



ECOS

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April 23, 2015

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Via email to: shapiro.mike@epa.gov; shaw.betsy@epa.gov

Re: Response to March 11, 2015 Letter on Efficient and Effective Oversight of State Permitting Programs

Dear Deputy Assistant Administrators Shapiro and Shaw,

The Environmental Council of the States (ECOS) is pleased to provide this response to the U.S. Environmental Protection Agency (EPA or Agency) on the letter (Attachment A) seeking feedback on a set of draft principles and best practices for efficient and effective oversight of the following three state permitting programs: the Clean Water Act (CWA) National Pollutant Discharge Elimination System (NPDES), Clean Air Act Title V (Title V), and the Resource Conservation and Recovery Act Subtitle C (RCRA). ECOS has coordinated with the media associations in developing these comments and this letter includes input from the Association of Clean Water Administrators (ACWA), the Association of State and Territorial Solid Waste Management Officials (ASTSWMO), the Association of State Drinking Water Administrators (ASDWA), the Association of Air Pollution Control Agencies (AAPCA). The National Association of Clean Air Agencies (NACAA) plans to send its own letter.

ECOS and the state associations (hereinafter “states”) recognize the value of enhancing the efficiency and effectiveness of the federal oversight process of delegated state programs. States appreciate the Agency’s recognition that current oversight practices in the three identified permitting programs differ, and that EPA crafted the principles at a high enough level to be relevant but flexible enough to take into account the programs’ varying statutory requirements, evolution, resources, and history. We write with the expectation that EPA will take our comments into consideration, and continue additional dialogue with us, as it develops final principles and practices.

General Comments and Areas of Clarification

In sum, the overall approach contained in the principles and practices appears appropriate so long as EPA and states work together on coordination, collaboration, and cooperation. The final principles and practices need to clarify whether these are a set of principles to be applied generally to EPA’s existing oversight of state permitting practices in the three programs or whether they are introducing a new formal review process focused on state permitting programs.

States recommend that EPA leverage existing permitting oversight practices to the greatest extent possible in lieu of establishing any new processes. The final principles and practices also need to clarify their relationship, if any, to EPA's State Review Framework (SRF) process.

We concur with EPA's statement in the letter that "shared accountability is critical to ensuring that public health and environmental protections are delivered consistently nationwide." Shared accountability means there are roles for both EPA and states to play in ensuring successful delegated programs as envisioned by Congress. How the final permitting oversight principles and best practices are applied is as important as how they read on paper. States are committed to working with EPA to refine these principles and practices, particularly as lessons are learned when they are applied in concrete and specific situations.

Budget issues are perhaps the single most important challenge for the states. States urge EPA to keep this in mind when finalizing the permitting oversight principles and best practices. States believe it likely that State and Tribal Assistance Grants will be reduced in the coming fiscal years. Such reductions could require states to work with EPA to recalibrate various permitting and related commitments, with focus being placed on actions and activities that make the most efficient and effective use of federal and state resources for the greatest environmental and public health benefit. It will be essential to test the viability of the final principles and best practices in times of stretched budgets, in the face of new and changing regulatory demands, and when staff and dollars are diverted to respond to resource intensive occurrences such as extreme weather events, natural disasters, or industrial accidents.

An "efficient and effective" permitting oversight program needs a clear basis to measure the adequacy of performance and the minimum expectations required. EPA should ensure that all baseline performance measures used to assess state permitting programs are current regulatory requirements and that there are no other benchmarks associated with unclear policies or guidance. We recommend that EPA work with states to include in the final principles and best practices clear language regarding conformance expectations with EPA regulations and recommended policies and guidance that might appropriately fit within this framework.

An efficient and effective oversight program also relies upon timely feedback from EPA to states. For instance, if EPA identifies possible issues informally with a state, it is reasonable to expect that a well-managed state program would seek to address these issues in an expedient manner and that EPA will also expeditiously make clear that its concern is resolved to conclude the informal matter with the state. If a state permitting program has more deeply embedded issues, an expeditious EPA report is important so that the state can put into place corrective steps, which may take time. The final principles should commit to timely EPA responses and include this goal in related performance metrics.

Comments on Draft Principles¹

- ***Routine review of state-developed permits and state permit programs (Principle #2)*** – States recommend that EPA set forth clear and appropriate criteria for such reviews to ensure consistency in the review process from Region to Region and from Headquarters program office to Headquarters program office. The final principles and practices should note that foundational documents (e.g., memoranda of understanding, delegation agreements) are not

¹ For ease of reference, we suggest EPA number its oversight principles.

anticipated to be included in “routine reviews.” These types of documents may vary from state to state given when they were adopted and other circumstances, and are important structural documents to the overall state program. Routine reviews of permitting practices in a state would, in states’ opinion, rarely require revising of such foundational keystones. States also recommend that oversight reviews also be conducted to the greatest extent possible as part of regular and/or existing meetings and interactions between the state and the EPA region.

- ***Environmental results as primary basis for yearly oversight activities (Principle #4)*** – States have worked with EPA to streamline program reporting obligations, moving from quarterly to either semi-annual or annual state grant reporting cycles. These reports offer an established mechanism for EPA to review results to assess oversight activities in the current reporting cycle. Additional annual oversight activities may place unnecessary burden on states and regional staff. Also, states and EPA recently moved to a two-year National Program Manager (NPM) Guidance cycle. States recommend that program oversight activities be conducted in alignment with the two year NPM cycle. EPA should work with states to identify and list specific permitting elements to be audited or reviewed.
- ***Use of established vehicles to identify, document, and address performances issues (Principle #5)*** – States and EPA have streamlined program reporting obligations, moving from quarterly to semi-annual or annual state grant reporting cycles. We recommend that grant workplan reporting be used to address effectiveness, efficiency and performance issues.

A successful permitting oversight program will yield solutions that address/correct inadequate performance and offer opportunities for enhancing adequate performance. Information gained through the permitting oversight process should be used to identify and implement state and federal program improvements. Not only should deficiencies be identified, but support should be offered by Regions and Headquarters to states that are found to have difficulty meeting federal program permitting requirements. Shared accountability means EPA must support and assist those states that need it most, even when it means realigning resources. Title 40 Part 35 requires that grant work plans include the roles and responsibilities of both the state and EPA in carrying out the work plan commitments.² The final principles and practices should refer to this existing mechanism for both states and the Agency to delineate responsibilities associated with maintaining strong, and improving underperforming, delegated state permitting programs.

- ***Continuing improvement of programs oversight (Principle #6)*** – A successful oversight program builds long term adaptation into the assessment process. States desire to be directly included in EPA’s periodic review of its oversight process. We recommend that EPA and states review and update the principles and best practices every five years, with a particular focus on improving environmental permitting program performance and meeting the minimum federal requirements.

² Title 40: Part 35, Subpart A [§35.107(b)(2)(v)],
http://www.epa.gov/ocir/nepps/pdf/title_40_part_35_governing_state_grants_including_ppgs.pdf.

Comments on Draft Best Practices

- 1. *Develop, keep current, and make readily available on-line policies, guidance, and tools*** – States strongly support this best practice and recognize the great potential for improvement on this specific topic. Today, the process of obtaining the necessary approvals to post new materials and update the Agency’s websites is challenging and time-consuming. Providing the most recent guidance, policies, and information applicable to any given topic is an important goal to strive for. One possible solution would be that ECOS along with the other media associations receive EPA funding to support timely and comprehensive online availability of documentation.

b. *Summarizing novel/controversial issues for use in future permit reviews* – ECOS and the state associations suggest that any summaries be made available to states and be included in training offered to states and EPA.
- 2. *Establish a strong, collaborative environment between states and EPA permitting programs*** – States commend EPA for its commitment to foster a strong state-EPA partnership. States have long supported early, meaningful, and substantial state involvement and it is crucial that EPA engage states as co-regulators prior to and during the permitting oversight process. Continuing diligent and frequent communication with states will be critical to developing and implementing a more efficient and effective oversight of state permitting programs. ECOS Resolution 98-9,³ includes the concepts of both ensuring that both State and Federal resources are used effectively and considering State and Federal roles in light of increased work load and decreasing resources. *See also* ECOS Resolution 8-10.⁴

States believe that a successful permitting oversight program needs to ensure that all aspects of the review process have been properly communicated to the assessor, assessee, and any third party stakeholder with an interest in the outcome. The EPA/state program oversight process needs to be accomplished through clear, accurate, up-to-date, efficient, and effective policies, guidance, training, and tools for both EPA and states’ staff.

- a. *Substantive communications in advance of complex permits going to public notice*** – States encourage EPA to provide timely, scientifically defensible, comments on proposed permits, preferably at an early stage of the process. If EPA’s review comes late in the permit development cycle, it leaves states with little time to respond and/or advance alternative approaches where appropriate. Likewise, waiting until late in the public participation process only delays issuance and renewals which may add to permit backlogs. It should also be noted that with draft water and air permits, EPA’s time for review (per federal regulations) does not begin until the state has produced a draft permit and provided notice to the public of its opportunity to comment on the draft. The draft best practice establishes an expectation of EPA involvement in the permitting process

³ *U.S. EPA Enforcement in Delegated States*, ECOS Resolution 98-9, approved on October 29, 1998, renewed on November 23, 2001, amended on October 4, 2004, September 17, 2007, August 30, 2010, and revised on September 18, 2013.

⁴ *Strengthening the State-EPA Partnership Including a Continued Commitment to NEPPS*, ECOS Resolution 8-10, approved on April 15, 2008, revised on March 30, 2011 and April 2, 2014. This resolution states that “the States and U.S. EPA are partners, co-regulators, and co-managers of a national system which must assure meaningful and substantial involvement of States in both the development and implementation of environmental and public health programs.”

before a complex or controversial draft permit has gone to public notice. While states may support informal collaboration and transparency with EPA on difficult issues, this best practice as drafted may put EPA in the midst of the permit process rather than in a role of oversight over a delegated state permitting program. "Substantive communications" with EPA in the permit process before the draft permit stage may result in significant delays in a state's ability to produce draft permits resulting in a less efficient permit process. Additional state-EPA discussion of this draft principle is needed to clarify what this might entail and how respect for existing delegations and operating agreements is maintained.

- e. ***Results from program reviews made available to the states and posted to the internet*** – States need to be given an opportunity to review their respective reports before their posting to the internet. In addition, and to the extent that the results from permit program reviews are posted on EPA's webpage, states encourage EPA to commit to having state comments on those reviews publicized in the same way. Both EPA and the states should ensure that the oversight process is well documented and that the results of the assessment, comments provided by the assessed and notable limitations of the reviews are all documented to ensure that a timely, accurate, and complete report is created. Echoing ECOS Resolution 11-2,⁵ states support a cooperative process for the scheduled release of routine data that allows states the opportunity to review data pertaining to their jurisdiction and submit timely corrections of data errors before the data is released. States believe EPA should provide advance notice to states and EPA regional offices prior to the scheduled release of routine datasets, so that states are prepared to respond to potential inquiries by the press and the public regarding those datasets including the results of permitting oversight reviews.

3. ***Enhancing effectiveness and efficiency of oversight***

- a. ***Targeting reviews to focus on the most environmentally significant permits and state-specific challenges*** – EPA's effort to enhance effectiveness and efficiency by focusing on the "most environmentally significant permits and state-specific challenges, and reviewing fewer routine/non- controversial permits" is a good approach. This is especially so in light of the funding and resources challenges that both federal and state environmental agencies are likely to see on the future. Some states may wish EPA to consider other factors or circumstances in a review, and those can be raised by the state at the appropriate time.⁶
- c. ***Routine intervals for permit/program reviews and flexibility to acknowledge resource constraints, past performance, and known ongoing problems*** – States urge EPA to clarify the meaning of the term "routine intervals" in order to (1) ensure consistency throughout the states and (2) avoid placing additional and unnecessary burden on the states.

⁵ *Respectful Use of Data*, ECOS Resolution 11-2, approved on March 30, 2011 and renewed on April 2, 2014.

⁶ For instance, post storms, state officials have had to obtain waivers to extend fulfillment of some EPA grant requirements to the next grant cycle. Natural disasters can yield permit backlogs and difficulties meeting federal requirements for EPA grants. See "Funding for 10 States' Programs Supported by Four Environmental Protection Agency Categorical Grants," General Accountability Office, May 6, 2013, <http://www.gao.gov/products/GAO-13-504R>.

States commend EPA for acknowledging the need for flexibility and differential oversight based on resource constraints, past performance and known ongoing problems. As described in the 1995 ECOS/EPA Joint Commitment to Reform Oversight and Create a National Environmental Performance Partnership System (NEPPS),⁷ the purpose of NEPPS is to “strengthen our protection of public health and the environment by directing scarce public resources toward improving environmental results, allowing states greater flexibility to achieve those results, and enhancing our accountability to the public and taxpayers”. Differential oversight is one of the seven principal components of NEPPS. *See also* ECOS Resolution 8-10.⁸ A successful permitting oversight program should provide recognition for exemplary performance. EPA and states should continue to identify opportunities to incentivize high performance.

- d. *Necessary information made available when requested*** – States encourage EPA to clarify this broad statement. States already provide a great deal of information to EPA through state grant annual or semi-annual reports; periodic State Review Framework (SRF) assessments; Permit Quality Review (PQR), Annual Noncompliance Report (ANCR), various reporting systems such as ICIS-NPDES, ICIS-Air; and other mechanisms. EPA should extract from existing state reported information prior to any additional information request being made.
- e. *Use of lean tools and joint governance concepts*** – States have been actively applying lean process improvement tools and there is much potential benefit of states and EPA working collaboratively to streamline processes. E-Enterprise for the Environment has as a core principle to streamline and modernize business practices. State encourage EPA’s commitment to use lean tools and encourages EPA to commit to fully implement work practice improvements, particularly for joint projects where there is state-federal interaction. *See* ECOS Resolution 07-5.⁹
- g. *Develop and deliver training programs for EPA and state permitting staff on regulations, policies, tools, expectations, etc.*** – This intended best practice was described as the “glue that will make this policy work.” Developing and offering training programs is essential. Reaffirming ECOS Resolution 06-9¹⁰, states recognize the need for a strong training program in order to develop the knowledge, skills, and abilities to effectively contribute to attaining and maintaining healthy air quality, to quickly learn new job responsibilities, and to maintain, enhance, and update skills in their existing areas of responsibility. Local, state, territorial, and federal officials, especially those EPA staff working in the regional offices, should receive training in a consistent and uniform manner and, because turnover in staff at all levels of government has reached such levels,

⁷ Joint Commitment to Reform Oversight and Create a National Environmental Performance Partnership System, May 17, 1995, http://www.epa.gov/ocirpage/nepps/pdf/joint_commit_create_nepps.pdf.

⁸ *Strengthening the State-EPA Partnership Including a Continued Commitment to NEPPS*, ECOS Resolution 8-10, approved on April 15, 2008 and revised on March 30, 2011 and April 2, 2014.

⁹ *To Sustain Techniques for Improvements to Work Practices and Business Processes in State and EPA Programs and Administrative Processes for the Protection of Human Health and the Environment*, ECOS Resolution 07-5, approved on March 21, 2007, revised on March 23, 2010 and March 4, 2013.

¹⁰ *National Training Strategy Implementation and Funding*, ECOS Resolution 06-9, approved on August 29, 2006, reaffirmed on September 21, 2009 and revised on August 28, 2012.

adequate training opportunities are critically needed by local, state, territorial, and federal agencies. States believe that training should be ongoing rather than a one-time occurrence. Training should include information about novel/controversial permit issues, and include both state and EPA presenters. Training should focus not only on individual permitting activities or approaches but also overall permitting program management. This may include innovative approaches such as e-permitting and tracking efforts that states are now deploying.

4. ***Team approach to permit and program reviews*** – In the private sector, audits teams may include representatives from outside companies. ECOS and the state associations recommend that EPA discuss with states the possibility of adding external state staff or external regional staff in review processes. Such an approach would broaden review teams to draw from both EPA and states directly impacted staff as well as EPA and state staff external to the review but knowledgeable about practices.

States recommend that the Agency work with ECOS to set up a time to discuss these comments with the responding state associations. To make these arrangements, please contact Alexandra Dunn, ECOS Executive Director and General Counsel, adunn@ecos.org or 202-266-4929. We thank you for the opportunity to provide input on these principles and best practices, and look forward to our conversation and to their eventual finalization.

Sincerely,



Robert J. Martineau, Jr.
ECOS President
Commissioner, Tennessee Department of Environment and Conservation

cc: ECOS Officers (Martha Rudolph (CO), Henry Darwin (AZ), Dick Pedersen (OR)) & Planning Committee Chair and Vice Chair (William Ehm (IA), John Linc Stine (MN))

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MAR 11 2015

Commissioner Robert J. Martineau, Jr.
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Dear Commissioner Martineau:

The purpose of this letter is to share with the Environmental Council of the States some high-level draft principles and best practices for efficient and effective oversight of state permitting programs. As described below, the United States Environmental Protection Agency has recently developed these draft materials and we are eager to obtain additional feedback on them from the states. We are requesting your assistance in designing an appropriate process to hear from ECOS' Planning Committee and other members of ECOS.

Background

In response to a 2011 Inspector General's report recommending better oversight of enforcement under the Clean Water Act, the EPA embarked on an effort to assess Headquarters and Regional oversight of major state delegated programs. Under a FY2013 key performance indicator established by then-Deputy Administrator Bob Perciasepe, the Office of Water, Office of Air and Radiation, Office of Solid Waste and Emergency Response, and Office of Enforcement and Compliance Assurance worked together to describe and compare oversight activities performed in the National Pollutant Discharge Elimination System, Clean Air Act Title V, and Resource Conservation and Recovery Act Subtitle C programs, respectively, noting that the State Review Framework for enforcement already had efforts underway on a parallel track. In this first phase, the participating offices identified, examined and explained differences between oversight practices in the three programs and, based on this learning, developed an initial set of common principles.

A second phase of work has recently been completed in which the draft principles have been further refined, and draft best practices for enhancing the efficiency and effectiveness of the oversight process of state permitting programs have been identified from across the EPA regional staff of the NPDES, Title V, and RCRA permitting programs. The best practices represent current practice in one or more Regional permitting programs that the other regions and national permitting programs believe all three programs should aspire to adopt. As part of this second phase, each program also reached out informally to seek feedback from their respective media association (e.g., ACWA, NACAA, ASTSWMO, etc.). These consultations were of

limited extent and were not designed to obtain consensus positions or endorsement by the media associations.

This effort falls under the Cross-Agency Strategy for “A New Era of State, Tribal, Local, and International Partnerships” which recognizes that good government, as well as tighter resources, requires that the EPA and states, among others, work together effectively in accordance with the principles of coordination, collaboration, cooperation, and accountability. Shared accountability is critical to ensuring that public health and environmental protections are delivered consistently nationwide. Shared accountability can be strengthened by focusing oversight on the most significant and pressing state program performance challenges, using data and analysis to accelerate program improvements and remaining mindful of overall program health and integrity.

Path Forward

In keeping with our overarching theme of shared accountability, we would appreciate receiving ECOS’ reactions to these general principles and practices. Oversight practices within the three programs of focus are in different places, responding to somewhat unique issues at any particular point in time, and reflecting their respective statutory obligations. No program currently operates fully consistently with all of the principles, nor employs all of the best practices. Our goal is that the consolidated principles and practices, incorporating ECOS input, can serve as useful guideposts to shape the direction in which each program progresses. There is also strong consensus that E-Enterprise solutions, which produce real time data as a result of improved business processes, electronic reporting, and/or advancing monitoring technologies, offer significant potential to transform oversight of permitting programs to greater levels of effectiveness and efficiency, and that states and the EPA must continue to work together to realize that potential.

Draft Principles

As noted above, no permitting oversight program is currently operating fully consistently with these principles, but there is common interest in coming into alignment with these principles over time. Issues unique to each program will influence the pace at which that alignment occurs. The principles are described as follows:

- The EPA/State program oversight process will be accomplished through clear, accurate, up-to-date, efficient, and effective policies, guidance, training, and tools for both EPA and state staff.
- The EPA will work with states to routinely review state-developed permits and state permit programs in accordance with established guidance to ensure legal authority, effective implementation, and national consistency.
- The EPA and state program authorities will use information gained through the oversight process to identify and implement necessary program improvements.

- Environmental results, as expressed in the EPA's National Program Manager guidance, annual commitments, and agreed-to priorities with the states, will provide the primary basis for yearly oversight activities.
- The EPA and the states will use established vehicles, wherever possible, (e.g., state grant commitments, annual state workplans) to identify, document, and address performance issues.
- We will look to continue to improve oversight programs over time with careful consideration of the perspectives of the EPA and states.

Draft Best Practices

These best practices are suggested methods to help permitting programs continue to enhance the efficiency and effectiveness of their oversight consistent with the principles listed above.

1. Develop, keep current, and make readily available on-line policies, guidance, and tools to support the EPA in its review of state-developed permits and permitting programs; examples include:
 - a. Maintaining checklists for preparing and reviewing permits and performing program reviews.
 - b. Summarizing novel/controversial issues for use in future permit reviews.
2. Establish a strong collaborative environment between the EPA and state permitting programs
 - a. Anticipate, plan for, and hold substantive communications well in advance of complex/controversial permits going to public notice
 - b. Hold regular conference calls with states to provide the national perspective, communicate new policies, and promote consistency and cross-fertilization of good ideas.
 - c. Share best practices with all permitting authorities.
 - d. Commit to regular meetings (face-to-face or by phone, as appropriate) between regional offices and their states.
 - e. The EPA will make results from program reviews available to the states and post them to the internet.
 - f. Ensure that follow-up on identified issues is performed in a timely manner and continues until resolution is achieved.

3. Enhance the effectiveness and efficiency of oversight by:
 - a. Targeting reviews to focus on the most environmentally significant permits and state-specific challenges, and reviewing fewer routine/noncontroversial permits.
 - b. Respecting and using existing state/regional relationships.
 - c. Conducting permit/program reviews at routine intervals, but with sufficient flexibility to acknowledge resource constraints, past performance, and known ongoing problems.
 - d. Allowing flexibility, when appropriate, in reporting requirements, provided necessary information is available when requested.
 - e. Using lean tools where possible to reduce the resources needed for oversight.
 - f. Planning continually for future challenges/opportunities, while leveraging/incorporating new approaches and technologies (e.g., e-Enterprise innovations).
 - g. Developing and delivering training programs for EPA and state permitting staff on EPA regulations and policies, tools for permit development, and expectations for program and permit submissions to EPA; timeframes for delivery should consider new permitting requirements and staffing changes.
 - h. Instituting strategies for retaining institutional knowledge.
 - i. Ensuring Program Guidance looks forward to future challenges and opportunities
4. Where possible, use a team approach to permit and program reviews to increase staff expertise, enhance overall productivity and awareness of trends in other programs, and increase accountability (where appropriate, use teams divided by geographic area).

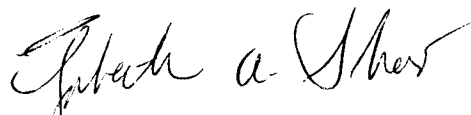
Our goal in seeking ECOS comments on these principles and practices is to get your reactions to these high level statements and, based on those reactions, refine the products to achieve a useful framework that will guide more specific activity with state media program organizations. Thus, we are interested in receiving comments on any of the individual principles and practices, suggested additions, or other improvements. We would also like your views on whether this framework, taken as a whole, provides a suitable basis for further work to improve the efficiency and effectiveness of oversight activities. We are requesting ECOS comments by April 15. The upcoming spring ECOS provides a potential opportunity for focused discussion on this subject, if

you would find that useful. We look forward to working with you to identify the best way to engage with ECOS on these draft principles and best practices so that we can achieve mutually beneficial environmental and programmatic results.

Sincerely,



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Elizabeth A. Shaw
Deputy Assistant Administrator
Office of Air and Radiation

cc: Alexandra Dapolito Dunn
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