

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

FEB 14 2003

Honorable M. J. Foster, Jr.
Governor of Louisiana
Baton Rouge, Louisiana 70804-9004

Re: Louisiana's administration of the LPDES program

Dear Governor Foster:

This is in follow-up to the letter from Christine Todd Whitman, Administrator of the U.S. Environmental Protection Agency (EPA), recently sent to you regarding the State's management of the National Pollutant Discharge Elimination System (NPDES) program. The Administrator has requested that we follow-up with our detailed findings regarding the Louisiana NPDES program. In October 2001, you and then-EPA Regional Administrator Gregg Cooke jointly decided to review the administration of the Louisiana Pollutant Discharge Elimination System (LPDES) program and other programs, in response to citizen concerns. You convened a special Governor's Task Force, while we began an informal investigation pursuant to 40 C.F.R. 123.64(b) in response to the October 9, 2001, petition for withdrawal of the LPDES program filed by the Tulane Environmental Law Clinic ("the Petition"). Our respective reviews are at a point in the process where we thought it important to provide you with our views.

EPA is encouraged by the efforts of the multi-stakeholder Task Force you created to review the operations of the Louisiana Department of Environmental Quality (LDEQ). This Task Force and its initial recommendations are positive steps toward identifying and solving problems with the State's administration of its federally approved environmental programs, including the LPDES program. The EPA Region 6 Office will submit comments on the Task Force's initial draft recommendations shortly.

While the Task Force was doing its work, EPA Region 6 conducted an informal investigation of the allegations in the Petition to determine whether cause exists to commence withdrawal proceedings under 40 C.F.R. § 123.64(b). The Region's informal investigation included on-site reviews of LPDES files, interviews with LDEQ management and staff, and an evaluation by Region 6 staff of information and data concerning program implementation provided in writing to EPA by LDEQ. The information collected thus far from the informal investigation supplements the large body of information already in EPA's possession as a result of semi-annual reviews performed by EPA to carry out its oversight responsibilities under the Clean Water Act.

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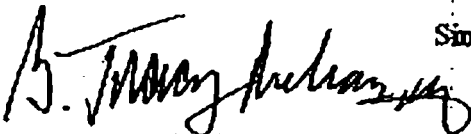
Based on the information available, EPA has serious concerns with certain aspects of the LPDES program. To assist the State in addressing these concerns, EPA has developed a list of performance measures that we believe would address these concerns. Many build upon the recommendations of your Task Force. We have discussed these performance measures with senior officials of LDEQ, and they agree that the measures are achievable within the time-frames identified in the enclosed list of performance measures. EPA stands ready to provide guidance, technical assistance, or other help to assist the State of Louisiana and LDEQ in accomplishing these important measures.

We would like to note that the enclosed performance measures apply only to the State's administration of the LPDES program. Although EPA has received petitions to withdraw Louisiana's authority to administer programs under the Resource Conservation and Recovery Act and Title V of the Clean Air Act as well, EPA Region 6 is still conducting informal investigations of those programs. EPA will share its views of those programs in the near future.

Again, we recognize your Task Force for its work in attempting to improve the administration of Louisiana's environmental programs. We expect that the State will continue this effort by taking the actions necessary to successfully complete the enclosed performance measures within the established time-frames. Please let us know by March 31, 2003, whether you intend to implement the measures and schedule that we have set out.

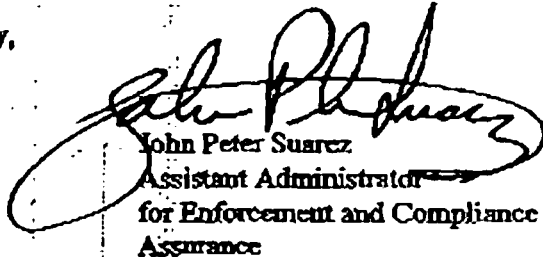
EPA looks forward to resolving these concerns with the State of Louisiana. However, we do reserve the right to consider the possible withdrawal of program authorization at some future date depending on the progress made in restoring program integrity.

If you have any questions or would like to discuss this letter, please do not hesitate to call either of us. If you have detailed questions on the enclosure, please have your staff contact Miguel Flores, Director of the EPA Region 6 Water Quality Protection Division, at (214) 665-7101 or Bob Murphy, Acting Director of the EPA Region 6 Compliance Assurance and Enforcement Division, at (214) 665-2210.



G. Tracy Mehan, III
Assistant Administrator
for Water

Sincerely,



John Peter Suarez
Assistant Administrator
for Enforcement and Compliance
Assurance

Enclosure

cc: Lawrence Starfield, Acting Regional Administrator
EPA Region VI

ENCLOSURE**LPDES PERFORMANCE MEASURES**

In regard to the LPDES program, EPA has developed the following performance measures to address issues and concerns raised by the State Auditor and the Petition filed by Tulane Environmental Law Clinic, as well as by EPA during its semi-annual program reviews. These performance measures were discussed on December 16, 2002, at the meeting held between LDEQ and EPA Region 6 Senior Managers. They are critical for addressing potential weaknesses in the LPDES program and EPA will consider the State's accomplishment of these measures in deciding how to respond to the petition. EPA stands ready to assist the State in accomplishing these performance measures by providing such things as technical training, assistance with the drafting of permits, assistance with the entering of Permit Compliance System (PCS) data, assistance with facility inspections, assistance with the handling of enforcement actions, and through possible Intergovernmental Personnel Act (IPA) assignments. EPA will periodically assess Louisiana's progress on these measures to ensure concrete actions are taking place towards achieving them.

Performance Measure 1: LPDES Permit Issuance

A goal of the NPDES permit program is to reduce overall backlog for permit issuance to 10%. Due to Louisiana's current major backlog of 38% and minor backlog of 49%, a plan to address this backlog is needed.

By April 30, 2003, the LDEQ should revise their "Backlog Elimination Strategy" (dated October 23, 2002) to commit to reducing the LPDES permit backlog. LDEQ has also agreed to reduce the backlog to 10% for major permits in 2004 and backlog of 10% for major and minor permits in 2005.

Another aspect of LPDES program implementation is the need for LDEQ to demonstrate that it has the capability to develop and issue the number of permits necessary to maintain the NPDES program. This goal of self sufficiency is inherent in any authorized program. EPA understands that LDEQ is utilizing contractor support to help meet its permit issuance goals. Contractor output is currently expected to be 45 major permits and 162 minor permits drafted by December 31, 2003. However, EPA will need to see that LDEQ becomes self-sufficient in its ability to issue or reissue NPDES permits (this may include contractor support). LDEQ and EPA have agreed to the following numbers (excluding contractor-drafted permits) below for major and minor permit issuance in calendar year 2003:

By July 30, 2003, LDEQ drafted/issued permits --
13 major permits
100 minor permits

By December 31, 2003, LDEQ drafted/issued permits --
35 major permits
300 minor permits

Accomplishment of this measure will demonstrate that LDEQ has the capability to develop and issue the number of permits necessary to maintain the NPDES program. Timely issuance of permits is important because expired permits may not reflect current technological and water quality requirements. Lack of permit conditions which reflect current requirements may result in wastewater discharges which have the potential to adversely affect human health and/or aquatic life.

Performance Measure 2: Improve Public Access to Files

By June 30, 2003, the LDEQ should submit a draft plan to EPA which improves public access to LDEQ's files (including expansion of the indexing system and the providing of technical and administrative assistance to the public). EPA will provide comments to LDEQ on the draft public access plan within 45 days of their submittal to EPA. By December 31, 2003, an appropriate plan should be implemented.

By June 30, 2003, LDEQ should develop and implement a quality assurance/quality control plan for the state paper and imaging systems.

By October 1, 2003, LDEQ should develop and implement a quality assurance/quality control plan for LDEQ input into national data systems

Accomplishment of this measure will ensure that public participation will be provided for, encouraged, and assisted by the EPA and the States.

Performance Measure 3: Enforcement Penalties

By December 31, 2003, LDEQ should make the following changes to its Penalty Rule (Environmental Quality Act, Title 33, Part 1, Subpart 1, Chapter 7). Changes to the Rule are noted in ~~strikeout~~/bold.

Paragraph 705 G - The department shall consider the monetary benefits realized through noncompliance. Any monetary benefits calculated should be added to the penalty subtotal. However, the amount calculated may not cause the penalty subtotal to exceed the maximum penalty amount allowed by law. A cash penalty should be collected unless it has been demonstrated and documented that the violator cannot pay the cash penalty.

By September 1, 2003, LDEQ should establish a policy that requires LDEQ to document in writing, within 14 working days of completion of penalty calculations, how the final penalty

collected complies with the nine factors to demonstrate consistent treatment for violations.

Accomplishment of this measure will eliminate the economic incentive for noncompliance and ensure fair and equitable treatment of the regulated community, in accordance with the scope of the rule.

Performance Measure 4: Beneficial Environmental Projects (BEPs)

By December 31, 2003, LDEQ should make the following changes to its Beneficial Environmental Project Rule (Environmental Quality Act, Title 33, Part 1, Subpart 1, Chapter 25). Required changes to the Rule are noted in bold.

Section 2501. Applicability -The department reserves the right to settle for the amount of cash penalty, if any, it deems appropriate in considering all of the circumstances relating to the case in which the settlement is perfected. The decision to enter into a settlement that includes a BEP is solely within the discretion of the department. All settlements should include a cash penalty, consistent with Environmental Quality Act, Title 33, Part 1, Subpart 1, Chapter 7, Part 705G.

By September 1, 2003, LDEQ should establish a policy that requires LDEQ to document in writing, within 14 working days of approval of any BEP project, how the final penalty collected recaptures the economic benefit and documents the value of the BEP to demonstrate the financial and economic value of the BEP.

Accomplishment of this measure will provide regulatory clarification regarding the effect of a BEP on the final cash penalty collected and ensure that, at a minimum, violators will be required to pay any economic benefit they may have realized as a result of the violation. The BEP will thus serve as a further deterrent to future noncompliance.

Performance Measure 5: Enforcement Actions

By July 30, 2003, LDEQ should develop and implement procedures and policies to issue unilateral enforcement actions that require corrective actions to address violations in a timely manner as defined by EPA oversight guidance.

In addition, LDEQ should develop procedures to initiate court actions, to refer cases to the Attorney General, or develop another appropriate mechanism to address the following situations:

- a. When a respondent fails to pay an appropriate penalty, as defined by the Environmental Quality Act, within 15 months of the date of the Penalty Notice;
- b. When there is a history of repeat violations, including delinquent construction

events longer than 18-24 months, and

- c. When the Secretary grants a request for hearing on an enforcement action and the appeal has not been resolved within 12 months of the date of the granting of the request.

Accomplishment of this measure will allow LDEQ to address violations that cannot be resolved through the administrative process. This may also prove to be an incentive to reaching agreement during the administrative process. In addition, this change will ensure timely correction of violations and take corrective actions out of the appeals process.

Performance Measure 6: Program Authorization Documents

By September 1, 2003, LDEQ should submit to EPA for review and comment drafts of revisions to all program authorization documents. These revisions should include all program changes implemented since the date of program approval, including any changes to the State's legal authorities. A draft revised Memorandum of Agreement between LDEQ and EPA should be included in these draft revised authorization documents. The draft revised authorization documents should include a description of the LDEQ management oversight that is in place to ensure that all policies, procedures and regulatory changes, if any, required by these Performance Measures have been implemented. EPA will provide comments to LDEQ on the draft revised authorization documents within 45 days of their submittal to EPA. Final documents will be due to EPA 60 days from the date of EPA's comments on the draft documents.

Accomplishment of this measure will ensure the revision of program authorization documents to reflect the current operations and legal authorities of the LPDES program, including any changes made in accordance with these performance measures. This will ensure that the public, as well as EPA and LDEQ staff, are aware of current operating policies and procedures.

Performance Measure 7: Enforcement Penalties Assessed Against Municipalities

The Louisiana Constitution, Article 12, Section 10, appears to require specific appropriations for penalty judgments against municipal or state agencies for violations of regulations.

By September 1, 2003, LDEQ should provide an explanation of how the State can adequately enforce such penalty judgments, including, if appropriate, a legal opinion from the Attorney General demonstrating that Article 12, Section 10 does not prevent such enforcement.

Moreover, until this issue is resolved, as an interim measure, LDEQ will forward to EPA those cases in which it is unable to collect a penalty against a municipality or state agency. LDEQ should include in the draft revised LPDES Memorandum of Agreement to be submitted to

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EPA by September 1, 2003 (see Performance Measure 6), a description of the referral process by which LDBQ will forward to EPA those cases against municipalities or state agencies, if any, in which LDBQ is unable to collect penalties within eighteen months of the date of Notice of Potential Penalty.

Accomplishment of this measure will ensure that proper enforcement action may be taken against municipalities or state agencies.



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

FEB 10 2003

THE ADMINISTRATOR

The Honorable M.J. Foster, Jr.
Governor of Louisiana
Post Office Box 94004
Baton Rouge, Louisiana 70804-9004

M. J. Foster
Dear Governor Foster:

Thank you for writing to me about the Louisiana Department of Environmental Quality's administration of the National Pollutant Discharge Elimination System (NPDES) program.

I agree that our mutual objective should be Louisiana's continued management of the NPDES program. The regulatory structure of the Clean Water Act is most effective when decisions regarding local water-quality issues - including monitoring, assessment, standards, load allocations, permitting, and compliance - are made by individual states as part of a high-quality, integrated program.

Your task force's findings and the reviews conducted by EPA's Region VI office have identified areas that must be addressed. I understand that representatives from both Louisiana and EPA are working on an action plan that seeks to resolve these issues. I have asked Tracy Mehan, Assistant Administrator for the Office of Water, and J.P. Suarez, Assistant Administrator for the Office of Enforcement and Compliance Assurance, to reply to you directly with the details of our concerns regarding the management of the NPDES program, along with a performance plan to remedy those concerns.

Clearly, the sound management of our water resources is a goal we both share. I look forward to working with you and your staff to ensure that the State of Louisiana continues to manage the NPDES program so that its waters will be effectively protected.

Best wishes.

Sincerely yours,

Christine Todd Whitman

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**

REGION 6

1445 ROSS AVENUE, SUITE 1200
DALLAS, TX 75202-2733

FEB 16 2003

Honorable M. J. Foster, Jr.
Governor of Louisiana
Baton Rouge, LA 70804-9004

Re: EPA Region 6's Comments on Governor's Task Force Initial Draft Recommendations

Dear Governor Foster:

Thank you for the opportunity to provide comments and suggestions for your multi-stakeholder Task Force. We recognize and applaud the efforts of your staff and the Task Force members for their work in addressing concerns related to the implementation of federally authorized environmental programs by the Louisiana Department of Environmental Quality (LDEQ).

As you know, EPA, through a series of discussions, is continuing to work with you and your staff to address issues raised in citizen petitions and other concerns. Recent letters from EPA Administrator Christine Todd Whitman, and Assistant Administrators G. Tracy Mehan and J. P. Suarez, provide performance measures and milestones which we believe will enable the State to more effectively protect public health and the environment.

The initial draft recommendations of the Task Force certainly represent an important step toward identifying and solving problems with the State's administration of its federally authorized environmental programs. Enclosed are our comments addressing the key areas of the draft Task Force report. We believe that, by addressing these comments in the final Task Force report, the State will be poised to make positive changes in the management and day-to-day operation of Louisiana's federally authorized environmental programs.

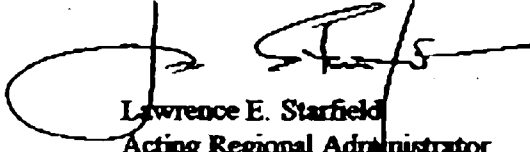
EPA has a strong commitment to work with Louisiana to solve operational problems. We look forward to discussing with LDEQ the appropriate assistance we can provide in areas such as technical training, drafting of permits, entering of program data into national data systems, facility inspections, and enforcement.

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If you have any questions or would like to further discuss our comments, please do not hesitate to contact me at (214) 665-2100.

Sincerely yours,



Lawrence E. Starfield
Acting Regional Administrator

Enclosure

ENCLOSURE 1

EPA Comments on the Governor's Task Force Initial Draft Recommendations

EPA submits the following comments on the Governor's Task Force's initial draft recommendations. EPA stands ready to assist the State in implementing the Task Force's recommendations by providing such things as technical training, assistance with the drafting of permits, assistance with the entering of Permit Compliance System (PCS) data, assistance with facility inspections, assistance with the handling of enforcement actions, and through possible Intergovernmental Personnel Act (IPA) assignments.

Task Force Issue No. E01: Authority of Field Personnel

This recommendation to develop regulations establishing a field citation program is a good first step towards freeing up resources to address more significant noncompliance in the Enforcement Division and sends a positive message to the public and potential violators.

Although the initial scope is limited, if the process proves feasible, EPA would encourage the state to consider expanding the field citation program into an expedited enforcement program for all programs where there is a violation that has a clear, straightforward solution. An expedited settlement program would include a complaint and settlement document being issued within a few days of the inspection that would assess a penalty and require payment of the penalty and correction of the violation within 30 days or less. If the respondent chooses not to sign the settlement agreement, or does not pay the penalty and come into compliance, then the expedited settlement offer would be withdrawn and a more formal enforcement action would be pursued with a higher penalty. Extensive federal experience has demonstrated that most respondents will choose to settle which means that compliance rates will increase while allowing LDEQ to devote most of its enforcement resources to significant violations and respondents who are not cooperative. EPA Region 6 has used this method with the SPOC program and has had dramatic increases in the compliance rate.

Task Force Issue No. E02: LDEQ Annual Inspection Rule

EPA agrees that the State needs to develop a prioritization strategy for inspections. The strategy will include the State/EPA priority initiative inspections that are negotiated annually, and also be reflective of the required programmatic regulatory inspection requirements. The strategy should also continue to stress the partnership between EPA and the State in coordinating and carrying out multi-media inspections and other State/EPA inspections.

This strategy should include potential noncompliance, watershed impact, size of facility, and other relevant considerations to ensure the most critical facilities receive an inspection. This

strategy should ensure that all facilities are inspected at some minimum. Permit re-issuance should not occur without at least one complete inspection to physically verify compliance.

Task Force Issue No. 3a: Beneficial Environmental Projects - tax treatment

This recommendation addresses the issue of inequitable consideration of BEP/SEP expenditures. The proposal to coordinate the efforts of LDEQ and LDED to ensure that facilities not attempt to gain any tax advantage from the project(s) is one way of accomplishing that. Another option to consider would be to calculate the value of the SEP/BEP taking into account any tax benefit which may accrue.

Task Force Issue No. 3b: Beneficial Environmental Projects - Work Process

This recommendation to allow greater public participation in the development of BEP/SEP proposals is commendable. However, additional changes should be made that will provide regulatory clarification of the effect of a BEP on the final cash penalty collected and ensure that, at a minimum violators, will be required to pay any economic benefit they may have realized. The BEP will thus serve as a further deterrent to future noncompliance.

Task Force Issue No. 4: Permitting Effectiveness and Efficiency

EPA agrees with the issue as stated and believes that the initial draft recommendations to streamline the permitting process and enhance public access to information are a step in the right direction. However, the recommendations do not address the possible lack of staff necessary to adequately implement the permitting program.

An area that directly affects permit issuance rates and subsequent backlogs is responsibility and accountability within an organization. The State of Louisiana has a large permit universe which requires an efficient, well run organization to supply its citizens with a well maintained program. We appreciate that a State may establish its own organization in any manner it deems appropriate, but it would greatly assist EPA if one LDEQ manager could be identified who will be accountable for ensuring that NPDES program goals and requirements are met. This may be of particular immediate importance so that EPA can accurately assess LDEQ's success in meeting necessary performance measures.

Another issue which affects the permit backlog numbers is maintenance of the Permit Compliance System (PCS), since this system reflects the work being completed. PCS serves as the National database to access data in order to accurately assess a program's effectiveness in accordance with commitments contained in the Memorandum of Agreement between EPA and the LDEQ. For permit issuance data, the LDEQ should commit to input all appropriate application/permit data older than 60 days into PCS for major and minor facilities, in accordance with the PCS Policy Statement. By the end of this calendar year, all appropriate PCS data entry should be completed. Thereafter, all permit/application data should continue to be entered into

PCS no later than 30 days from receipt of data information.

In addition, the LDEQ has indicated in their Comprehensive Backlog Reduction Strategy that three additional permit writer positions are required to administer the permitting program. Adequate staffing is important to ensure that Louisiana can maintain a program adequate to prepare and issue permits. In addition, it is our understanding that several positions necessary to properly administer the LPDES permitting program have been lost due to budget cuts and hiring freezes. Staff levels should be commensurate with the State's permit issuance needs in all programs. LDEQ should develop a plan and a proposed schedule for obtaining any additional agency resources required for administration of all permit programs. Such additional agency resources should be in place as soon as possible.

Task Force Issue No. E6: Access to Information

EPA agrees with the Task Force Recommendations on this issue. EPA also found the current Louisiana system to be time consuming and burdensome to access and therefore problematic in regard to providing the public sufficient permitting and enforcement information to ensure adequate public participation. Special care should be taken to address historical patterns of documents being missing, misfiled and mis-indexed. The recommendation to increase public access to the data via the Internet and a friendly web-based interface has the potential for being a more efficient way for the public to obtain information from any location. EPA also recommends that LDEQ personnel be responsible for indexing the documents rather than contract personnel who are not as familiar with the information. Development and implementation of a quality control plan for the State imaging and paper systems will ensure these issues are addressed.

EPA recommends that LDEQ implement a plan which improves public access to LDEQ's files including expansion of the indexing system to cover, at a minimum, the following document categories: current permit and fact sheet, public comments/response to public comments (in chronological order), DMRs, pretreatment, and toxicity. Also, as soon as possible after completion of the index system's expansion, LDEQ should implement a plan to provide technical and administrative assistance to the public on obtaining and interpreting the information found in the imaging system by providing written procedures and technical term descriptions to citizens and environmental groups, and any other interested parties.

Another aspect of public access is access to information in national data systems. The LDEQ should develop a comprehensive quality assurance/quality control plan that will ensure the information in these systems is timely, accurate, complete, and in accordance with any national policy statements related to national data systems. This plan should also address any software conversion concerns between State and EPA data systems. Access to the information should be available to Regional office personnel as well as central office personnel to ensure a free flow of information among all parties.

Task Force Issues F-01 thru F10 Submitted by Funding Sub-committee

An increase in resources would improve program operations if allocations increased the number of staff for surveillance personnel, enforcement writers, attorneys, compliance monitoring, and data management staff. We also recommend that the salary structure be reviewed to consider its impact on the retention of qualified staff. This additional staff would ensure LDEQ could issue, assess, settle, and collect penalties resulting from significant violations that were discovered during facility inspections. This will also address concerns raised regarding timely and appropriate enforcement actions.

A fee increase may not remedy the budget shortfall if there is not also aggressive collection of annual fees and late penalties. The initial draft recommendations do not discuss the actual amount of annual fees that are delinquent and the effect the actual collection of those fees may have on the budget. The final report should address whether, if all of the fees are collected, a fee increase would still be necessary. The state should begin implementing the provisions of their regulations found in Title 33, Part III Chapter Two under § 219, which outline the consequences of failing to pay annual fees.

Task Force Issue F-11: Contract laboratory services to the extent practicable

EPA agrees with this recommendation.

Issue F-12: Credit card usage for payment of fees and other assessments

This recommendation is a positive step toward facilitating collection of penalties.

Task Force Issue F-15 Submitted by Funding Sub-committee

See EPA comment to Issues F-1 - F-10.

Task Force Issues F-17 Submitted by Funding Sub-committee

The Task Force Report, Issue No. F-17, incorrectly indicates that the allotment of federal grants is based solely on state population. It is important to note that several factors are addressed in environmental program funding formulas. For example, the funding allotment for Clean Air Act 105 grants is based on population, the extent of actual or potential air pollution problems, and the financial need of each agency. The funding allotment formula for Clean Water Act Section 106 funds is based on the following six components selected to reflect the extent of the water pollution problem in each state: surface water area, ground water use, water quality impairment, point sources, non-point sources and population of urbanized areas. We have also made an effort at the Regional level to target discretionary funds towards the highest priority environmental projects within our states. For example, the Region is funding passive ozone monitoring within the State of Louisiana with discretionary funds provided by the Office of Air

Quality Planning and Standards. The manner in which these monies are actually spent is decided by agreement between EPA and the states.