



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

SEP 19 2008

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

MEMORANDUM

SUBJECT: Counting and Reporting Inspections Conducted Using Federal Credentials

FROM: Lisa Lund, Director
Office of Compliance *Lisa Lund*

TO: Carol Rushin
Deputy Regional Administrator
Region 8

This memorandum is issued in response to a letter from Kerry Clough, then Deputy Regional Administrator for Region 8, dated January 2, 2008 requesting OECA to revise its policy on how federal inspections are defined for counting and reporting purposes. I am happy to report to you that OECA is agreeing to revise its counting rules by creating a separate reporting category to count the number of tribal inspections conducted using federal credentials, alongside the number of federal inspections. The data on tribal inspections conducted with federal credentials will be included in Annual Results, Accomplishments Reports and AA Trip Reports. And tribal inspections will be counted separately in the ACS commitments to provide a broader picture of inspection coverage and account for regions' work related to issuing credentials.

Background

Region 8 requested OECA to revisit an October 11, 2005, memorandum from Phyllis P. Harris, then Principal Deputy Assistant Administrator for OECA, which states that "the term 'federal' does not include inspections conducted by states or tribes... where the state or tribe is using federal credentials." As indicated in the Region 8 request, this counting rule has been subsequently affirmed in many contexts.

In Region 8's letter, the rationale for requesting that OECA count and report state and tribal inspections conducted with credentials as "federal" inspections includes the following:

- Region 8 states that "This definition is inconsistent with previous Agency descriptions regarding the issuance and use of federal credentials to state or tribal employees (memorandum entitled "Guidance for Issuing Federal EPA Inspector Credentials to Authorize Employees of State/Tribal Governments to Conduct Inspections on Behalf of EPA" from Michael M. Stahl dated September 30, 2004).
- The Region also makes the case that because regions are expected to oversee such inspections and the use of the credentials, and are required to conduct any follow-up enforcement activities, these inspections should be considered "federal" inspections.
- Further, the Region states that because we count inspections by contractors and SEE employees with credentials, we should also count those of states and tribes.

Finally, the Region presents a list of other considerations, which include:

- This counting rule devalues the contribution of state and tribal inspections to federal enforcement.
- Tribes may opt out of seeking credentials because they are not counted as federal.
- This may discourage regions from providing credentials because they do not get "credit" for this work.
- It may provide a support for legal challenges either to cases or to credentialed inspectors seeking entry to facilities.

This issue was discussed at the Senior Enforcement Managers' meeting on January 17, 2008. The regions expressed strong interest in receiving "credit" for inspections conducted by states and tribes using EPA credentials. After discussion, the regions reached consensus that the request should be limited to inspections conducted by tribes using EPA credentials. One reason for making this distinction is that states cannot use grant resources to conduct federal inspections. Under the Federal Grant and Cooperative Agreement Act (FGCAA), as implemented by EPA Order 5700.1, EPA may not award grants to obtain services for the direct use or benefit of the Agency unless otherwise authorized by law. Authority in EPA's annual appropriations acts to award Direct Implementation Tribal Cooperative Agreements (DITCA) for tribes includes a specific provision that overrides the FGCAA. This memorandum is thus limited to counting and reporting tribal inspections conducted using EPA credentials.

OECA Decision

After much research and consultation, and based on the above concerns raised by the regions, OECA has decided to modify its mid-year and end-of-year reporting to include information on the number of inspections conducted by tribes using federal credentials. We agree to provide a mechanism to count tribal inspections conducted with federal credentials in a way that explicitly recognizes the tribes' work in conducting the inspections, while also accounting for the substantial work on the part of the regions in issuing the credentials.

Beginning in FY 2008:

1. OECA will report the number of inspections conducted by tribes using federal credentials as a separate number alongside the number of federal inspections. This is similar to our current reporting of referrals and supplemental referrals. These data will be reported in the Annual Results, Accomplishments Reports and AA Trip Reports.
2. In the Annual Commitment System, regions may identify inspections conducted by tribal employees with federal credentials in order to reflect their work associated with issuing and maintaining credentials. Regions may count those inspections as contributing to overall inspection coverage in their region.

OECA used the following rationale in coming to this decision.

- Inspections conducted with federal credentials are done "on behalf" of the Agency, not as our direct activity. We need to be very cognizant of federal restrictions on augmenting Agency resources beyond appropriated levels, as well as the grant restrictions (mentioned above) against awarding grants to obtain services for the direct use or benefit of the Agency unless otherwise authorized by law. While the DITCA Tribal grants have an override provision, many of the tribal inspections with credentials are funded by mechanisms other than DITCA grants. If we counted these inspections as federal inspections, they would be seen as a benefit to the Agency.

While the purpose of issuing a credential is not to support a state or tribal program, there is value to states and tribes in having inspectors obtain federal credentials. Credentials are often used to fill gaps in programs where authorities may be lacking. Further, the fact that most of these inspections are funded by federal grants that require the state or tribe to provide some matching funds serves as evidence that the tribes believe there is benefit to them.

Notwithstanding the use of federal credentials, there are differences between federal and state or tribal inspectors, e.g., for purposes of tort liability, medical monitoring, workman's compensation, and access to CBI. In addition, states and tribes would be subject to additional ICDS requirements and thus a new unfunded reporting burden.

- Inspections carried out by tribes (and states) funded by federal grants are required to be reported as grant outputs to OMB. If we were to count the tribal (or state) inspections conducted with EPA credentials that were funded by federal grants as federal inspections and reported them as grant outputs, then we would be double-counting and double-reporting.
- Recent reports by the OIG and GAO have recommended numerous improvements in our measures, data quality, transparency and accuracy of reporting our annual results, in press releases, and other documents. We are confident that an aggregated number

of inspections that gives the appearance of EPA taking credit for state or tribal actions would not withstand the scrutiny of the OIG and GAO.

To our knowledge and to the extent that this issue has been discussed with tribes, tribes have considered these inspections to be their activity, not EPA's. If we were to aggregate these inspections with the ones conducted by EPA and its agents, any indication of the tribal contribution to enforcement would be lost. Any move to aggregate these numbers would require extensive outreach to those tribes with credentials to ensure their concurrence with this action.

- Contract and SEE inspections are currently counted as federal inspections because they are acting as our agents under contracts for their services. SEE grants differ from state or tribal grants in that the authorizing legislation allows them to be treated in the same way as contracts.
- We have had no way to distinguish inspections conducted by state or tribal inspectors using federal credentials because they could only be counted as state, tribal or federal inspections, using the "Compliance Monitoring Agency Type" data field in the ICIS database. With the ICIS 2.8 release on January 28, 2008, two new selections were added to this field to allow an inspection to be identified as having been conducted by a state using federal credentials, or by a tribe using federal credentials. This change allows EPA to identify, through ICIS, inspections that were conducted by state or tribal employees using EPA credentials.
- In addition, this creates a link from the inspections done with credentials to the violations identified and enforcement actions taken as a result of these inspections. This "pipeline" demonstrates the value of these inspections to federal enforcement activities.

Implementation

As mentioned above, ICIS already allows reporting of inspections conducted by tribal employees with federal credentials using new menu options under the "Compliance Monitoring Agency Type" data field, but currently reporting is voluntary. So that we can include complete and accurate data of these inspections for FY 2008 end-of-year reporting, the Regional Credential Contacts will report these data manually and in accordance with the September 2004 "Guidance for Issuing Federal EPA Inspector Credentials to Authorize Employees of State/Tribal Governments to Conduct Inspections on Behalf of EPA." To meet the FY 2008 end-of-year reporting deadlines, we will need these data by October 17, 2008. While these data will be included in FY2008 end-of-year reporting, there is no 2008 ACS reporting, as this decision will not apply to ACS commitments until FY2009.

Consistent with the July 28, 2008 "End-of-Year FY08 Enforcement and Compliance Reporting and certification – Updates and Clarifications" signed by Betsy Smidinger, in FY 2009 OECA will require that regions enter all inspections conducted by

tribal employees using federal credentials into ICIS. Regions will continue to manually report on the inspection reports reviewed and actions taken as required by the 2004 Guidance. Inspections for which ICIS is not the database of record will also need to be entered into the appropriate legacy systems. And inspections conducted under grants will continue to be entered into the designated databases and reported as grant outputs to OMB. OECA will include these data in mid-year and end-of-year workbooks for certification along with other mid- and end-of-year data. Additional ICIS data entry guidance and retrieval information will be distributed in the FY 2009 Reporting Plan.

I appreciate the Region raising this issue for our consideration, and to all those who have provided their perspective. I believe this outcome will accord the regions the acknowledgement of the investment they make in the credentials program, while preserving the integrity of our federal inspections numbers. Thank you for your input into this issue.

cc: Catherine McCabe
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