



U.S. ENVIRONMENTAL PROTECTION AGENCY
OFFICE OF INSPECTOR GENERAL

Catalyst for Improving the Environment

Evaluation Report

EPA Should Revise Outdated or Inconsistent EPA-State Clean Water Act Memoranda of Agreement

Report No. 10-P-0224

September 14, 2010

Report Contributors:

Dan Engelberg
Kathlene Butler
Charles Brunton
Anthony Chirigotis
Julie Hamann
Melba Reed

Abbreviations

| | |
|-------|---|
| CFR | Code of Federal Regulations |
| CWA | Clean Water Act |
| EPA | U.S. Environmental Protection Agency |
| GAO | U.S. Government Accountability Office |
| MOA | Memorandum of Agreement |
| NPDES | National Pollutant Discharge Elimination System |
| OECA | Office of Enforcement and Compliance Assurance |
| OIG | Office of Inspector General |
| OW | Office of Water |



At a Glance

Catalyst for Improving the Environment

Why We Did This Review

This review is part of a series the Office of Inspector General is conducting of U.S. Environmental Protection Agency (EPA) oversight of State enforcement programs. We assessed whether EPA's memoranda of agreement (MOAs) with States related to the National Pollutant Discharge Elimination System (NPDES) program impede consistent EPA-State enforcement and to what degree MOAs comply with federal requirements under the Clean Water Act (CWA).

Background

The CWA allows EPA to authorize States to operate the NPDES program if States meet certain criteria. States cannot operate NPDES programs on behalf of EPA without an authorizing MOA. MOAs should establish the foundation for EPA management control and oversight, ensure that CWA goals are being met, and ensure national consistency of State NPDES programs.

For further information, contact our Office of Congressional, Public Affairs and Management at (202) 566-2391.

To view the full report, click on the following link:
www.epa.gov/oig/reports/2010/20100914-10-P-0224.pdf

EPA Should Revise Outdated or Inconsistent EPA-State Clean Water Act Memoranda of Agreement

What We Found

NPDES MOAs between EPA and States do not ensure Agency management control and effective oversight over a national program administered by States that is capable of providing equal protection to all Americans. EPA Headquarters does not hold EPA regional or State offices accountable for updating their MOAs when necessary and relies on other planning and management mechanisms to exercise control over State programs. However, MOAs are critical because they are the common denominator for State-authorized programs and should represent a common baseline. Outdated MOAs or MOAs that are not adhered to reduce EPA's ability to maintain a uniform program across States that meets the goals of CWA sections 101 and 402. An effective national program must maintain consistent management control and oversight of State programs.

What We Recommend

We recommend that EPA ensure that all NPDES MOAs contain essential elements for a nationally consistent enforcement program, including CWA, Code of Federal Regulations, and State Review Framework criteria. We recommend that EPA develop and provide a national template and/or guidance for a model MOA; direct EPA regions to revise outdated or inconsistent MOAs to meet the national template and standards; and establish a process for periodic review and revision of MOAs, including when the CWA or Code of Federal Regulations are revised or when State programs change. Finally, we recommend that EPA establish a national, public clearinghouse of all current MOAs so that EPA, States, and the public have access to these documents.

EPA generally agreed with our recommendations, saying it would coordinate assessment and revision of NPDES MOAs with implementation of the CWA Action Plan. Three recommendations are open and one recommendation is listed as undecided. In its final response to this report, EPA should provide estimated or actual completion dates for all recommendations.



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

THE INSPECTOR GENERAL

September 14, 2010

MEMORANDUM

SUBJECT: EPA Should Revise Outdated or Inconsistent EPA-State
Clean Water Act Memoranda of Agreement
Report No. 10-P-0224

FROM: Arthur A. Elkins, Jr.
Inspector General

A handwritten signature in black ink, appearing to read "Arthur A. Elkins, Jr.", is written over the typed name.

TO: Bob Perciasepe
Deputy Administrator

This is our report on the subject evaluation conducted by the Office of Inspector General (OIG) of the U.S. Environmental Protection Agency (EPA). This report contains findings that describe the problems the OIG has identified and corrective actions the OIG recommends. This report represents the opinion of the OIG and does not necessarily represent the final EPA position. Final determinations on matters in this report will be made by EPA managers in accordance with established audit resolution procedures.

The estimated cost of this report – calculated by multiplying the project’s staff days by the applicable daily full cost billing rates in effect at the time and adding travel costs – is \$660,519.

Action Required

In accordance with EPA Manual 2750, you are required to provide a written response to this report within 90 calendar days. You should include a corrective actions plan for agreed-upon actions, including milestone dates. Your response will be posted on the OIG’s public Website, along with our comments on your response. Your response should be provided in an Adobe PDF file that complies with the accessibility requirements of section 508 of the Rehabilitation Act of 1973, as amended. If your response contains data that you do not want to be released to the public, you should identify the data for redaction. We have no objections to the further release of this report to the public. This report will be available at <http://www.epa.gov/oig>.

If you or your staff have any questions regarding this report, please contact Wade Najjum at (202) 566-0832 or najjum.wade@epa.gov, or Dan Engelberg at (202) 566-0830 or engelberg.dan@epa.gov.

Table of Contents

Chapters

| | | |
|----------|--|-----------|
| 1 | Introduction | 1 |
| | Purpose | 1 |
| | Background | 1 |
| | Scope and Methodology | 4 |
| 2 | Outdated or Inconsistent MOAs Impede Enforcement | 6 |
| | MOAs Are Missing Key Regulatory Requirements | 6 |
| | Most MOAs Are Outdated | 8 |
| | MOAs Are Inconsistent across Regions and States | 11 |
| | Some MOAs Contain Provisions that Are Inconsistent with the CWA | 12 |
| | Some EPA Regions Do Not Use MOAs to Manage State Enforcement Programs | 12 |
| | EPA Could Establish a National Baseline for CWA Implementation with an MOA Template | 14 |
| | Conclusion | 15 |
| | Recommendations | 15 |
| | Agency Response and OIG Comment | 16 |
| | Status of Recommendations and Potential Monetary Benefits | 17 |

Appendices

| | | |
|----------|--|-----------|
| A | List of CFR Criteria for MOA Assessment | 18 |
| B | Detailed Methodology | 21 |
| C | OIG Analysis of MOAs by CFR Section | 24 |
| D | Agency Response and OIG Comment | 26 |
| E | Distribution | 30 |

Chapter 1

Introduction

Purpose

We sought to determine the degree to which Clean Water Act (CWA) National Pollutant Discharge Elimination System (NPDES) memoranda of agreement (MOAs) between the U.S. Environmental Protection Agency (EPA) and States comply with federal requirements, and whether MOAs impede EPA's ability to exercise consistent management controls and oversight of State enforcement activities. Past reviews by the EPA Office of Inspector General (OIG) and others identified widespread enforcement problems. Although there are many causes for this common pattern of noncompliance, the EPA Office of Enforcement and Compliance Assurance (OECA) identified poor quality MOAs between EPA and States as one impediment to consistent enforcement. OECA requested that the EPA OIG evaluate the issue. This evaluation is part of a series of OIG reviews of EPA oversight of State enforcement programs.

Background

EPA is the responsible agency for implementing the 1972 CWA. Congress designed the CWA to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. As part of the CWA, the NPDES program regulates pollution to waterbodies. The CWA allows EPA to authorize States, tribes, and territories to operate the NPDES program if these entities demonstrate they have the authority and capability to run the program, and if their environmental enforcement authorities are at least as stringent as federal law. Both the U.S. Government Accountability Office (GAO) and the EPA OIG have frequently reported on problems with EPA-State enforcement.

MOAs, which are part of the States' application for NPDES authorization, are required, foundational documents between EPA and States. They define baselines and set collaborative expectations for program characteristics, permitting, monitoring, inspections, and enforcement, and are required by a unique set of federal regulations. Title 40 Code of Federal Regulations (CFR) Part 123, designed for the NPDES program, sets out MOAs as an instrument for ensuring that EPA and States adhere to the CWA. EPA's Deputy Administrator has overall authority for directing regional offices to revise MOAs.

CWA Enforcement Is Principally Implemented by States, but EPA Retains Authority

EPA has a vital role in ensuring that States, which largely implement the CWA, implement nationally consistent programs that offer equal protection from pollution to all Americans. EPA has given NPDES authority to 46 States and the U.S. Virgin Islands, beginning with California in May 1973 and most recently giving authority to Alaska in October 2008. As envisioned by Congress in the CWA, States form the first line of environmental defense: States take the majority of inspection and enforcement actions in the programs they implement. However, EPA does not forfeit its authority to independently review and overrule permits, conduct compliance inspections, issue violations, or take enforcement actions when it authorizes a State program. EPA remains responsible for ensuring that States operate NPDES programs in a manner that achieves national enforcement goals, protects public health and the environment, and is consistent with the CWA and the CFR.

EPA is the primary entity that can ensure national consistency. National consistency offers equal protection from pollution to all Americans, and is also vital to establishing a level playing field for regulated facilities so that no State has an economic advantage.

Authorization MOAs Establish the Foundation for Consistent Management Control

Office of Management and Budget guidance directs government agencies to operate programs using adequate management controls to ensure effective program operation. Management controls involve planning, oversight, and reporting systems. As part of a system of national management controls, the CFR requires authorization MOAs between EPA and every State operating an NPDES enforcement program. NPDES authorization MOAs (hereafter referred to as MOAs) must contain and meet relevant regulatory provisions. The CFR outlines a national baseline and expectations for the roles and responsibilities of EPA and States for the NPDES program. MOAs provide a foundation for national consistency for NPDES program enforcement. For example, MOAs must not contain any provisions restricting EPA's statutory oversight responsibility. In addition, renegotiation of MOAs can occur at any time to accommodate changes in federal and State laws and EPA-State agreements. The CFR states that no EPA-State agreement may override the MOA and requires the MOA, the annual program grant, and other EPA-State agreements should be consistent. See Appendix A for a list of CFR criteria for MOAs.

Although the foundations of the EPA-State enforcement relationship are built upon authorization agreements and the accompanying MOAs, EPA and States also use other annual and multiyear planning tools to set short-term expectations, establish measures, and set performance goals. The annual and multiyear

planning documents used by EPA regions and States vary by region and by State and are not required by regulation. A senior EPA official described the EPA-State NPDES relationship as a “layer cake,” with several layers of documents and agreements. The official said that EPA plans to address the multilayered EPA-State structure by simplifying the State-EPA enforcement process and accompanying document requirements.

EPA’s Enforcement Performance Has Been Questioned

In 2005, EPA initiated the State Review Framework, a formal process using standardized criteria, collaboratively developed by OECA, EPA regions, States, and the Environmental Council of the States, to gauge State performance in compliance assurance and enforcement. EPA wanted to increase its oversight inspections and other direct actions in the States. EPA reviewed State data, inspection and enforcement files, negotiated commitments, management discussions with the State, and other existing assessments. Through its reviews, EPA identified four programmatic deficiencies in State enforcement: data quality, identification of significant violations, the timeliness of enforcement actions, and penalties.

In October 2009, the EPA Administrator testified before the House Transportation and Infrastructure Committee that EPA was falling short of expectations for effective and fair enforcement of the CWA:

Data available to EPA shows that, in many parts of the country, the level of significant non-compliance with permitting requirements is unacceptably high and the level of enforcement activity is unacceptably low. For example, one out of every four of the largest Clean Water Act dischargers had significant violations in 2008. Many of these violations were serious effluent violations or failure to comply with enforcement orders. The government’s enforcement response to these violations is uneven across the country. For example, a violation in one State results in the assessment of mandatory minimum penalties, while in another State, no enforcement action is taken for the same violation. This situation creates a competitive disadvantage for States that are enforcing the law. We need to change this. Strong and fair compliance and enforcement across the country is vital to establishing a level playing field for industrial facilities, preventing some regions from attempting to achieve an economic advantage over others.¹

¹ Testimony of Lisa P. Jackson, Administrator, U.S. Environmental Protection Agency, Before the Committee on Transportation and Infrastructure, U.S. House of Representatives, October 15, 2009. http://www.epa.gov/ocir/hearings/testimony/111_2009_2010/2009_1015_lpj.pdf.

Both GAO and the EPA OIG have frequently reported on problems with the EPA-State enforcement relationship, noting key issues such as data quality, identification of violations, issuing enforcement penalties and other enforcement actions in a timely and appropriate manner, and general oversight issues. See Appendix B for a list of reports on these issues.

In its October 2009 testimony before the House Transportation and Infrastructure Committee, GAO reported that longstanding issues impact EPA and State enforcement efforts.² For example, findings from a GAO enforcement report in 2000 demonstrated that local variations among EPA's regional offices led to inconsistencies in the actions they take to enforce environmental requirements.³ In 2004, the EPA OIG responded to a congressional request to review the Region 3 NPDES program.⁴ In part, the OIG found that the MOAs between the States and Region 3 were all more than 10 years old at the time and included outdated requirements. These MOAs had not been revised as of the date of this report.

Scope and Methodology

EPA provided the OIG with the 46 State MOAs that were in force at the time we began this evaluation, as well as South Carolina's draft revised MOA.

The OIG identified 46 regulatory requirements that apply to State NPDES enforcement programs. These requirements are contained in Title 40 CFR Sections 123.24, 123.26, and 123.27 and were the criteria by which we reviewed the 46 MOAs. See Appendix A for the list of criteria.

The criteria fall into two categories. The first category consists of requirements for MOA documents themselves (Title 40 CFR 123.24), and the second category consists of criteria that while not required to be contained within MOA documents, are required for NPDES programs themselves (Title 40 CFR 123.26 and 123.27). We excluded two CFR criteria in these sections because they pertained specifically to States with federally recognized Indian tribes.⁵

The OIG rated each of the 46 MOAs for inclusion of statements addressing each regulation. For each of the 46 criteria, the OIG rated the MOA as a "0" (does not address this element), "1" (addresses the element in some way), or "2" (addresses

² Testimony of Anu K. Mittal, Director, Natural Resources and Environment Team, U.S. Government Accountability Office, Before the Committee on Transportation and Infrastructure, U.S. House of Representatives, "Clean Water Act: Longstanding Issues Impact EPA and States' Enforcement Efforts," October 15, 2009.

³ GAO, *Longstanding Issues Impact EPA's and States' Enforcement Efforts*, GAO-10-165T, October 15, 2009.

⁴ EPA-OIG, *Congressionally Requested Review of EPA Region 3's Oversight of State National Pollutant Discharge Elimination System Permit Programs*, Report No. 2005-S-0002, October 29, 2004.

⁵ Title 40 CFR 123.24(b)(1)(ii) says that where a State is authorized to issue permits on the Federal Indian reservation of the Indian tribal seeking approval, MOAs should include provisions for transferring relevant information if the Indian Tribe does not already have the documents. We excluded this criterion from the 46-State analysis. Title 40 CFR 123.27(e) is intended for inclusion in joint State-tribe-EPA MOAs or tribal-EPA MOAs. We excluded it as well based on the rationale above.

the element verbatim or in synonymous language). Each MOA thus received an overall score in our analysis based on a maximum of 92 points. The OIG does not deem this evaluation system comprehensive of all CFR and other requirements. However, the system serves as one indicator of MOA comprehensiveness. The OIG did not evaluate other EPA-State agreements for their inclusion of criteria not contained in MOAs.

The OIG also gathered evidence from interviews with EPA and external environmental groups. EPA interviews included the Deputy Administrator; OECA officials; and EPA personnel in Regions 1, 4, 8, and 10. Environmental groups interviewed were the Association of State and Interstate Water Pollution Control Administrators, the Environmental Council of the States, and the Environmental Integrity Project. These groups were selected for OIG interviews because they are key stakeholders and liaisons for State-EPA enforcement issues.

The OIG conducted this evaluation in accordance with generally accepted government auditing standards. Those standards require that we plan and perform our work to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our evaluation objective. We conducted our evaluation from October 2009 through June 2010.

For additional information about our methodology, see Appendix B.

Chapter 2

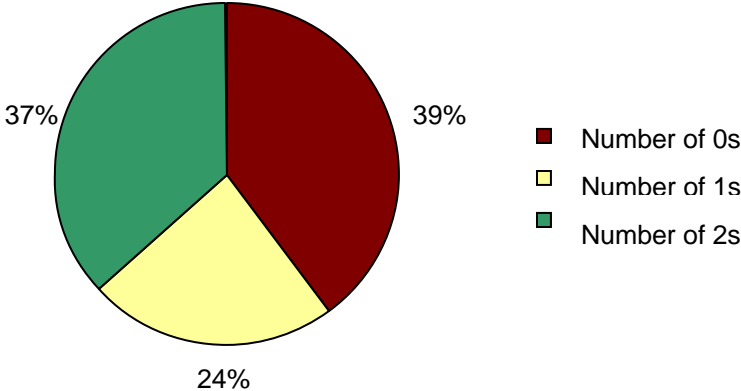
Outdated or Inconsistent MOAs Impede Enforcement

MOAs between EPA and States that are out of date or inconsistent hinder Agency management control and effective oversight over a national program administered by States that is capable of providing equal protection to all Americans. EPA does not hold regional or State offices accountable for updating their MOAs when necessary and relies on other planning and management mechanisms to exercise control over State programs. However, MOAs are critical because they are the common denominator for State-authorized programs and should represent a common baseline. MOAs that are outdated MOAs or not adhered to reduce EPA’s ability to maintain a uniform program across States that meets the goals of CWA sections 101 and 402.

MOAs Are Missing Key Regulatory Requirements

MOAs were missing key requirements of Title 40 CFR 123.24. MOA documents also lacked MOA-specific program regulations contained in Title 40 CFR 123.26 and 123.27. For each of the 46 criteria, OIG rated the MOA as a “0” (does not address this element), “1” (addresses the element in some way), or “2” (addresses the element verbatim or in synonymous language). Figure 2-1 shows that across all regulatory criteria, MOAs did not contain 39 percent of the criteria, and that 61 percent of regulatory criteria are either not addressed or only partially addressed. EPA should define the requirements for management control of a nationally consistent enforcement program, and then review each State MOA to determine which MOAs are adequate and which MOAs need to be revised.

Figure 2-1: Degree to Which MOAs Meet Regulatory Requirements



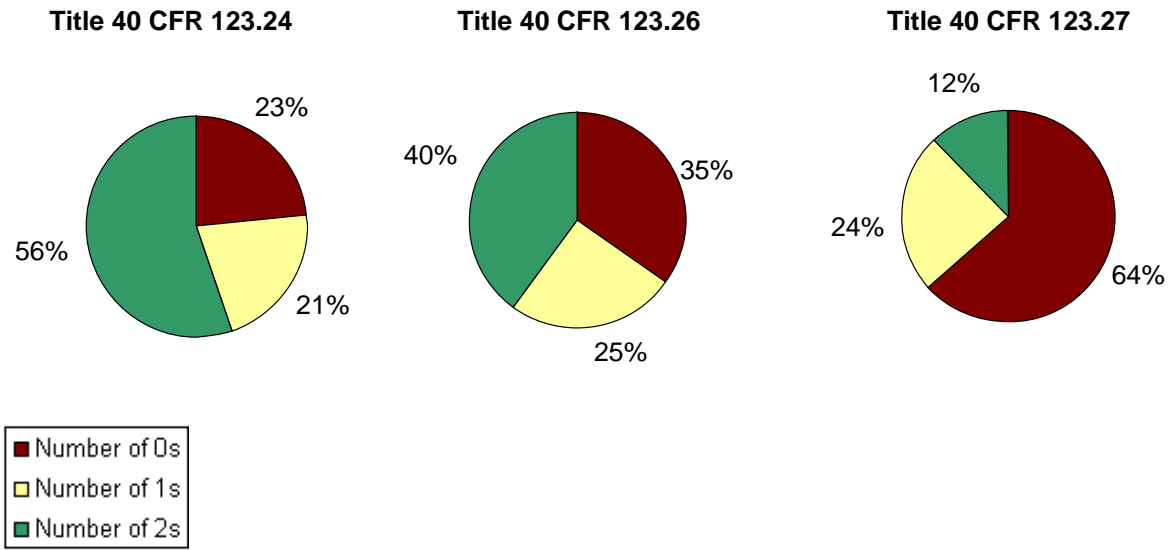
Source: OIG assessment of NPDES MOAs.

MOAs did not address key regulatory requirements for MOA documents. For example, the CFR requires that States establish data management systems to support their compliance evaluation activities. Twenty percent of the MOAs did not contain any language about a data management system. This does not mean the State does not have such a system or that the system is not discussed in another document. However, because the primary, required document, the MOA, does not mention it, EPA cannot readily determine whether there is nationwide uniformity in data management systems.

MOAs also did not include a number of the additional regulatory program requirements contained in Title 40 CFR 123.26 and 123.27. These additional requirements correspond to the programmatic deficiencies that OECA identified in its first-round State Review Framework evaluations (data quality, identification of significant violations, the timeliness of enforcement actions, and penalties). For example, the CFR requires that States establish minimum civil penalty policies, such as the ability to assess at least a \$5,000 penalty per day for each NPDES violation. The State Review Framework identified penalty calculation as a comprehensive weakness. Fifty-four percent of MOAs did not include any language about minimum civil penalty standards (i.e., received a score of “0” for this element). Only 1 of the 46 MOAs specified that the minimum penalty per day, per violation, would be \$5,000 (a score of “2”).

MOAs most comprehensively addressed the MOA-specific regulations (CFR 123.24), containing these requirements 77 percent of the time. MOAs contained fewer requirements in the non-MOA-specific monitoring and inspections section (65 percent for CFR 123.26) and fewest in the enforcement section (36 percent for CFR 123.27). For example, 63 percent of the MOAs did not include language verifying that no other State enforcement agreement could override the MOA, as required by CFR 123.24(c). Eighty percent of MOAs did not note whether the State had the authority to enter any permitted facility (123.26(c)). Figure 2-2 shows how the percentage of missing regulations varied according to the CFR section under review.

Figure 2-2: Distribution of Scores by CFR Section



Source: OIG assessment of NPDES MOAs.

Although the regulations listed in CFR 123.26 and 123.27 are not required to be included in MOA documents, the confluence of the overarching State Review Framework issues and the missing regulations in MOAs leads us to believe that State enforcement programs would be improved by standardizing and renegotiating authorization MOAs to include language addressing these regulations.⁶

Most MOAs Are Outdated

The CFR provides that EPA and States can revise MOAs at any time, and 89 percent of the MOAs that we reviewed contained a statement to that effect. However, existing MOAs do not contain any time-set periodic reevaluation clauses. EPA Headquarters has not advised regions to revisit MOAs to ensure that they are relevant, nor has it developed a periodic review process to ensure that MOAs remain up to date. As a result, most initial MOAs have not been revised. EPA should establish a process for regularly reviewing the adequacy of existing MOAs and ensuring that MOAs keep up with changing regulations.

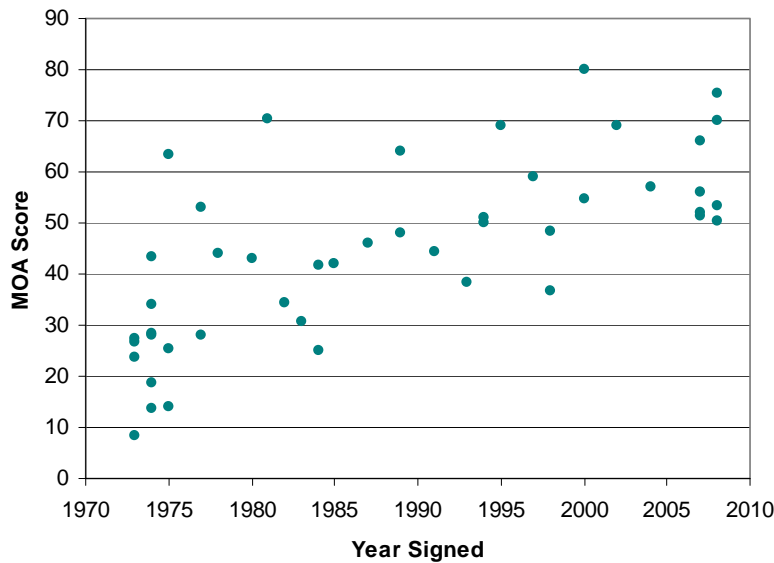
⁶ Title 40 CFR 123.24(b)(1)(ii) says that where a State is authorized to issue permits on the Federal Indian reservation of the Indian tribal seeking approval, MOAs should include provisions for transferring relevant information if the Indian Tribe does not already have the documents. Our MOA assessment excluded this criterion from the 46-State analysis. Nonetheless, of the 31 States with both federally recognized Indian tribes and delegated NPDES programs, only 10 contained the necessary information pertaining to the possible transfer of the relevant program information and permit files for Indian tribes. Title 40 CFR 123.27(e) is intended for inclusion in joint State-tribe-EPA MOAs or tribal-EPA MOAs. We excluded it as well based on the rationale above. Five of the State MOAs that we reviewed contained language pertinent to this CFR criterion.

Few MOAs have been updated to address increasing State responsibilities under the CWA, new NPDES programs, and the expanding CWA regulated universe, which now includes the Storm Water Phase II implementation, concentrated animal feeding operations, and concentrated aquatic animal production program implementations. Further, many MOAs do not address how States should adapt to the increasing number of regulated entities. MOAs should be written to accommodate for program changes to avoid becoming invalid over time.

MOA quality increases with more recently negotiated MOAs because newer MOAs more closely adhere to the most recent CFR requirements. One of the earliest MOAs received the lowest overall score of 8.3 points (out of a possible 92), whereas the most recently negotiated MOA (Alaska, signed in 2008) received an overall score of 75.3 points. Alaska’s MOA was generally modeled after the current CFR requirements. The MOA earning 8.3 points in our scale, Kansas’s, was signed in 1973 and has not been revised.

We found that 74 percent of active MOAs were authorized more than 10 years ago (prior to 2000). Thirty-five percent of authorized States’ active MOAs were signed in the 1970s, years before the CWA’s Storm Water, Sanitary Sewer Overflow, and Combined Sewer Overflow provisions were established. These MOAs have not been revised to include these newer CWA programs. See Appendix C for State MOA authorization years and scores for MOAs by CFR section. Figure 2-3 shows the general trend of improved adherence to CFR requirements over time for all MOAs reviewed.

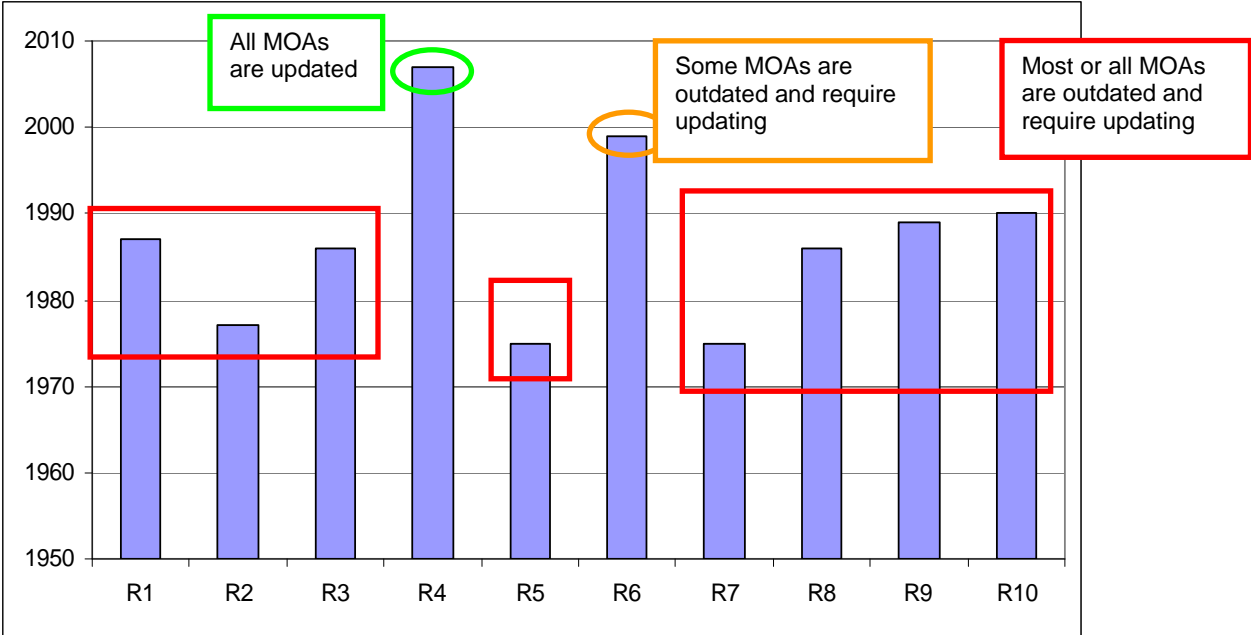
Figure 2-3: MOA Total Score by Year Signed



Source: OIG assessment of NPDES MOAs.

Because our analysis shows that older MOAs were more likely than newer MOAs to be deficient, EPA should consider MOA age to prioritize MOA renegotiations. Figure 2-4 shows that average MOA age varies by region, and suggests using age as an indicator of renegotiation priority.

Figure 2-4: MOA Average Signing Year by Region



Source: OIG assessment of NPDES MOAs.

Noting that the MOAs were outdated and contained language that limited EPA oversight, Region 4 independently updated and renegotiated the MOAs with all of its States. The renegotiated MOAs included several significant changes such as changing the definition for when EPA would initiate enforcement actions, adding new enforcement initiatives like the State Review Framework, changing data reporting requirements, and changing the method for tracking significant compliance issues. The Region uses the updated MOAs as foundational documents and the CWA section 106 plans for more detailed program information. The new MOAs clearly delineate roles and responsibilities and may improve EPA-State relationships.

Region 4 did not seek Office of Water (OW) and OECA approval of these MOAs. According to an OW attorney, OW considered these revisions to be minor and the Region did not need approval. This determination was not documented. EPA does not have a policy that governs what sorts of changes require approval by OW and OECA and a process for documenting decisions. This reduces EPA’s management control over the content of these MOAs. To maintain nationally consistent control over all State NPDES programs, EPA needs a policy that governs Headquarters approval of revised MOAs and maintains control over

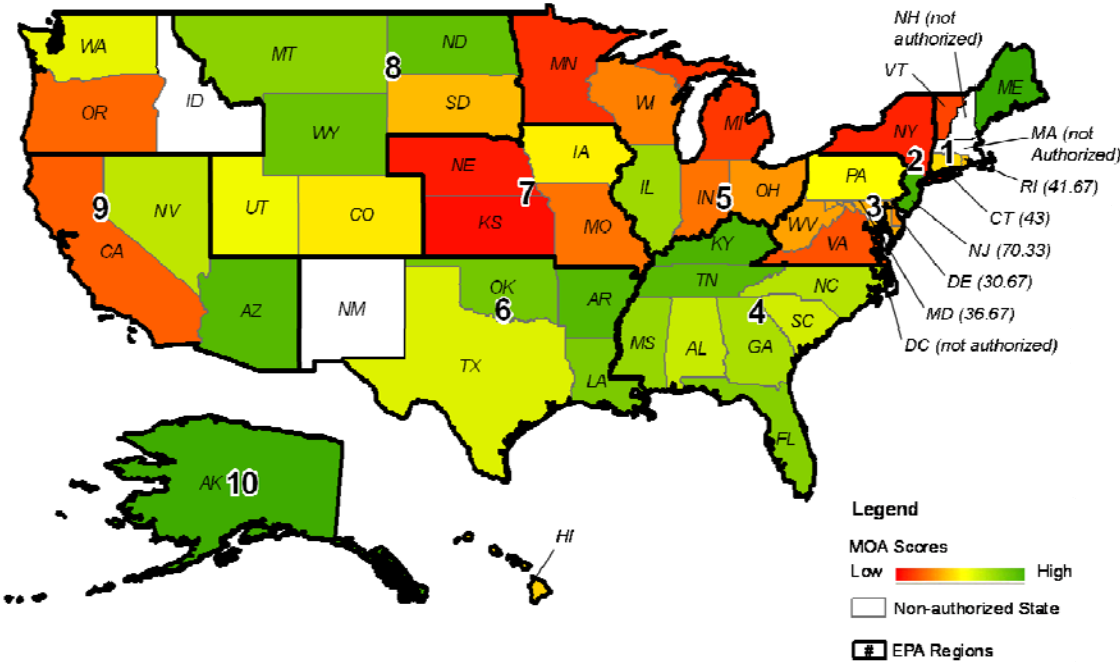
changes in MOAs. On July 27, 2010, EPA’s response to this draft report indicated that OW has initiated efforts to clarify the delegation process as described in EPA Delegation 2-34.

MOAs Are Inconsistent across Regions and States

MOAs vary among regions, creating differences in State enforcement programs. This variance can lead to differences in how the NPDES program is implemented throughout the country.

Figure 2-5 shows that certain regions (regions are outlined in black) have higher-scoring MOAs than others, based on selected CFR criteria. For example, Region 8 MOAs generally scored higher than Region 3 MOAs. Interregional variability stems from differing regional priorities that influence MOA negotiation and MOA age. Region 4’s recently renegotiated MOAs all scored between 50 and 70 points on our scale, whereas Region 3’s generally older MOAs all scored between 25 and 44 points.

Figure 2-5: MOA Scores by State and EPA Region



Source: OIG assessment of NPDES MOAs.

The figure also demonstrates interstate variability in MOA alignment with regulations. Similar to regional differences, interstate variability stems from State priorities as well as MOA age. Updated MOAs typically score over 50 points.

For example, in Region 10 the highest-scoring MOA (Alaska) was the most recently updated MOA (2008), whereas the outdated MOAs in Oregon and Washington scored lowest. Oregon's MOA, signed in 1973, scored 27.3 points, and Washington's MOA, signed in 1989, scored 48.0 points.

Some MOAs Contain Provisions that Are Inconsistent with the CWA

In addition to missing many regulatory requirements, a number of MOAs contain other language that is inconsistent with the CWA. Under the CWA, EPA retains responsibility and authority over CWA implementation and outcomes even when a State has received authorization. However, 17 percent of MOAs contain language that is worded to limit EPA's authority to conduct inspection and enforcement activities in States. In a number of cases, this type of language has led to disagreements between EPA and States.

For example, although the CFR states, "The Regional Administrator will normally notify the State at least 7 days before any such inspection," South Carolina's 1994 MOA states, "EPA shall provide to the State at least thirty (30) days notice before a joint or independent inspection." A Region 4 enforcement manager stated that this provision limited EPA's enforcement authority. As a result, Region 4 reduced this notice period in the proposed revision. In the draft South Carolina MOA, this provision was revised to state, "EPA will normally provide DHEC [the State Department of Health and Environmental Control] at least seven (7) calendar days notice before a joint or independent inspection is conducted."

Through the State Review Framework process, OECA found that some States believe that their MOAs preclude EPA enforcement action. OECA officials told us that when OECA has an unfavorable relationship with a State, the State sometimes uses its MOA as a justification to avoid taking the enforcement actions EPA feels are needed. In the face of inappropriate clauses in MOAs, EPA could take action in States based on its authority under the CWA. However, in some cases, EPA did not act; sensitive relationships between EPA regions and States led regions to look for other solutions.

Some EPA Regions Do Not Use MOAs to Manage State Enforcement Programs

Rather than establishing a consistent national approach to meet CWA goals, EPA has largely deferred control to regional offices. States and regions frequently do not use MOAs to manage or oversee State enforcement programs. MOAs should be foundational enforcement documents that regions and States use on a regular basis to clarify basic roles and responsibilities, and the CFR states that no other EPA-State documents can take precedence over MOAs.

Managers in three of the four EPA regions we interviewed told us that they do not routinely refer to the MOAs to manage their State programs. In these regions,

EPA managers used other types of agreements such as Performance Partnership Agreements, Performance Partnership Grants, annual inspection and monitoring plans, and National Program Guidance for State program oversight.

Some regional managers note MOA shortcomings. In Region 1, enforcement program managers told us that MOAs do not guide State program management, and regional personnel did not refer to MOAs. Managers see the original MOAs as documents that defined the roles and responsibilities at the time of the authorization and also laid out some basic expectations for the transfer of documents. However, they used Performance Partnership Agreements and periodic meetings instead of MOAs to manage State programs. Region 1 managers stated that they use other documents because program management requires flexibility. The Region's original MOAs were not updated to reflect changes to the CWA throughout the years. However, the Region 1 manager stated that MOAs are the basic underpinning of State authorization to run the program. The manager said a strong, vibrant MOA should include clear expectations, clear definition of roles/responsibilities, and clear descriptions of accountability.

An EPA Region 8 enforcement official reported that MOAs were rarely used for enforcement as compared with other agreements. An enforcement manager from the Region reported that although all MOAs have standard statements that declare that MOAs preclude other agreements, in practice, Performance Partnership Agreements trump all other enforcement documents.

However, Region 8 and its States experienced conflicts over enforcement authority. In one case, Region 8 did not hold Colorado accountable to its MOA. During our interview, regional personnel reported that while they were negotiating an ancillary enforcement agreement, Colorado asserted that EPA relinquished the right to perform NPDES inspections and enforcement actions once State authorization occurred. Even though this was programmatically inaccurate and the MOA supported EPA's position, regional personnel found it was easier to "give up" on the agreement negotiations rather than to reiterate EPA's rights and authorities. One manager from the Region noted that MOAs should have clearer delineations for EPA and State expectations for issuance of notices of violation, and another said MOAs should contain provisions that better delineate EPA and State facility inspections.

A Region 8 enforcement official also stated that many of its MOAs are more than 10 years old and should be renegotiated. The official added that although the Region uses other documents, it would be beneficial to have a single, overarching document to provide the basic agreement with additional documents providing the necessary details on annual performance and operations. Moreover, a regional enforcement manager suggested that MOAs should be periodically modified to accommodate changes in the program.

Although Region 10 NPDES managers did use the MOA for permitting, they did not use MOAs for enforcement program management. Instead, they used Performance Partnership Agreements, Performance Partnership Grants, and the National Program Guidance.

When OECA began assessing MOAs, some were not available to EPA Headquarters. Therefore, these documents, which show how EPA and States manage enforcement, were also not readily available to the public for review or comparison. EPA could improve transparency and accountability by maintaining a publicly available MOA repository where all States, EPA regions, and the public can access the documents.

The problem with MOAs is cyclical: one reason regional enforcement managers do not use MOAs is that they are not updated to reflect current CWA amendments pertinent to new NPDES program requirements and subsequent CFR additions, and MOAs are outdated because regions have not used them regularly enough to target them for improvement.

EPA Could Establish a National Baseline for CWA Implementation with an MOA Template

EPA faces a significant challenge: to implement a nationally consistent enforcement program that offers equal protection from pollution to all Americans. By renegotiating outdated or inconsistent MOAs according to a national template, EPA can establish a current baseline for national consistency. A national template could also ease the MOA negotiation process. EPA should identify the key requirements that should be delineated in MOAs, including the other programmatic concerns disclosed through the CFR and issues uncovered during OECA's State Review Framework, and incorporate them into a national template.

The officials of OECA, EPA regions, and State organizations we spoke with agree that MOAs are out of date and should be renegotiated, but OECA also pointed out that the process could face State resistance because it might require considerable resources. Enforcement managers and officials in two of the four regions we spoke with indicated that MOA renegotiation would be a low priority for them and would require them to remove resources from other enforcement activities. However, in our opinion, the management control benefit justifies the resource requirement. For example, as a result of renegotiating MOAs, Region 4 enforcement staff reported that they improved baseline management control over EPA-State enforcement relationships. In the face of a disagreement over responsibilities, regional staff said they show State program staff where an enhanced requirement is written in the updated MOA, and the State program staff then carry out the requirement.

Staff from each region we interviewed and other stakeholders agreed that an EPA Headquarters model MOA would be beneficial in determining MOA adequacy.

Region 4 developed a regional template for use in its MOA renegotiations. Regional enforcement officials reported that the template did not change much between the beginning and end of negotiations. A Region 10 enforcement program manager suggested that a model MOA that would serve as a foundational reference document could help to clarify the core oversight responsibilities. Region 10 staff stated that a model MOA could identify EPA and State expectations with respect to inspection, timely follow-up, data quality, transparency, and adequate response. In addition, the Environmental Council of the States said its member States would be interested in discussing a model MOA.

Conclusion

The current state of the MOAs means that EPA cannot assure it has effective management control over State programs that assures the public that CWA objectives are being achieved. EPA has not established a national template defining the key requirements necessary for current, robust MOAs. In addition, EPA has not developed a periodic review system to determine which MOAs remain adequate and which need to be revised to remain current with changing regulations. MOAs should establish the foundations for nationally consistent enforcement, defining the baseline roles and responsibilities for EPA and States. MOAs should also be the basis for assessing States' ability and commitment to administer EPA's NPDES program in accordance with the CWA. The CFR requires MOAs to outline the basic parameters of the EPA-State relationship and ensure CWA goals are being met through State-authorized programs. To ensure that MOAs fulfill their intended function, EPA must put in place a system that maintains and oversees consistent management controls over State programs. To ensure transparency and accountability, EPA should maintain a publicly available MOA repository, making these documents available to all States, EPA regions, and the public.

Recommendations

We recommend that the Deputy Administrator:

- 2-1 Develop a national MOA template including essential requirements derived from the updated CWA, CFR requirements, and State Review Framework findings.
- 2-2 Develop a systematic approach to identify which States have outdated or inconsistent MOAs; renegotiate and update those MOAs using the MOA template; and secure the active involvement and final, documented concurrence of Headquarters to ensure national consistency.

- 2-3 Establish a process for reviewing MOAs on a regular basis, taking into account legislative and management changes that affect the adequacy of the MOA.
- 2-4 Maintain a publicly available repository of MOAs.

Agency Response and OIG Comment

EPA's Deputy Administrator provided the Agency response, coordinating comments from OECA and OW. The Deputy Administrator generally agreed with these recommendations and provided an outline of corrective actions that he would take in response to the recommendations.

The Deputy Administrator agreed with recommendations 2-1, 2-3, and 2-4.

In response to recommendation 2-2, the Deputy Administrator stated that renegotiating MOAs with States can be time consuming and may not be always be the best use of EPA resources. Deficiencies in State enforcement programs may be better addressed through other solutions and approaches. The Deputy Administrator proposed that OECA and OW integrate MOA assessment into a coordinated State program review process to identify and correct MOAs that present the greatest barriers to State program performance.

The OIG responds by noting that the draft report and the final report both make mention of the other mechanisms EPA uses to manage programs, even noting that there is a layered system of management controls (see page 2, for example). However, the report emphasizes that while EPA uses other mechanisms, the only required mechanism is the authorization MOA. The way in which EPA regions and States use other mechanisms varies, but the MOA is the only document that each State must have. For this reason, it is important that authorization MOAs be up to date and compliant with the CFR.

While acknowledging EPA's need to maintain flexibility, the OIG believes that MOAs are a critical building block of State enforcement programs. Depending on how it is constructed, a systematic State program review process that contains a strategy for updating outdated or inconsistent MOAs could address our recommendation. We will list the status of recommendation 2-2 as "undecided," and list the other recommendations as "open." We look forward to a detailed strategy and timeline for implementation in the Agency's 90-day response to this final report.

Status of Recommendations and Potential Monetary Benefits

| RECOMMENDATIONS | | | | | | POTENTIAL MONETARY BENEFITS (in \$000s) | |
|-----------------|----------|--|---------------------|----------------------|-------------------------|---|------------------|
| Rec. No. | Page No. | Subject | Status ¹ | Action Official | Planned Completion Date | Claimed Amount | Agreed To Amount |
| 2-1 | 15 | Develop a national MOA template including essential requirements derived from the updated CWA, CFR requirements, and State Review Framework findings. | O | Deputy Administrator | | | |
| 2-2 | 15 | Develop a systematic approach to identify which States have outdated or inconsistent MOAs; renegotiate and update those MOAs using the MOA template; and secure the active involvement and final, documented concurrence of Headquarters to ensure national consistency. | U | Deputy Administrator | | | |
| 2-3 | 16 | Establish a process for reviewing MOAs on a regular basis, taking into account legislative and management changes that affect the adequacy of the MOA. | O | Deputy Administrator | | | |
| 2-4 | 16 | Maintain a publicly available repository of MOAs. | O | Deputy Administrator | | | |

¹ O = recommendation is open with agreed-to corrective actions pending
 C = recommendation is closed with all agreed-to actions completed
 U = recommendation is undecided with resolution efforts in progress

Appendix A

List of CFR Criteria for MOA Assessment¹

| | CFR | Criterion |
|----|-----------|---|
| 1 | 123.24(a) | MOA executed by the State Director and the Regional Administrator and approved by Administrator |
| 2 | | MOA meets all requirements of paragraph (b) |
| 3 | | MOA has no provisions restricting EPA's statutory oversight responsibility |
| 4 | 123.24(b) | Provisions for prompt transfer from EPA to the State of pending permit applications and any other relevant program operation information |
| 5 | | MOA contain procedure for transfer of any existing permits for administration |
| 6 | | MOA contain specific procedure for transfer of administration if a State lacks administration authority for permits issued by Federal government |
| 7 | | MOA contain provisions specifying classes and categories of permit applications, draft permits, and proposed permits for Regional Administrator review |
| 8 | | MOA contain provisions specifying the frequency and content of reports, documents and other information which the State is required to submit to EPA |
| 9 | | MOA contain provisions allowing EPA to routinely review State records, reports, and files relevant to the administration and enforcement of the approved program |
| 10 | | MOA contain provisions for coordination of compliance monitoring activities by the State and by EPA and EPA inspection of select facilities or activities within State |
| 11 | | MOA contain procedures to assure coordination of enforcement activities |
| 12 | | MOA contain provisions, when appropriate, for joint processing of permits by the State and EPA for facilities or activities which require permits from both EPA and the State under different programs per § 124.4 |
| 13 | | MOA contain provisions for modification of the MOA in accordance with this part |
| 14 | 123.24(c) | MOA, the annual program grant and the State/EPA Agreement should be consistent. If the State/EPA Agreement indicates that a change is needed in the Memorandum of Agreement, the Memorandum of Agreement may be amended through the procedures set forth in this part. |
| 15 | | State/EPA Agreement cannot override MOA |
| 16 | 123.24(d) | MOA specify the extent to which EPA will waive its right to review, object to, or comment upon State-issued permits under section 402(d)(3), (e) or (f) of CWA |
| 17 | 123.26(a) | State programs shall have procedures for receipt, evaluation, retention and investigation for possible enforcement of all notices and reports required of permittees and other regulated persons (and for investigation for possible enforcement of failure to submit these notices and reports). |
| 18 | 123.26(b) | State programs shall have inspection and surveillance procedures to determine, independent of information supplied by regulated persons, compliance or noncompliance with applicable program requirements. |
| 19 | | The State shall maintain a program which is capable of making comprehensive surveys of all facilities and activities subject to the State Director's authority to identify persons subject to regulation who have failed to comply with permit application or other program requirements. Any compilation, index or inventory of such facilities and activities shall be made available to the Regional Administrator upon request; |
| 20 | | The State shall maintain a program for periodic inspections of the facilities and activities subject to regulation. |

¹ MOA assessment excludes the review of 123.24(b)(ii) and 123.27(e) as noted within the Scope and Methodology.

| | CFR | Criterion |
|----|-----------|---|
| 21 | | These inspections shall be conducted in a manner designed to: Determine compliance or noncompliance with issued permit conditions and other program requirements; |
| 22 | | These inspections shall be conducted in a manner designed to: Verify the accuracy of information submitted by permittees and other regulated persons in reporting forms and other forms supplying monitoring data; and |
| 23 | | These inspections shall be conducted in a manner designed to: Verify the adequacy of sampling, monitoring, and other methods used by permittees and other regulated persons to develop that information; |
| 24 | | The State shall maintain a program for investigating information obtained regarding violations of applicable program and permit requirements; and |
| 25 | | The State shall maintain procedures for receiving and ensuring proper consideration of information submitted by the Public about violations. Public effort in reporting violations shall be encouraged, and the State Director shall make available information on reporting procedures. |
| 26 | 123.26(c) | The State Director and State officers engaged in compliance evaluation shall have authority to enter any site or premises subject to regulation or in which records relevant to program operation are kept in order to copy any records, inspect, monitor or otherwise investigate compliance with the State program including compliance with permit conditions and other program requirements. States whose law requires a search warrant before entry conform with this requirement. |
| 27 | 123.26(d) | Investigatory inspections shall be conducted, samples shall be taken and other information shall be gathered in a manner (e.g., using proper "chain of custody" procedures) that will produce evidence admissible in an enforcement proceeding or in court. |
| 28 | 123.26(e) | Maintaining a comprehensive inventory of all sources covered by NPDES permits and a schedule of reports required to be submitted by permittees to the State agency; |
| 29 | | Initial screening (i.e., pre-enforcement evaluation) of all permit or grant-related compliance information to identify violations and to establish priorities for further substantive technical evaluation; |
| 30 | | When warranted, conducting a substantive technical evaluation following the initial screening of all permit or grant-related compliance information to determine the appropriate agency response; |
| 31 | | Maintaining a management information system which supports the compliance evaluation activities of this part; and |
| 32 | | Inspecting the facilities of all major dischargers at least annually. |
| 33 | 123.27(a) | To restrain immediately and effectively any person by order or by suit in State court from engaging in any unauthorized activity which is endangering or causing damage to public health or the environment; |
| 34 | | Note: This paragraph (a)(1) requires that States have a mechanism (e.g., an administrative cease and desist order or the ability to seek a temporary restraining order) to stop any unauthorized activity endangering public health or the environment. |
| 35 | | To sue in courts of competent jurisdiction to enjoin any threatened or continuing violation of any program requirement, including permit conditions, without the necessity of a prior revocation of the permit; |
| 36 | | To assess or sue to recover in court civil penalties and to seek criminal remedies, including fines, as follows: |
| 37 | | Civil penalties shall be recoverable for the violation of any NPDES permit condition; any NPDES filing requirement; any duty to allow or carry out inspection, entry or monitoring activities; or, any regulation or orders issued by the State Director. These penalties shall be assessable in at least the amount of \$5,000 a day for each violation. |

| | CFR | Criterion |
|----|-----------|---|
| 38 | | Criminal fines shall be recoverable against any person who willfully or negligently violates any applicable standards or limitations; any NPDES permit condition; or any NPDES filing requirement. These fines shall be assessable in at least the amount of \$10,000 a day for each violation. |
| 39 | | Criminal fines shall be recoverable against any person who knowingly makes any false statement, representation or certification in any NPDES form, in any notice or report required by an NPDES permit, or who knowingly renders inaccurate any monitoring device or method required to be maintained by the Director. These fines shall be recoverable in at least the amount of \$5,000 for each instance of violation. |
| 40 | 123.27(b) | The maximum civil penalty or criminal fine (as provided in paragraph (a)(3) of this section) shall be assessable for each instance of violation and, if the violation is continuous, shall be assessable up to the maximum amount for each day of violation. |
| 41 | | The burden of proof and degree of knowledge or intent required under State law for establishing violations under paragraph (a)(3) of this section, shall be no greater than the burden of proof or degree of knowledge or intent EPA must provide when it brings an action under the appropriate Act; |
| 42 | 123.27(c) | A civil penalty assessed, sought, or agreed upon by the State Director under paragraph (a)(3) of this section shall be appropriate to the violation. |
| 43 | | Procedures for assessment by the State of the cost of investigations, inspections, or monitoring surveys which lead to the establishment of violations; |
| 44 | | In addition to the requirements of this paragraph, the State may have other enforcement remedies. The following enforcement options, while not mandatory, are highly recommended: |
| 45 | 123.27(d) | Any State administering a program shall provide for public participation in the State enforcement process by providing either: |
| 46 | | Authority which allows intervention as of right in any civil or administrative action to obtain remedies specified in paragraphs (a)(1), (2) or (3) of this section by any citizen having an interest which is or may be adversely affected; or (2) Assurance that the State agency or enforcement authority will: (i) Investigate and provide written responses to all citizen complaints submitted pursuant to the procedures specified in §123.26(b)(4); (ii) Not oppose intervention by any citizen when permissive intervention may be authorized by statute, rule, or regulation; and (iii) Publish notice of and provide at least 30 days for public comment on any proposed settlement of a State enforcement action. |

Appendix B***Detailed Methodology***

The OIG initially received 45 State MOAs from OECA. OECA collected the MOAs in 2009 by contacting EPA's Water Permitting Division. OECA confirmed that it received current, executed MOAs by contacting regional staff. MOAs were not collected for Connecticut and South Carolina, though OECA later received Connecticut's current MOA. Region 1 was unable to confirm whether the MOAs that had been collected were the most current executed documents. OECA attributed this to the fact that MOAs are rarely used, and the people who originally developed and worked on them are no longer with the Region. When the OIG later interviewed Region 1 water enforcement staff and officials, they reported that they had all of their current MOAs. We received the 1994 South Carolina MOA directly from Region 4, where enforcement officials were still negotiating revisions to the document. OIG reviewed both the 1994 and newly revised unapproved MOA but only used the 1994 approved MOA for our quantitative analysis.

The OIG selected 46 criteria from three Title 40 CFR sections (123.24, 123.26, and 123.27). The OIG chose these sections because they represent state NPDES program requirements: agreement with the regional administrator, compliance requirements, and enforcement authority requirements for States that have been authorized NPDES programs. The OIG did not evaluate other annual or multiyear EPA-State agreements.

We excluded two CFR criteria from Title 40 CFR sections 123.24 and 123.27 from our MOA Assessment to reflect the fact that not all States have federally recognized Indian tribes and thus create parity across all States. Title 40 123.24(b)(1)(ii) says that where a State is authorized to issue permits on the Federal Indian reservation of the Indian tribal seeking approval, MOAs should include provisions for transferring relevant information if the Indian Tribe does not already have the documents. Title 40 CFR 123.27(e) says that where Indian tribes cannot satisfy the criminal enforcement authority requirements in section 123.27 of the CFR, they may still receive program authority from EPA if they meet other enforcement authority criteria (See 40 CFR 123.34).

The requirements included in CFR sections 123.24, 123.26, and 123.27 indicate the requirements for States to receive the CWA enforcement authorization. CFR section 123.24 indicates the requirements MOA content for NPDES program approval and management, 123.26 indicates the regulations States must follow to demonstrate an adequate compliance inspection and monitoring program, and 123.27 indicates the regulations States must follow to demonstrate that they can take timely and appropriate enforcement actions. Because each EPA regional office negotiated MOAs differently, OIG believes that the extent to which required language from these three sections is included in MOAs may vary.

The selected CFR sections define the scope of the OIG review by focusing analysis on MOA requirements and also addressing the issues raised in OECA's State Review Framework: data, identification of significant violations, penalty assessment, and timely and appropriate enforcement actions. By confirming and qualifying whether each MOA contained adequate

provisions addressing each requirement, OIG addressed the completeness of MOAs and also assessed deficiencies related to four key issues OECA uncovered in its State Review Framework process: penalty calculation, identification of significant violations, data quality, and taking timely and appropriate enforcement actions.

The OIG selected the 46 criteria to provide a broad indication of how current MOAs address issues that OECA has identified as lacking in State enforcement programs. Although all of the criteria included in CFR sections 123.24, 123.26, and 123.27 may not have been required at the time MOAs were initially negotiated between EPA regions and States, these sections represent the key criteria for determining whether States with NPDES authority have demonstrated to EPA that they can address permitting requirements, compliance reviews and inspections, and enforcement actions. Our criteria included Title 40 CFR 123.26 and 123.27, even though those regulations are not required of MOAs, because they are related to the four programmatic deficiencies that OECA identified through its State Review Framework assessments (listed in Chapter 1).

OIG rated each of the 46 EPA-provided MOAs for its inclusion of statements addressing each regulation. For each of the 46 criteria included in a spreadsheet guide (shown in Appendix A), team members rated the MOA as a “0” (does not address this element), “1” (addresses the element in some way), or “2” (addresses the element verbatim, or in synonymous language). Each MOA thus received an overall score in our analysis that could be a maximum of 92 points. The OIG evaluation team did not deem this system comprehensive; rather, it is an indicator of MOA completeness.

Prior GAO and OIG Work

OIG staff reviewed past oversight reports from the EPA OIG and GAO relating to EPA oversight of State enforcement issues. In particular, we reviewed those reports that cite MOAs or other EPA-State agreements as a root cause of enforcement deficiencies. These reports informed our evaluation design and background.

GAO

Longstanding Issues Impact EPA’s and States’ Enforcement Efforts. GAO-10-165T, October 15, 2009.

Environmental Enforcement: EPA Needs to Improve the Accuracy and Transparency of Measures Used to Report on Program Effectiveness. GAO-08-1111R, September 18, 2008.

Collaborative EPA State Effort Needed to Improve Performance Partnership System. GAO/T-RCED-00-163, May 2, 2000.

Environmental Protection: More Consistency Needed Among EPA Regions in Approach to Enforcement. GAO/RCED-00-108, June 2000.

Environmental Protection: EPA's and States' Efforts to Focus State Enforcement Programs on Results. RCED-98-113, May 27, 1998.

Water Pollution: Many Violations Have Not Received Appropriate Enforcement Attention. GAO/RCED-96-23, March 20, 1996.

EPA OIG

Better Enforcement Oversight Needed for Major Facilities with Water Discharge Permits in Long-Term Significant Noncompliance. Report No. 2007-P-00023, May 14, 2007.

EPA Region 6 Needs to Improve Oversight of Louisiana's Environmental Programs. Report No. 2003-P-00005, February 3, 2003.

State Enforcement of Clean Water Act Dischargers Can Be More Effective. Report No. 2001-P-00013, August 14, 2001.

North Carolina NPDES Enforcement and EPA Region 4 Oversight. Report No. 2000-P-00025, September 28, 2000.

Appendix C

OIG Analysis of MOAs by CFR Section

| | MOA Date | CFR General Program Requirements Avg. Score (Scale: 0 – 2) | CFR Compliance Evaluation Requirements Avg. Score (Scale: 0 – 2) | CFR Enforcement Requirements Avg. Score (Scale: 0 – 2) | Overall Avg. Score (Scale: 0 – 2) | Total Score (Scale: 0 – 92) |
|--------------------------|----------|--|--|--|-----------------------------------|-----------------------------|
| Alabama | 2008 | 1.40 | 1.19 | 0.64 | 1.09 | 50.3 |
| Alaska | 2008 | 1.71 | 1.81 | 1.36 | 1.64 | 75.3 |
| Arizona | 2002 | 1.94 | 1.88 | 0.57 | 1.50 | 69.0 |
| Arkansas | 1995 | 1.81 | 1.69 | 0.93 | 1.50 | 69.0 |
| California | 1973 | 0.98 | 0.31 | 0.43 | 0.58 | 26.7 |
| Colorado | 1974 | 1.02 | 1.25 | 0.50 | 0.94 | 43.3 |
| Connecticut ¹ | 1980 | 1.06 | 1.31 | 0.36 | 0.93 | 43.0 |
| Delaware | 1983 | 1.17 | 0.44 | 0.36 | 0.67 | 30.7 |
| Florida | 2007 | 1.75 | 1.13 | 0.71 | 1.22 | 56.0 |
| Georgia | 2007 | 1.63 | 1.35 | 0.32 | 1.13 | 52.2 |
| Hawaii | 1985 | 0.69 | 1.25 | 0.79 | 0.91 | 42.0 |
| Illinois ¹ | 1977 | 0.31 | 1.50 | 1.71 | 1.15 | 53.0 |
| Indiana | 1977 | 1.06 | 0.69 | 0.00 | 0.61 | 28.0 |
| Iowa | 1978 | 1.38 | 0.88 | 0.57 | 0.96 | 44.0 |
| Kansas | 1973 | 0.52 | 0.00 | 0.00 | 0.18 | 8.3 |
| Kentucky | 2008 | 1.88 | 1.50 | 1.14 | 1.52 | 70.0 |
| Louisiana | 2004 | 1.69 | 1.38 | 0.57 | 1.24 | 57.0 |
| Maine ¹ | 2000 | 1.88 | 1.94 | 1.36 | 1.74 | 80.0 |
| Maryland | 1998 | 1.10 | 1.00 | 0.21 | 0.80 | 36.7 |
| Michigan | 1973 | 0.85 | 0.56 | 0.07 | 0.51 | 23.7 |
| Minnesota | 1974 | 0.92 | 0.19 | 0.07 | 0.41 | 18.7 |
| Mississippi | 2008 | 1.71 | 1.19 | 0.50 | 1.16 | 53.3 |
| Missouri | 1974 | 1.25 | 0.44 | 0.07 | 0.61 | 28.0 |
| Montana ¹ | 2000 | 1.35 | 1.38 | 0.79 | 1.19 | 54.7 |
| Nebraska | 1974 | 0.48 | 0.38 | 0.00 | 0.30 | 13.7 |
| Nevada | 1994 | 1.31 | 1.44 | 0.50 | 1.11 | 51.0 |
| New Jersey | 1981 | 1.58 | 1.75 | 1.21 | 1.53 | 70.3 |
| New York | 1975 | 0.81 | 0.06 | 0.00 | 0.30 | 14.0 |
| North Carolina | 2007 | 1.58 | 1.19 | 0.50 | 1.12 | 51.3 |
| North Dakota | 1989 | 1.75 | 1.50 | 0.86 | 1.39 | 64.0 |
| Ohio | 1974 | 1.50 | 0.63 | 0.00 | 0.74 | 34.0 |
| Oklahoma | 1997 | 1.88 | 1.44 | 0.43 | 1.28 | 59.0 |
| Oregon | 1973 | 1.21 | 0.50 | 0.00 | 0.59 | 27.3 |
| Pennsylvania | 1991 | 1.33 | 1.44 | 0.00 | 0.96 | 44.3 |
| Rhode Island | 1984 | 1.48 | 0.63 | 0.57 | 0.91 | 41.7 |
| South Carolina | 1994 | 1.44 | 1.13 | 0.64 | 1.09 | 50.0 |
| South Dakota | 1993 | 1.40 | 0.75 | 0.29 | 0.83 | 38.3 |

| | MOA Date | CFR General Program Requirements Avg. Score (Scale: 0 – 2) | CFR Compliance Evaluation Requirements Avg. Score (Scale: 0 – 2) | CFR Enforcement Requirements Avg. Score (Scale: 0 – 2) | Overall Avg. Score (Scale: 0 – 2) | Total Score (Scale: 0 – 92) |
|---------------|----------|--|--|--|-----------------------------------|-----------------------------|
| Tennessee | 2007 | 1.81 | 1.31 | 1.14 | 1.43 | 66.0 |
| Texas | 1998 | 1.27 | 1.63 | 0.14 | 1.05 | 48.3 |
| Utah | 1987 | 1.38 | 1.13 | 0.43 | 1.00 | 46.0 |
| Vermont | 1984 | 0.56 | 0.88 | 0.14 | 0.54 | 25.0 |
| Virginia | 1975 | 1.27 | 0.31 | 0.00 | 0.55 | 25.3 |
| Washington | 1989 | 1.06 | 1.63 | 0.36 | 1.04 | 48.0 |
| West Virginia | 1982 | 1.40 | 0.44 | 0.36 | 0.75 | 34.3 |
| Wisconsin | 1974 | 1.33 | 0.44 | 0.00 | 0.62 | 28.3 |
| Wyoming | 1975 | 1.46 | 1.69 | 0.93 | 1.38 | 63.3 |

Source: OIG analysis of data obtained from State MOAs reviewed.

¹ The OIG did not receive signed and dated MOAs. The OIG estimated these dates based on the OECA documentation provided.

² South Carolina still operated under a 1994 MOA, but Region 4 and South Carolina were working on a revised MOA at the time this report was issued.

Appendix D

Agency Response and OIG Comment

July 27, 2010

MEMORANDUM

SUBJECT: Response to the Office of Inspector General Draft Report, *EPA Should Revise EPA-State Clean Water Act Agreements*, No. 2010-1033, June 9, 2010

TO: Arthur Elkins Jr.
Inspector General

I am transmitting our response to the draft report, *EPA Should Revise EPA-State Clean Water Act Agreements*, No. 2010-1033, June 9, 2010, which focuses on assessing the effectiveness of memoranda of agreement between the U.S. Environmental Protection Agency and states pursuant to the National Pollutant Discharge Elimination System program. We thank your office for undertaking this review; we believe it will help us in achieving our goals of improving the quality of our oversight of state environmental programs and ultimately the level of state performance in administering NPDES programs. While we generally agree with the analysis and recommendations of the report, we offer the following comments.

MOAs are not the sole mechanism for management control of the NPDES program

On the first page of the report in the "What We Found" section and elsewhere throughout the document, the report finds that "NPDES MOAs between EPA and States do not ensure Agency management control and effective oversight over a national program administered by States that is capable of providing equal protection to all Americans." The analysis in this report is incomplete in supporting this statement. While we agree that inadequate MOAs may not support our efforts to ensure an effective state program, there are multiple layers of management controls and oversight programs that address the implementation and performance of the NPDES program but were not included in this review. These layers of controls and reviews, which include compliance and enforcement, also are relied upon to ensure an effective state program. For example, the Office of Water ensures adequate implementation of the NPDES permitting program through Performance Partnership Agreements, CWA Section 106 grant-work plans and associated measures, and program and permit-quality reviews and associated action items. The Office of Enforcement and Compliance Assurance uses enforcement agreements, Performance Partnership Agreements, grant-work plans, biannual regional reviews and the State Review Framework. Thus, while MOAs are one tool used by the EPA to ensure management control and effective oversight over state NPDES programs, they are not the only tool used to determine the health of a state program. Deficiencies in MOAs can be offset by or addressed through other management

tools. We ask that the report be modified to reflect the multiple layers of management controls, with MOAs as just one of those layers, albeit an important one.

OIG Response: The OIG believes the report adequately characterizes the multiple layers of management controls. More specifically, the report notes, “As part of a system of national management controls, the CFR requires authorization MOAs between EPA and every State operating an NPDES enforcement program.” The report also indicates that the MOAs are part of a layered system: “Although the foundations of the EPA-State enforcement relationship are built upon authorization agreements and the accompanying MOAs, EPA and States also use other annual and multiyear planning tools to set short-term expectations, establish measures, and set performance goals. The annual and multiyear planning documents used by EPA regions and States vary by region and by State, and are not required by regulation. A senior EPA official described the EPA-State NPDES relationship as a ‘layer cake,’ with several layers of documents and agreements. The official said that EPA plans to address the multilayered EPA-State structure by simplifying the State-EPA enforcement process and accompanying document requirements.”

Methodology

To conduct its analysis, the OIG identified 48 regulatory requirements contained in 40 CFR Sections 123.24, 123.26, and 123.27, which apply to the enforcement component of NPDES programs. The requirements used by the OIG include some that apply to the MOA documents themselves (40 CFR Section 123.24), but nearly two-thirds are NPDES program requirements not explicitly required in the MOAs (40 CFR Sections 123.26 and 123.27). This approach was helpful in that it demonstrates how many enforcement-related provisions are included in the MOAs. However, this analysis may not necessarily result in the identification of those MOAs with the most significant deficiencies because it gives equal weight to all requirements. For example, the provision in 40 CFR Section 124.24(a) requiring that an "MOA [have] no provisions restricting EPA’s statutory oversight authority" is weighted the same as the provisions in 40 CFR Section 123.24(b)(1.1-1.3), which require the transfer of permits from the EPA to the state. The former is crucially important for program oversight, whereas the latter is likely moot at this time as all relevant permits have been transferred from the EPA to states, with the exception of some permits EPA Region 10 has issued in Alaska². Moreover, the methodology does not identify which elements are most important to ensuring program performance, may not be related to actual program performance or are covered by other agreements or guidance. We ask that the report be modified to acknowledge that some requirements are more important than others in terms of ensuring program performance.

² On October 31, 2008, EPA authorized Alaska to assume responsibility for the NPDES program in phases, pursuant to section 402(n) (4) of the Clean Water Act. 73 Fed. Reg. 66243, 66244 (November 7, 2008). EPA expects to transfer all relevant permits to the State by October 31, 2011. *Id.*

OIG Response: The OIG analysis was intended as an objective assessment of MOA compliance with the CFR. The OIG assessment does not address State program performance, only MOA completeness. The report notes that the OIG included additional elements (in 40 CFR 123.26 and 123.27) based on OECA's findings from the State Review Framework process. The OIG presents one method for assessing MOA quality, and report recommendation 2-2 directs the Deputy Administrator to "develop a systematic approach to identify which States have outdated or inconsistent MOAs, renegotiate and update those MOAs using the MOA template, and secure the active involvement and final, documented concurrence of Headquarters to ensure national consistency." In developing this approach, the Deputy Administrator can choose to assign weights to those aspects of NPDES MOAs that he deems most important.

Recommendations

2-1 We agree that a national MOA template is a useful tool in establishing nationally consistent MOAs. We have an existing template from 1986, but we agree that it could be updated to be more useful. We note that the EPA is in the midst of implementing the Clean Water Act Action Plan, which will result in new approaches for improving compliance and water quality. We suggest that any action to refine the existing MOA template take place in coordination with the development of new approaches identified through this process.

OIG Response: The OIG agrees with the Agency's proposed actions in response to recommendation 2-1. The recommendation is open with agreed-to actions pending. In its final response to this report, EPA should provide estimated or actual completion dates for this recommendation.

2-2 We agree that a systematic effort to identify and review problematic MOAs and update them, as appropriate, could assist in improving program performance and should be incorporated into existing periodic reviews of state programs. We do not agree, however, that renegotiating MOAs is the only way to address an inadequate state program. MOAs are two-party agreements and willingness to make certain modifications will vary from state to state. Therefore, renegotiating MOAs can be time-consuming and unpredictable and, in light of our preceding comments about the variety of tools used to exercise management control over state NPDES programs, may not be the most timely or effective mechanism. It is important that the EPA maintain flexibility to develop and use these other types of mechanisms such as enforcement agreements that supplement an MOA in cases where renegotiating an MOA proves impracticable or would do little to substantially improve a state's program. This approach was suggested in the Clean Water Act Action Plan.

In responding to Recommendation 2-2, we propose that the Office of Enforcement and Compliance Assurance and the Office of Water work together to integrate more closely our existing program-review processes and specifically to include the review of existing MOAs based on the new template as part of this process. Our goal in this effort would be to identify and correct those MOAs that present the greatest barriers to state program performance,

implement other solutions and approaches to achieve the maximum environmental and public health benefits in light of any deficiencies identified or both.

OIG Response: The response does not mention MOAs that are outdated by the current CWA. To maintain consistent, effective management control, MOAs must be current so as to take into account the most up-to-date CWA requirements, as reflected in the CFR. The OIG commends both OECA and OW for proposing to work together to integrate more closely their existing program-reviews processes. The recommendation is undecided with agreed-to actions pending. In its final response to this report, EPA should provide estimated or actual completion dates for this recommendation.

2-3 We agree that establishing processes, as discussed above, for reviewing MOAs as part of our ongoing program reviews would be useful and would assist in ensuring nationally consistent program performance over time.

OIG Response: The OIG agrees with the Agency's proposed actions in response to recommendation 2-3. The recommendation is open with agreed-to actions pending. In its final response to this report, EPA should provide estimated or actual completion dates for this recommendation.

2-4 We agree that maintaining a publicly available repository of MOAs would improve transparency and accountability.

OIG Response: The OIG agrees with the Agency's proposed actions in response to recommendation 2-4. The recommendation is open with agreed-to actions pending. In its final response to this report, EPA should provide estimated or actual completion dates for this recommendation.

Please see the attachment for specific technical corrections and comments. Should you have any questions or concerns about this response, please contact Nena Shaw at (202) 564-5106.

Bob Perciasepe /s/

Attachment

Appendix E

Distribution

Office of the Administrator
Deputy Administrator
Assistant Administrator for Enforcement and Compliance Assurance
Assistant Administrator for Water
Director, Office of Regional Operations
Agency Follow-up Official (the CFO)
Agency Follow-up Coordinator
General Counsel
Associate Administrator for Congressional and Intergovernmental Relations
Associate Administrator for External Affairs and Environmental Education
Audit Follow-up Coordinator, Office of Enforcement and Compliance Assurance
Inspector General