitors the effectiveness of state compliance assurance programs by measuring the outputs of agency activities, such as numbers of inspections and enforcement actions. The workgroup recognizes that environmental outcome-based measures can provide states and EPA with flexibility and the ability to be innovative on how best to return facilities to compliance in a timely and effective manner, while accommodating the unique characteristics of the various state/EPA relationships and programs.

Until recently, ECOS and EPA have not been able to easily generate this kind of “bottom line” compliance assurance outcome information. In the FY2018 – FY2022 EPA Strategic Plan, EPA took a major step forward in moving to outcome measures for compliance assurance programs. EPA identified a new priority to increase compliance with environmental laws. The Strategic Plan states: “To maximize compliance over the next five years, the Agency will refocus efforts toward areas with significant noncompliance issues and where enforcement can address the most substantial impacts to human health and the environment.” This focus on increasing compliance and environmental outcomes is also a priority for states. EPA selected CWA NPDES as the first program for initiating the effort to increase compliance rates, setting a goal of reducing the rate of significant noncompliance in the

NPDES program by 50% (to a rate of 12%) by the end of FY2022. EPA has already started to engage states in this effort.

When evaluating state compliance assurance programs, EPA focuses on how much effort states are dedicating to traditional activities like inspections and enforcement actions. The workgroup concluded that one reason EPA focuses on these traditional tools is measuring the effectiveness of other tools, such as state-delivered training or compliance assistance websites, is difficult. Moreover, these types of alternative tools would not work in the absence of a robust government inspection and enforcement program. The workgroup therefore tried to identify opportunities for states and EPA to pursue innovative compliance assurance approaches in situations where we can measure how effective those approaches are.

The workgroup conducted a state survey that indicated that some states use *find and fix* programs as an important part of their compliance assurance programs to address less serious violations and return facilities to compliance quickly.<sup>1</sup> For purposes of this Report, we define *find and fix* as:

- *Find and fix* starts with the inspection of a regulated facility by a regulatory agency, the inspector identifies a relatively minor violation or likely violation, brings it to the attention of the facility owner/operator and informs them of the *find and fix* program. If the owner/operator readily agrees to fix the violation and then provides proof that it has corrected the violation in a relatively short time period, then the regulatory agency may waive any penalty for that violation. The agency retains its enforcement authority and discretion on whether to use the *find and fix* tool in any given circumstance and to follow-up with an enforcement action if appropriate.

The workgroup suggests states and EPA consider the use of *find and fix* as potentially an effective tool to quickly remedy minor violations. However, states and EPA have other tools to address minor violations. Further, the workgroup is not aware of empirical data on the effectiveness of *find and fix* and thus encourages states or EPA programs that wish to pilot this tool to do it in a way that we can measure its effectiveness.

## **Recommendations**

- 1) After EPA's initiative to improve NPDES compliance identifies the main drivers for compliance rates and best practices for improving compliance, EPA and states should consider how EPA can evaluate state NPDES programs by tracking compliance rates rather than solely relying on activity measures.

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<sup>1</sup> Approximately seventeen states and D.C. responded to the survey.



- 2) EPA and states should identify other program areas to pilot the development and use of compliance rates.
- 3) EPA and states should evaluate the effectiveness and appropriate use of *find and fix*, as well as compliance assistance.

## **7. Conclusion**

The ECOS-EPA Compliance Assurance Workgroup has accomplished a great deal over the past year. First, this report contains principles and recommendations that states and EPA regions should consider in order to improve compliance assurance programs and, by doing so, deliver improved environmental outcomes. Second, the workgroup influenced EPA's transition from National Enforcement Initiatives to National Compliance Initiatives. And third, the workgroup influenced EPA's January 2018 "Interim Guidance on Enhancing Regional-State Planning and Communication on Compliance Assurance Work in Authorized States." The workgroup recommends that the OECA Assistant Administrator consider this workgroup report as the EPA updates the Interim Guidance in FY2019.

## Appendix A: ECOS-USEPA Compliance Assurance Workgroup

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