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**Report of the EPA-State Worksharing Task Force:
Prohibitions, Areas of Caution, and
Recommendations to Enhance Worksharing Opportunities**



**Office of the Administrator
OCIR
EPA 140-R-12-001
July 2012**

Acknowledgement

The Office of Congressional and Intergovernmental Relations would like to acknowledge the following individuals for their contributions to this document and participation on the task force.

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Report of the EPA-State Worksharing Task Force: Prohibitions, Areas of Caution, and Recommendations to Enhance Worksharing Opportunities

Introduction

Budget issues at the state and federal levels have focused more attention on worksharing as a tool to help both the states and the US Environmental Protection Agency (EPA) implement programs more efficiently. The FY 2011-2015 EPA Strategic Plan included a cross-cutting partnership strategy that incorporated worksharing. The FY 2011 Action Plan, which implements the cross-cutting strategy, included language directing the Office of Congressional and Intergovernmental Relations (OCIR) to convene a task force to identify program areas where worksharing can be applied, and areas where statutes or regulations prohibit it.

Worksharing is a tool that can be applied in situations where either EPA or a state can perform work deemed a priority by both. It is utilized to make the most effective use of resources, and often when resources are constrained for one or both parties. In some instances, it is contemplated as part of the joint planning process between a region and a state, and at other times, it is used to address unforeseen circumstances. Worksharing arrangements can include resources and expertise to conduct work (e.g., writing permits, conducting inspections, managing site cleanups, etc.) or other tangible support (e.g., technology, training, laboratory services, etc.). Specific examples include regions sharing work by developing Total Maximum Daily Loads (TMDL) for impaired waters in states where TMDLs are required to meet a consent decree and/or for waters that cross multiple jurisdictions, and regional air enforcement staff performing stack tests for states lacking this expertise.

This report presents the findings of the Task Force in FY 2011, the strategic direction provided to it by the Agency's Executive Management Council (EMC), recommendations, and next steps. It does not establish new policy; however, the report's findings and recommendations can be used by Agency executives to inform future policy direction and management choices.

Background

The states first raised the issue of worksharing in March 2009 through an Environmental Council of the States (ECOS) handout on "workload sharing" developed for their Spring Meeting. At the first Senior Leadership Meeting with the Deputy Administrator in January 2010, states raised the issue again. The following summer, the Deputy Administrator called for development of policy direction on worksharing as part of the FY 2011 annual planning and budget process. The policy direction workgroup compiled a table of worksharing examples collected from the regions as part of this effort. The Deputy Administrator and the states continued to discuss worksharing during the second ECOS-EPA Senior Leadership Meeting in August of 2010.

In response to the FY 2011 Action Plan, OCIR worked with National Program Managers (NPM) to include best practices and examples of worksharing in the FY 2012 NPM Guidance.¹ OCIR met with the guidance contacts and provided draft language and a table of worksharing examples. When the NPMs' annual guidance was finalized in April 2011, almost all discussed worksharing and/or states' need for flexibility.

In April 2011, the Worksharing Task Force began a review to identify program areas where worksharing can be applied, and areas where statutes or regulations prohibit it. There is a Key Performance Indicator (KPI)² for this work in the Action Plan.

During the 2011 ECOS Spring Meeting, state commissioners expressed a specific interest in pursuing Interagency Personnel Assignments (IPAs) and staff training as opportunities to meet important state needs. Additionally, during Task Force deliberations, state members requested EPA to work with states to identify, promote and distribute worksharing best practices.

OCIR presented the early findings of the Task Force and states' suggestions and requests to the EMC in July 2011. The EMC concurred with the findings and recommendations of the Task Force regarding the results of the NPM review and expanding membership on the Task Force to include all regional offices.

Findings

Based on the NPM reviews, two prohibitions and a few areas of caution were identified. Areas of caution do not prohibit worksharing, but must be considered when developing a worksharing agreement. The areas of caution identified relate to appropriations law, grants law, information law and ethics. The prohibitions relate to Superfund site remedy selection and preparation of a state's competitive grant application. See Appendix A for details.

In addition to the prohibitions outlined in Appendix A, there are other situations that are inappropriate for worksharing arrangements. Since worksharing is primarily conducted between EPA's regional offices and their states, the NPMs noted that all worksharing scenarios could not be anticipated. It is often done on an as-needed basis in response to unique situations that arise in a state. Regions and states should consult with legal counsel and NPMs to evaluate each proposed worksharing arrangement to determine appropriateness relative to applicable statutes and regulations.

¹ The Agency was advancing worksharing through its National Environmental Performance Partnership System NPM Guidance in FY 2010 and FY 2011, but it had not been incorporated into other NPM guidance until FY 2012.

² KPI Text: Establish an Agency-wide taskforce to determine parameters for worksharing, identify program elements where worksharing can be applied, and areas where statutes or regulations prohibit worksharing. Include best practices and examples of worksharing in FY 2012 NPM Guidances.

The Task Force and the EMC each used Think Tank--software designed to facilitate brainstorming--to generate ideas about how to move forward to address the aspects of worksharing the states thought would be most beneficial to them. There was considerable agreement and overlap between the results from the two Think Tank sessions. The combined results are presented in Appendix B. These ideas will inform the Task Force's work in FY 2012.

In August 2011, the state members of the Task Force submitted their suggestions for worksharing core principles and best practices as a starting point for the Task Force's discussions on that topic in FY 2012. The purpose of the core principles is to focus state-EPA worksharing efforts to achieve more efficient and mutually beneficial outcomes. Best practices should incorporate the core principles of worksharing. The states offered elements for success in activities such as drafting permits, conducting inspections, and monitoring. States continue to support reinvigorating the IPA program and expanding training opportunities as priorities for worksharing.

Recommendations

The Task Force concluded its work in FY 2011 with the recommendations below.

- **NPMs should encourage and support worksharing in their annual guidance.** The NPM review of statutes and regulations for worksharing prohibitions provided an opportunity for the NPMs to focus on worksharing. Previously, the NPMs' role generally had been to support, facilitate, and in some situations, provide additional staff or contract resources to the regions, as regions provide assistance to their states through worksharing.
- **EPA's efforts should support, not supplant, the state's role.** Concerns were noted by both the states and EPA regional offices that when EPA engaged in some worksharing arrangements, the Agency tended to take the lead when that was not the state's intention, especially in the enforcement arena.
- **Worksharing arrangements should be considered during annual planning process negotiations.** Ideally, such arrangements would benefit both EPA and the state, and clearly define the roles and responsibilities of the partners.
- **Regions should track and report worksharing arrangements,** possibly by developing a non-commitment indicator in the Annual Commitment System (ACS)³ for contract funding levels and FTE dedicated to worksharing. This tracking should be implemented so as not to create a new reporting burden for the states. Worksharing should be

³ The ACS assists National Program Managers (NPMs) and regional managers in negotiating and agreeing on annual regional performance commitments. The ACS captures key program measures identified in National Program Guidance documents and is used to facilitate agreement on the final annual regional commitments that are made against each measure.

documented in a Performance Partnership Agreement, Performance Partnership Grant or other EPA/state operating agreement.

Next Steps

To ensure the Agency maintains its focus on worksharing, EPA included an action item in the FY 2012 Action Plan for the Cross-cutting Fundamental Strategy to Strengthen State, Tribal, and International Partnerships. The action item, which implements the strategic direction provided by the EMC, is as follows: [EPA will] *Work with states through the EPA-State Worksharing Task Force to identify, develop and make available to regions and states worksharing best practices; and investigate ways to make EPA's expertise available to assist states through personnel and information/data exchange and training, and provide recommendations to the Agency's Executive Management Council and ECOS leadership by September 2012.*

In keeping with the strategic direction from the EMC, in FY 2012 the Task Force will focus its work in the following areas:

- Identify, promote and distribute worksharing best practices;
- Investigate ways to make EPA's expertise more available to states through IPAs and digital/electronic resources; and,
- Investigate opportunities to expand/enhance training opportunities for states.

Appendix A: Worksharing Areas of Caution & Prohibitions

Submitting Office	Category	Citation	Description
AREAS OF CAUTION			
Office of Water (OW) & Office of General Counsel	Appropriations Law	31 U.S.C. 1301(a); Government Accountability Office, <i>Principles of Federal Appropriations Law</i> , pp. 4-12	If a state uses State and Tribal Assistance Grants (STAG) funds for its National Pollution Discharge Elimination System (NPDES) program there is a “pick and stick” ⁴ issue if EPA uses Environmental Program Management (EPM) funds to help the state carry out the same activities the Agency funds with STAG appropriations, particularly if the Agency uses EPM funds for a contract task order for work on the NPDES permit. EPM funds may only be used if there is a direct federal interest (interstate waters, federal facilities, EPA litigation vulnerability) in a specific NPDES permit. However, costs for routine EPA staff oversight and technical assistance for the state NPDES program may be charged to EPM.
Office of Water & Office of General Counsel	Appropriations Law	31 U.S.C. 1301(a); Government Accountability Office, <i>Principles of Federal Appropriations Law</i> , pp. 4-12; 4/12/06 OW “Pick and Stick” Guidance	Per the 4/12/06 OW “pick and stick” guidance on the use of EPM funds for TMDLs, the Agency may use EPM funds for contracts used to prepare TMDLs when there is a direct federal government interest in the development of the TMDLs. The guidance specifies situations in which there is a direct federal interest. Consult OW’s 4/12/06 guidance for questions regarding using EPM funds for contracts used to develop TMDLs for states as part of worksharing agreements. There is no “pick and stick” issue as long as the EPM funds can be used for Agency salaries for worksharing arrangements with the state and EPA has the authority to carry out the functions at issue at the federal level. Categorical STAG funds are not available for EPA to carry out federal functions except in Direct Implementation (DI) situations.

⁴ The “pick and stick” rule is applied to situations in which two appropriations are available for the same purpose. The Agency may select which appropriation to charge for the expenditure in question. Once the election has been made, the Agency must continue to use the same appropriation for that purpose unless the Agency at the beginning of the fiscal year informs Congress of its intent to change appropriations for the fiscal year. *Principles of Federal Appropriations Law*, pp. 2-23. EPA may, prior to the beginning of the fiscal year, inform Congress of its intent to change appropriations for the function by means of explicit language in a Congressional Justification or otherwise. *Department of Homeland Security – Use of Management Directorate Appropriations to Pay Costs of Component Agencies*, B-307382 (September 7, 2006).

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			In DI, Categorical STAG funds may only be used for contractors and SEE enrollees; EPA may not use Categorical STAG funds for the salaries of EPA personnel.
Office of General Counsel	Grants Law	Clean Air Act (CAA) Section 105	Whether an IPA would affect a state’s level of effort requirement really depends on the work that is being done. If the EPA person performs a special assignment, there is likely an argument that the costs are non-recurring. If the IPA work just expands on recurring costs and increases the level of effort in a given year over previous years, those additional expenditures arguably increase the level of effort. The best way to ensure it does not is to keep the IPA outside the grant altogether. For the CAA 105 program, the state defines the section 105 program and it could determine that the IPA is outside the grant, even if the activities are essentially the same.
Office of General Counsel	Grants Law (in-kind assistance)	State Continuing Environmental Program (CEP) grants	In-kind assistance to states would be an option under a CEP grant if the Agency used STAG funds to hire the contractor.
Office of General Counsel	Ethics		Unlike most federal agencies, EPA lacks authority to accept gifts. The Agency cannot accept gifts from outside sources because of its official position or from prohibited sources (and anyone regulated by or doing business with EPA is a prohibited source). From an ethics perspective, then, EPA is chary of “partnerships” and “sharing” because these concepts sometimes involve gifts from “partners” that the Agency may not be able to accept.
Office of General Counsel, Office of	Permitting		Where the state is the EPA-approved permitting authority and EPA's role in these permitting programs is one of oversight, worksharing

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Water, Office of Air and Radiation			between EPA and the state to conduct permitting activities in states that are authorized to issue permits could, in some instances, produce tension with or lead to a conflict with EPA's oversight role.
Office of General Counsel	Information Law	40 CFR 2.209 <i>Disclosure in special circumstances</i> and 2.30(h) <i>Disclosure to authorized representatives</i>	Agency regulations at 40 CFR 2.209 <i>Disclosure in special circumstances</i> , and 2.301(h) <i>Disclosure to authorized representatives</i> set out the requirements that must be addressed in order to share any information with a Confidential Business Information (CBI) claim under the circumstances noted. Also, the provisions in 2.301 apply to CBI in the context of CAA information; they are replicated in other Special Rules governing certain information obtained under other EPA-administered statutes in the regulations that immediately follow that section.
Office of Water	Authorizing Statute	Clean Water Act (CWA) Section 404 Permitting Program	The statute authorizes the US Army Corps of Engineers and authorized states to issue 404 permits consistent with the environmental requirements in the CWA Section 404(b)(1) Guidelines established by EPA. The statute and its implementing regulations provide that EPA may object to state-issued permits if the permits are the subject of an interstate dispute or outside the requirements of Section 404, or the 404(b)(1) Guidelines. EPA's role in the 404 permitting process is one of oversight. Worksharing for 404 permitting activities with states authorized to issue 404 permits may, in some instances, be inconsistent with EPA's oversight role.
Office of Water	Appropriations Law	CWA 104(b)(2)	In EPA's National Water Program Guidance, EPA identifies Section 404 implementation as an eligible activity under CWA 106 grants. See: http://water.epa.gov/resource_performance/planning/FY-2012-National-Water-Program-Guidance.cfm , Appendix D, page 2. Also, if a state uses STAG funds for CWA 404 activities, there is a "pick and stick" issue if EPA uses EPM funds to help a state carry out the same activities.

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Office of Water & Office of General Counsel	Authorizing Statute Appropriations Law	CWA 106 Program	For the CWA 106 program, the statute and implementing regulations require states to have an adequate monitoring program and provide CWA 305(b) information in order to be eligible to receive 106 funds. EPA cannot carry out these activities on behalf of the state, but can provide a state with technical assistance with its CWA 305(b) reporting and CWA 106 grant application. Additionally, because states use CWA 106 STAG funds for water monitoring programs, for example, there is a “pick and stick” issue if EPA uses EPM funds to help the state carry out the same activities.
PROHIBITIONS			
Office of Solid Waste and Emergency Response	Authorizing Statutory Restriction	Comprehensive Environmental Response, Liability, and Compensation Act (CERCLA) - 42 USC Section 9604 – Response	CERCLA Section 104 authorizes the President to respond to releases and threatened releases of hazardous substances, pollutants and contaminants. The President has delegated this authority to EPA except at certain federal facilities. EPA may enter into a contract or cooperative agreement with a state, tribe, or political subdivision to carry out response actions; however, the National Contingency Plan (NCP) requires that EPA select or concur with a remedy (Record of Decision) in order for an EPA-funded remedial action to proceed.
Office of General Counsel	Grants Law	Sections 4 and 11a of the Policy for Competition of Assistance Agreements, 5700.5A1, 1/11/05	EPA cannot prepare a state's competitive grant application. EPA is currently benchmarking with other agencies on policies and procedures involving federal involvement in the preparation of a state's noncompetitive grant application.

Appendix B: EPA Executive Management Council and Task Force Combined Think Tank Results

The Agency's senior leaders and the Task Force members were asked the following questions and the compiled results are presented below. There was considerable agreement and overlap between the results from each of the two Think Tank sessions. Results for Questions 1 and 2 were combined below under "Making EPA's Expertise More Available to the States" and Question 3 results are under "Training."

Question 1. What creative, but practical, ways might we be able to consider for using IPAs to help meet state needs within EPA's budget constraints (e.g., short-term assignments, FTE pool, other, etc.)?

Question 2. What other ways might EPA share its expertise with states that do not require formal IPAs?

Question 3. Where are we already supporting effective joint training and what topics might be good candidates to consider for future joint training?

Making EPA's Expertise More Available to States

- Exchange personnel--no net loss of staff to either organization and provides a learning opportunity for both.
- Use IPAs as developmental opportunities for early and mid-career staff.
- Use short-term IPAs or allow staff to travel to assist states with specific projects.
- Take advantage of digital/electronic media to share expertise and data (e.g., electronic permits, templates, model documents, guidance, practitioner Wiki sites, webinars, etc.).
- Develop MOUs to help states with sampling, permitting, and laboratory analyses.
- Consider use of interns for appropriate tasks.
- Include worksharing in annual work planning conducted between the regional offices and states.
- Clearly define roles and responsibilities of each party.
- Consider worksharing opportunities with local governments, tribes, and other federal agencies.

Training

- Make training available to state staff in ways that do not require travel.
- Convene multi-state meetings to share information (in-person or virtual).
- Inventory currently available training.
- Determine areas of training not presently available that may be of value or whether more frequent training of certain types may be useful.