

# EPA-State Partnership Memo Signals Focused Enforcement

By **Bernard Hawkins**

On July 11, 2019, Susan Parker Bodine, assistant administrator for the U.S. Environmental Protection Agency's Office of Enforcement and Compliance Assurance, or OECA, released a seven-page memorandum to the EPA's regional administrators that "sets out expectations and procedures for enhancing effective partnerships in civil enforcement and compliance assurance work between the U.S. Environmental Protection Agency and states that are authorized, delegated, or approved to implement federal environmental programs."<sup>[1]</sup>



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The partnership memo withdraws and replaces an interim policy that had previously been released Jan. 22, 2018.<sup>[2]</sup> Reading the memo as removing the EPA from the state-enforcement process, or as somehow lessening the EPA's role in this process as a whole, would appear to be a mistake.

The partnership memo addresses three key aspects of the recommended relationship between the EPA regions and the states. These key aspects include: promotion of joint work planning between the EPA regions and states; identification of expected roles of the EPA regions and states in implementing authorized programs; and description of the preferred process for the elevation and resolution of issues that might arise between the EPA regions and the states in addressing enforcement actions within a state.

## **Joint Work Planning Between States and EPA**

First, the partnership memo addresses "expectations and best practices for periodic joint work planning and effective communication between the EPA regions and states to further the goal of shared accountability for the consistent enforcement of the law."<sup>[3]</sup>

The memo explains that "[c]ooperative, periodic, and early joint planning and regular communication between the EPA and states is essential to promote enhanced, shared accountability between federal and state enforcement authorities. A 'no surprises' principle is the foundation of joint work planning and will minimize the misunderstandings that can be caused by the lack of regular, bilateral communication."<sup>[4]</sup>

The partnership memo then encourages greater communication between the states and EPA regions about what is occurring within enforcement sections of the state and within the EPA regions. It encourages "no surprises" within the relationship that exists between the EPA and the states.

While the memo has been touted as providing a greater role for the states (with the implication that this could somehow mean less enforcement or involvement from the EPA regions), the primary role of the states under this memo appears contingent on enhanced communication and planning with the EPA regions.

This level of cooperation could actually result in more interactions between the states and the EPA about ongoing enforcement cases. These interactions could lead to more active EPA input on state-led enforcement matters.

The partnership memo sets out the type of joint planning and communication that OECA believes to be appropriate. Discussions should address such items as strategic planning, joint inspections with recommended best practices, and joint enforcement planning.[5]

The memo makes it clear that EPA regions should provide states with advance notice of inspections, and should avoid duplicating inspections in most cases.[6] OECA recommends that any disagreements between states and the EPA regions concerning enforcement activities in a state that cannot be resolved at the initial levels of recommended interaction (starting with career-level employees and managers) should be elevated in the manner set out in Part III of the memo, discussed below.

The memo says that joint strategic planning between the states and EPA regions could include discussion of:

(1) the environmental compliance problems and needs in the state; (2) national, regional, and state compliance assurance priorities; (3) emerging issues; and (4) how the combined resources of the EPA and the state could be used to address these needs. Strategic planning should also include a discussion of how the EPA and the state may mutually build their respective capabilities to conduct inspections and develop and prosecute cases. Strategic planning meetings should include senior management.[7]

Thus, the memo expresses a desire for the EPA and the states to collectively identify “environmental compliance problems,” “compliance assurance priorities” and “emerging issues,” within the region and the states, and to coordinate on how to best address these problems.

The partnership memo is encouraging an agreement on enforcement priorities and then promoting a division of effort, to avoid needless duplication and best allocate limited resources to cover the greatest number of problems or potential problems — including the development of joint resources to address these issues of concern.

This level of cooperation could then produce a more coordinated, better-equipped and more far-reaching enforcement capability within each state, providing more focused scrutiny for some facilities moving forward. For other facilities (where coordination may have been historically lacking), the increased cooperation and planning could avoid duplicate inspections from the EPA and the states.

OECA explains how cooperative planning could help the EPA satisfy its responsibility to ensure compliance with federal statutes. The memo provides best practices for how EPA regions and the states should work together in setting their separate inspection priorities and commitments. These best practices include:

- EPA regions and states should avoid duplicative or overlapping inspections that would result in the EPA and states inspecting the same facility for the same regulatory requirements within the same 12-month period. (However, overlapping inspections could be appropriate where the facility is “complex,” and particularly where the inspections will focus on different regulatory requirements, or where the EPA and state agree that “multiple inspections serve a valuable purpose.”)[8]

- “EPA regions and the states should exchange and discuss their targeting rationales and draft inspection plans as early as possible.” This should be more than just an exchange of target lists, but should include a discussion of the purpose and objective for inspections.[9]
- “EPA regions should provide states with advance notice of inspections, especially because inspection plans tend to be dynamic and it might have been some time since the planned inspection was discussed.” [10]

Reviewing these best practices, it is apparent that following these recommendations could, in many instances, enhance the level of communication occurring between states and the EPA regions concerning planning, strategy and objectives for enforcement within the states.

The partnership memo encourages regions and states to invite each other to participate in joint inspections “where there is value in both entities participating.”[11] This should be based upon consideration of how to best utilize the “combined resources” of the EPA and states “to meet national inspection coverage expectations under applicable Compliance Monitoring Strategies and statutory requirements and should consider the use of alternative compliance monitoring strategies where appropriate.”

And, consistent with the “no surprises” principle, where the EPA has the lead for enforcement, it should be sharing information requests and inspection reports with the states for authorized programs.[12]

With respect to joint enforcement planning, the memo again requires significant joint planning between the states and EPA regional offices. Best practices suggested include:

- The EPA region providing input on what enforcement action it believes is warranted within the state, including a review of the EPA’s observations and findings from inspections and case development techniques, and input on whether enforcement should be federal, state or a joint action.[13]
- Where a state will take the lead on an EPA-identified enforcement action, there should be agreement on how state-specific actions will be “appropriate for the circumstances” — including remedy and civil penalties as appropriate.[14]
- Where the EPA is taking the lead for enforcement, the state should be notified of the action before the facility.[15]
- Joint enforcement should include regular updates on progress and outcomes in light of state and federal priorities.[16]
- The EPA and states should remain aware of the need for confidentiality in the enforcement process, so as not to diminish the effectiveness of the partnership.[17]
- The EPA and states should continue to address the need for additional enforcement, and discuss the appropriate agency to take the lead in any such actions.[18]
- There should be general ongoing assistance and cooperation between the states and the EPA.

The above points emphasize the significant level of communication and cooperation envisioned between the EPA regions and states that, in some instances, may not be presently occurring.

### **Roles of the EPA and States In Implementing Authorized Programs**

In a second major theme, the partnership memo recognizes the primary role of the states in implementing authorized programs, while acknowledging the EPA's ongoing responsibilities in limited circumstances, and outlining instances that may warrant direct federal action.

The memo provides that "[t]he EPA will generally defer to a state as the primary implementer of inspections and enforcement in authorized programs." [19] However, OECA identifies nine examples where the EPA may elect to take the lead for enforcement.

#### ***Where a State Has Requested That the EPA Take the Lead***

Based upon the joint planning discussed in Section I above, the EPA and the state may agree on the EPA taking the lead for a particular type of enforcement action, sub-program, sector or geographic area under an EPA-state work-sharing arrangement. [20]

#### ***Violations That Are Part of a National Enforcement Initiative***

The EPA and states should discuss how to best use limited resources and expertise to maximize addressing the National Compliance Initiatives or NCIs. "NCIs will be defined as a subset of cases in a program area where the EPA has determined that national consistency and federal assistance in achieving compliance are important to the protection of public health and the environment." [21]

#### ***Emergency Situations or Substantial Risks to Human Health or the Environment***

States and the EPA may agree that it is appropriate for the EPA to take the lead under emergency circumstances. [22]

#### ***Where a State Lacks Adequate Equipment, Resources or Expertise***

The EPA may elect to take the lead in situations "where the state does not have the equipment, resources, or expertise necessary to enforce an aspect of an authorized statutory program." [23] However, the EPA should defer to states that have demonstrated "greater compliance assurance capability" than to those that continue to have "difficulty improving compliance." [24]

#### ***Multijurisdictional Interests or Interstate Impacts***

The partnership memo provides that the EPA should take the lead in situations where noncompliance is occurring at multiple facilities owned or operated by the same entity in multiple states to ensure consistency. The EPA may also be the appropriate lead agency where noncompliance impacts other states or nations. [25]

#### ***Significant Violations That a State Has Not Timely or Appropriately Addressed***

This would involve situations where EPA does not believe that a state has not provided a timely or appropriate action. But note that disagreements on enforcement should be addressed as discussed in Section III below.

### ***Serious Violations for Which the EPA's Criminal Enforcement Authorities May Be Needed***

The partnership memo provides that, “[b]ecause only a handful of states have active environmental criminal enforcement programs, most environmental criminal investigations are performed by the EPA in consultation and cooperation with local law enforcement authorities.”[26]

### ***State Enforcement Program Review Inspections to Verify Delegated Program Effectiveness***

The EPA has responsibilities under the various federal statutes to verify efficacy of authorized enforcement programs.[27]

### ***Enforcement at Federal and State Facilities***

The EPA may need to be the lead agency to assist a state in situations where there is enforcement at a federally-owned facility. In addition, the EPA may need to be the lead in scenarios where the state is the target of enforcement, and there are conflicts internal to the state that make enforcement less effective.[28]

### ***Process for Elevation of Issues***

Finally, the third section of the partnership memo outlines a process by which OECA prefers that disagreements between the EPA regions and states concerning enforcement matters will be resolved. The best practices outlined by the memo include:

- Issues should be resolved whenever possible at the EPA and state career management level.
- If career management cannot resolve an issue, the matter should be elevated within 30 days for resolution by regional and state senior management.
- If following elevation within the region and the state there remains a dispute between the EPA regional administrator and the state secretary or commissioner, the matter should be elevated within 60 days to the assistant administrator for the Office of Enforcement and Compliance Assurance for a decision. The regional administrator and the state secretary or commissioner will be afforded the opportunity to present the matter in dispute to the assistant administrator prior to a final decision.[29]

### ***Conclusion***

The partnership memo does not signal the end of EPA regional involvement in state enforcement. In fact, the memo specifies a significant level of planning and cooperation between the EPA regions and the states that may not be presently occurring in some instances.

This level of interaction could produce more enhanced and effective enforcement at the state level. Facilities should be aware of the type of planning and coordination that is likely to be occurring between the EPA regions and the states, and how this interaction could change the approach to enforcement that is occurring at the state level.

While the memo directs the EPA regions to provide significant deference to the states in taking the lead on enforcement activities, to avoid duplication of efforts and inefficiencies, this deference appears contingent on intensive joint planning and cooperation in conducting and reviewing the results of enforcement activities.

In addition, OECA identifies nine examples of the types of actions where the EPA may retain a lead role for enforcement. Finally, the memo provides a preferred pathway for how EPA regions and the states should seek to resolve disputes concerning how enforcement activities are being conducted within a given state.

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[1] Enhancing Effective Partnerships Between the EPA and the States in Civil Enforcement and Compliance Assurance Work, Susan Parker Bodine (July 11, 2019) ("partnership memo") at page 1.

[2] Partnership memo, fn. 7, page 2.

[3] Partnership memo at page 1.

[4] Partnership memo at page 2.

[5] Partnership memo at pages 2-3.

[6] Partnership memo at pages 3, 4 and 5.

[7] Partnership memo at page 3.

[8] Partnership memo at page 4.

[9] Id.

[10] Id.

[11] Id.

[12] Id.

[13] Partnership memo at pages 4-5.

[14] Partnership memo at page 5.

[15] Id.

[16] Id.

[17] Id.

[18] Id.

[19] Partnership memo at page 6.

[20] Id.

[21] Id.

[22] Id.

[23] Id.

[24] Id.

[25] Id.

[26] Id.

[27] Id.

[28] Id.

[29] Partnership memo at page 7.