



December 12, 2013

# National Strategy for Improving Oversight of State Enforcement Performance<sup>1</sup>

## Purpose

EPA and states have a shared mission to protect public health and the environment. Compliance with our nation's environmental laws and regulations is critical to attaining the public health and environmental benefits they set out to achieve. Environmental enforcement is an important tool in securing compliance with those laws and regulations. To accomplish this mission, EPA authorizes state, tribal and territorial<sup>2</sup> agencies to directly implement environmental laws.<sup>3</sup> Federal and state regulators work cooperatively together as co-regulators to achieve compliance, with delegated or authorized states performing the vast majority of enforcement across the country. EPA relies heavily on authorized states to implement the day-to-day business of compliance and enforcement programs, with states contributing a majority of the staff and resources necessary to ensure protection of public health and the environment. EPA, in turn, develops national policies and guidance, many of which set goals for performance, to achieve consistency across state programs and establish a level playing field for businesses, states and the public. Strong state performance is therefore fundamental to maximizing compliance and public health and environmental protections.

In 2004, EPA and the Environmental Council of the States (ECOS) established the State Review Framework (SRF), a national system for regularly and periodically reviewing state enforcement performance with respect to the Clean Air Act, Clean Water Act and the Resource Conservation and Recovery Act. Implementation of the SRF and other evaluative efforts has shown that while there are a large number of states with effective enforcement programs, state performance in meeting national enforcement goals and taking necessary enforcement actions varies across the country. Regional oversight of state performance has also been shown to be varied and inconsistent, and can be improved.<sup>4</sup> The purpose of this Strategy is to supplement the SRF and

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<sup>1</sup> This policy supplements and does not supersede existing state/EPA enforcement guidance or agreements (i.e., A. James Barnes, "Revised Policy Framework for State/EPA Enforcement Agreements," <<http://www.epa.gov/compliance/resources/policies/state/enforce-agree-mem.pdf>> (Washington, D.C., 1986)), some of which specifically address EPA intervention.

<sup>2</sup> For the purposes of this document, the term "states" includes tribal and territorial government agencies. This document also applies to regional direct implementation programs.

<sup>3</sup> State authority granted by EPA does not abrogate EPA's statutory responsibilities for protecting human health and the environment for all citizens.

<sup>4</sup> U.S. EPA, results of individual State Review Framework reviews, <<http://www.epa.gov/compliance/state/srf/index.html>> (2004-2012). U.S. EPA Office of Inspector General, "EPA Must Improve Oversight of State Enforcement," <<http://www.epa.gov/oig/reports/2012/20111209-12-P-01113.pdf>> (2011). U.S. EPA Memorandum, Robert Perciasepe and Cynthia Giles to Arthur Elkins, Inspector General (March 12, 2013). U.S. EPA Office of Inspector General, "State Enforcement of Clean Water Act Dischargers Can Be More Effective," <<http://www.epa.gov/oig/reports/2001/finalenfor.pdf>> (Washington, D.C., 2001). U.S. General Accounting Office, "More Consistency Needed Among EPA Regions in Approach to Enforcement," <<http://www.gao.gov/new.items/rc00108.pdf>> (Washington, D.C., 2000). U.S. EPA Office of Inspector General (2011). U.S. EPA Office of Inspector General, "EPA Must Improve Oversight of State Enforcement." <<http://www.epa.gov/oig/reports/2012/20111209-12-P-01113.pdf>>

set forth EPA's policy for responding to and resolving significant state performance issues in a nationally consistent manner. This National Strategy is built upon three foundational principles:

1. EPA's goal is to ensure consistent implementation and oversight of federal environmental laws and policies across states in order to provide equal environmental benefits to the public and a level playing field for regulated entities;
2. EPA recognizes that an integral part of the SRF is a consistent national approach to assessing state performance and identifying and addressing significant issues; and
3. EPA's responsibility is to oversee and, where necessary, work to improve state performance by building upon existing practices and effective working relationships.

States operate under different political and resource constraints; nonetheless, EPA must ensure that states use their best efforts to consistently apply the law and pursue vigorous enforcement, as appropriate. EPA must clearly articulate expectations for acceptable state enforcement programs, and consistently hold states – and EPA where it implements the law – accountable. In many circumstances, state performance issues can be addressed during the general oversight of a state's compliance and enforcement program. Where a performance problem cannot be readily addressed, or where there is a significant<sup>5</sup> or recurring performance issues, there are steps EPA can and should take to actively promote improved state performance.

The following three elements of this strategy are aimed at improving state enforcement performance over time:

1. **The Escalation Approach to Problem-Solving:** A series of escalating steps intended to provide consistent guidance to the regions in their review of and response to state enforcement performance issues.
2. **Plans for Addressing Significant Issues:** EPA Regions and states should work together to develop plans to address identified significant individual state performance issues.
3. **Transparency Efforts:** Efforts intended to provide the public with timely, high quality information on state and federal enforcement performance can motivate government to improve.

### **Problems Identified**

Measuring state performance is a complex undertaking. Data from national data systems alone cannot tell us what we need to know about performance. EPA's current metrics are based on the activities the states perform and not on the level of compliance within regulated sectors, which is difficult to assess with the information currently available. This is complicated by the fact that some states have issues with data completeness and/or accuracy as reported in national data

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<sup>5</sup> "Significant issues" include, but are not limited to, those identified on pages 3 and 4 of this document, as well as routine compliance and enforcement issues that, over time, develop into chronic, unresolved problems.



systems. States are also not required to report on all of their regulated sectors or the actions that they take in those sectors. Moreover, there is often important context around data that must be taken into account to provide an accurate picture, making it difficult to portray performance in an easily understandable and transparent way.

Even if a state's compliance and enforcement performance in one program exceeds expectations, it is rare that a state's performance is uniform across programs, components or sectors. It may be that a state has issues in one program, one aspect of a program, or a particular sector. In some cases, issues may cross program boundaries. This means that approaches to improve state performance must be focused on and tailored to the specific identified problem.

Performance issues may be related to inadequate program funding or resources, either long-term or due to fluctuations in a state's or the national economy. Generally, resource levels are not a focus of program oversight attention unless there are performance issues. In those cases, regions and states collaboratively should look at root causes of the performance issues, including the resource shortage, and design strategies that try to address those causes that include both short term (e.g., work share arrangements in the case of temporary resource or expertise shortages) and more permanent and long term (e.g., additional fees or grant funding) solutions.

Performance issues are also sometimes caused or compounded by legal or administrative issues that can hinder timely and appropriate enforcement. Examples include:

- A state environmental agency's lack of administrative penalty authority or limits on its statutory or regulatory penalty authorities;
- Issues related to legal resources or approvals needed from independent boards or commissions;
- Other statutory or regulatory impediments;
- Technical limitations (including data);
- Use of enforcement orders to circumvent standards or to extend permits without appropriate notice and comment; or
- Failure to inspect and enforce in some regulated sectors.<sup>6</sup>

The SRF utilizes a nationally consistent approach to assess and identify whether significant state enforcement performance problems exist, based on regular, periodic reviews. The first round of the SRF (which began in 2004) resulted in almost 1200 recommendations for improvement, of which over 85% have been completed by states within the context of the existing state/regional oversight framework. These improvements are noteworthy. However, the second round of SRF reviews found that significant issues identified in the first round remain unresolved. Four significant issues in particular were found to have continued from the first to second rounds of the SRF in many states. These unresolved and recurring issues indicate the need for a focused national effort to address them, and include:<sup>7</sup>

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<sup>6</sup> U.S. EPA Office of the Inspector General, "Wastewater Management: Controlling and Abating Combined Sewer Overflows," <<http://epa.gov/oig/reports/2002/csfinal.pdf>> (2002). U.S. Government Accountability Office, "Concentrated Animal Feeding Operations: EPA Needs More Information and a Clearly Defined Strategy to Protect Air and Water Quality from Pollutants of Concern," <<http://www.gao.gov/assets/290/280229.pdf>> (2008).

<sup>7</sup> U.S. EPA Office of Compliance, State Review Framework National Issue White Papers.

- Widespread and persistent data inaccuracy and incompleteness in national data systems, which make it hard to identify when serious problems exist or to track state actions;
- Routine failure of states to identify and report significant noncompliance;
- Routine failure of states to take timely or appropriate enforcement actions to return violating facilities to compliance, potentially allowing pollution to continue unabated; and
- Failure of states to take appropriate penalty actions, which results in ineffective deterrence for noncompliance and an unlevel playing field for companies that do comply.

The lack of progress in correcting these issues has highlighted the need for this strategy to provide additional guidance to regional implementation of the SRF concerning consistent response to identified issues.

### **Taking Action – Escalation Approach to Problem-Solving<sup>8</sup>**

Most state performance problems can and should be dealt with initially in a collaborative manner at a staff or mid-management level. Many regions and states utilize upfront and regular collaborative discussions to work together towards effective state enforcement programs. In addition, raising and discussing identified issues in the process of annual planning, where regions and states can view the set of issues and priorities as a whole and negotiate decisions about the use of resources in a strategic way can be constructive and effective. It also makes sense to incorporate known issues into the SRF review cycle. Known issues may include issues identified in the SRF process or may be identified through a region's other day-to-day interactions with or oversight of a state. Examples could include, but are not limited to, issues identified in other past reviews (such as PQR reviews), discovered during joint or oversight inspections, compliance challenges under statutes not examined under the SRF framework, and/or discussed in other oversight venues (such as Watch List discussions or grant oversight). The National Strategy recognizes that regional and state resources are limited and that the focus should be on addressing the most significant issues. When resources are an issue, the region and state should look for both long and short term solutions.

The following four tiers outline tools for regions to use in responding to state performance issues. In many cases, these tiers would be utilized in a progressive or escalating manner, but the regions have the flexibility to implement any of the tiers in the sequence necessary to appropriately address a performance issue. There are many factors that might influence the manner of regional engagement with a state, such as the complexity of the issue, previous engagement on similar issues, or a state's interest in engaging and improving their performance. For example, if the resolution to a performance issue is complicated or requires a longer

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<sup>8</sup> As part of each federal program that is authorized or delegated to a State, EPA reserves its right to take federal action for multiple purposes in addition to the purpose of escalation presented in this strategy. These purposes include but are not limited to the following: to carry out EPA's national enforcement initiatives, to provide adequate enforcement presence as a deterrent for maintaining a national level playing field, to fulfill cooperative workshare agreements with the State, to assure adequate understanding of EPA's roles in ensuring compliance with federal laws, etc.

implementation period and has an agreed upon plan with the state, the region may want to continue using lower tier approaches. Alternatively, if the region has already tried the lower tier approaches without stimulating improvement, or the state demonstrates an unwillingness to work toward improvement, an escalated tier action may be warranted.

There also may be situations where a region chooses to engage with a state in different ways simultaneously, such as developing a written plan to memorialize the steps needed to address a particular state enforcement issue while continuing to cooperatively workshare with the state in the short term. The regions can and should partner with states to improve performance wherever possible using whatever tools are determined to be appropriate under the circumstances. Regions and states can take varied approaches to improving state enforcement programs as long as the performance issue is resolved, resulting in equal environmental benefits to the public and a level playing field for regulated entities across state borders.

**Tier 1: Work with the state to call attention to the issue:** When enforcement performance issues are discovered in an individual state enforcement program, EPA's role is to raise the issue, clarify expectations, and try to reach agreement with the state on the steps needed to resolve it. These discussions can take place at the senior staff, or more likely, the first line management level. Depending on the circumstances, EPA may need to assist the state program through communication or capacity building activities, such as helping to further clarify expectations, providing issue specific technical assistance, mentoring and conducting training and workshops. EPA may also help the program develop standard operating procedures or commit to voluntary joint cooperative workshare agreements to allow the state to transfer resources to resolving problems, with an exit strategy in place.

**Tier 2: Elevate problem-resolution to higher levels of management and document the path to resolution:** There are times when a problem-solving approach at the staff or first-line management level will not be successful. In that case, regions should elevate discussions of significant issues to higher management levels at the region and state, up to and including the Regional Administrator/State Commissioner level.<sup>9</sup> Senior managers may use annual data reviews and other metrics (such as in the State Performance Dashboards referenced below) as tools in these discussions to demonstrate the need for corrective action. At this level, corrective actions are often specified in writing (as in SRF reports and recommendations) and may be included in grant work plans and Performance Partnership Agreements (PPAs) or other communications. States have the flexibility to indicate their preferences to their region on how to document commitments to resolve issues, though it is strongly suggested that these agreements be in writing. These should be monitored on a regular basis and EPA and state managers periodically advised of progress in meeting corrective action commitments.

A method that has been successfully employed by a few regions to document the path to resolving outstanding issues is a focused, issue-specific Memorandum of Agreement (MOA) which identifies the problems and corrective actions necessary, and includes milestones and schedules. If such MOAs are developed, it is recommended these MOAs be signed at the

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<sup>9</sup> There may be other reasons for elevating issues to senior management beyond an unsuccessful attempt at resolution.

Regional Administrator/Deputy Regional Administrator and State Commissioner level, and that they address the consequences of non-performance.

**Tier 3: Take direct EPA action:** Another tool available to regions is to engage in more direct actions to achieve desired EPA compliance and enforcement goals and reinforce the need for a state to act. Such activities include: reviewing completed state actions to see if improvements are being made; reviewing actions prior to the state's taking those actions to ensure conformance with EPA policy; conducting joint, oversight, or federal only inspections, or bringing federal only cases,<sup>10</sup> calling attention to the state performance issue.

**Tier 4: Escalating EPA action:** There are additional very serious actions that EPA can take to focus attention on the lack of progress in resolving significant state performance issues. These actions should be considered only after other attempts to resolve issues have failed. Actions may include overfiling where a state fails to take appropriate action on a particular enforcement matter; withholding grant dollars to evoke a particular change in performance; temporary or partial withdrawal of a program; or in certain, extremely rare circumstances full program withdrawal until such time as the state once again meets authorization or delegation requirements.

Withdrawal of authorization of a state program is not a goal, but rather is an action of last resort, to be invoked only in the most egregious circumstances. Both public health and the environment benefit from the partnership of both the state and federal government in the implementation of environmental programs. Thus the goal of the State Review Framework and of regional oversight is, and has always been, to improve state programs, not withdraw them. Withdrawal, however, may be the only viable response where a state has significant program-wide issues that, if left unaddressed, have the potential to adversely impact human health or the environment. Consequently, if a state is not fulfilling its obligations under its authorization or delegation agreement, withdrawal should remain an option considered by EPA.

As part of each federal program that is authorized or delegated to a State, EPA has retained the right to take federal action for multiple purposes. These purposes include but are not limited to the following: to carry out EPA's national enforcement initiatives, to provide adequate enforcement presence as a deterrent for maintaining a national level playing field, to fulfill joint cooperative workshare agreements with the State, and to assure adequate understanding of EPA's roles in ensuring compliance with federal laws.

**Plans for Addressing Significant Performance Issues:** The National Strategy lays out a nationally consistent way to implement an integral part of the SRF, which is to address significant state performance issues and improve oversight and performance. Senior management in OECA and the regions will engage in discussions annually regarding significant state enforcement performance issues identified in the SRF process as well as through other information available to the regions. These discussions will normally take place during annual OECA/Regional meetings, but could occur at other times as needed.

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<sup>10</sup>This option would be in addition to federal actions that EPA brings routinely in authorized or delegated state programs for other purposes such as carrying out EPA's national and regional enforcement priorities, or carrying out joint enforcement projects with states.

As part of these discussions, each region should have a written plan, updated annually, for addressing identified significant state performance issues. The plan will provide information needed to serve as a basis for the OECA/Regional discussion, including identification of the issues (based on objective and comparable data whenever possible and by media if appropriate), corrective measures<sup>11</sup> being taken or envisioned, and the associated timeline. These plans should be discussed with states, and their active engagement should be strongly encouraged in addressing the problem. Regions and OECA should monitor progress under these plans and work with states to ensure state program improvements.

### **Transparency Efforts**

EPA has published, and will continue to publish, information on state performance in order to be transparent about and provide public access to information regarding the level of environmental protection being provided to residents within their state borders. In February 2013, OECA released CWA, CAA and RCRA state dashboards and comparative maps that provide the public with information about the performance of state and EPA enforcement and compliance programs across the country. Also available through the dashboards are links to the results of State Review Framework evaluations for the state agencies, and any performance areas with recommendations for improvement.

EPA recognizes that improvements are needed in data quality and in the way we measure performance at both the state and federal levels. As we move towards the future, EPA will seek to employ “Next Generation Compliance”<sup>12</sup> tools and approaches to improve our national data and how performance is measured and portrayed to the public. With these advances, there will be more high quality data for both federal and state regulators and the public to utilize to review and evaluate government performance. Better and more complete data will also provide an ability to look more comprehensively to identify the most serious violations and better evaluate compliance patterns. It will help to determine what strategies work best to reduce pollution and improve compliance.

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<sup>11</sup>Corrective measures should be aligned with those identified in the escalation section of this strategy. They might include, but are not limited to, training, , increased communications, elevating to higher management levels, detailing resources, shared data collection, financial assistance for technology upgrades, standard operating procedure templates for states, active EPA inspections and/or enforcement in a state, withholding grant funds, and withdrawal of program authorization/delegation.

<sup>12</sup> “Next Generation Compliance” is EPA’s new approach to implementing compliance and enforcement programs. It includes the use of electronic reporting from the regulated community and authorized/delegated programs, use of field technologies to get real-time information on ambient conditions and compliance, building more incentives into rules to promote compliance, use of transparency to improve both facility and government performance, and the employment of innovative enforcement approaches to better track, analyze and compel compliance.