



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

FEB 10 2017

OFFICE OF THE
ADMINISTRATOR

The Honorable Eugene Dodaro
Comptroller General
Government Accountability Office
Washington, D.C. 20548

Dear Mr. Dodaro:

This letter reports violations of the Anti-deficiency Act as required by 31 U.S.C. § 1351. The violations of 31 U.S.C. § 1341 occurred in the U.S. Environmental Protection Agency's Hazardous Substance Superfund account, Treasury Appropriation Symbol 68-8145/X in the total amount of \$463,119.93. The violations occurred in Fiscal Years 1986, 1989, and 1995 in connection with the use of funds from state partners in the Superfund Remedial and Superfund Emergency Response and Removal programs.

During an unrelated programmatic review, it came to the EPA's attention that in the 1980s and 1990s, some EPA Regional Administrators agreed to accept state funds for certain Superfund sites into the Hazardous Substance Superfund account and then spent those funds for state-requested work at those sites. The EPA has determined that the state-requested work for some sites went beyond the response actions that the EPA was authorized to conduct under the remedy selected pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act. As a result, those expenditures exceeded the agency's CERCLA statutory authority and thus violated the ADA.

The EPA's Hazardous Substance Superfund account is available for the "necessary expenses to carry out the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 . . ." See, e.g., Pub. L. 103-327 (1994). CERCLA authorizes the EPA to use Superfund monies to take action whenever there is a release or substantial threat of release of any hazardous substance into the environment, or, a release or substantial threat of release into the environment of any pollutant or contaminant that may present an imminent and substantial danger to public health or welfare. See 42 U.S.C. § 9604(a)(1). When such conditions are present, the EPA has the authority under CERCLA to act "consistent with the national contingency plan to remove or arrange for the removal of, and provide for remedial action related to such hazardous substance, pollutant, or contaminant . . . or take any other response measure consistent with the national contingency plan which the President deems necessary to protect the public health or welfare or the environment." 42 U.S.C. § 9604(a).¹

¹ Thus, CERCLA authorizes two types of response actions: removal and remedial actions. Removal actions include actions necessary to protect public health or the environment. See 42 U.S.C. § 9601(23). Remedial actions include long-term, permanent actions to abate a release and contamination necessary to protect public health or the environment. See 42 U.S.C. § 9601(24).

The EPA has the authority to enter into certain types of agreements with the states regarding the conduct and financing of CERCLA response actions. See 42 U.S.C. § 9604(c), (d). In particular, before the EPA initiates a Superfund-financed remedial action in connection with a privately operated facility, a state must enter into an agreement to pay or assure payment of 10 percent of the remedial action costs and all future maintenance costs. See 42 U.S.C. § 9604(c)(3)(C)(i). Additionally, regardless of any cost sharing arrangements, the EPA cooperates closely with the states by consulting with the relevant state and considering the state's views regarding selection of the removal or remedial action. Occasionally during this consultation process, states request that particular work be incorporated into the response action. It was in connection with such state requests that the EPA violated the ADA.

Specifically, the EPA violated the ADA, 31 U.S.C. § 1341(a)(1)(A), by obligating funds in excess of the amount available in the Hazardous Substance Superfund account for a particular purpose. For three Superfund sites at issue where the EPA incorporated state-requested work into a response action, the EPA did not deem the state-requested work to be "necessary to protect the public health or welfare or the environment." For that reason, the Hazardous Substance Superfund account was not legally available for that purpose. Additionally, because the EPA has no other accounts available for that purpose, the EPA violated the ADA by obligating funds in excess of the amount legally available, which was zero dollars.

The site-specific circumstances were as follows:

- 1) In FY 1986, the EPA signed an agreement with the State of Michigan to accept \$164,160 to install a double-lined pipe at the Verona Well Field site. In the agreement, the EPA did not deem the double-liner to be necessary to protect the public health or welfare or the environment. However, in support of state objectives, the EPA obligated additional state funds for the double-liner on the Superfund contract.
- 2) In FY 1989, the EPA signed an agreement with the State of Kansas to accept \$165,000 to install a water supply system at the Cherokee County site with a greater capacity than the EPA deemed necessary to protect the public health or welfare or the environment. However, in support of state objectives, the EPA obligated additional state funds for the water supply system on the Superfund contract.
- 3) In FY 1995, the EPA signed an agreement with the State of Kansas to accept \$133,959.93 to install a water supply system (including fire protection elements) with a greater capacity than the EPA deemed necessary to protect the public health or welfare or the environment. However, in support of state objectives, the EPA obligated additional state funds for the water supply system on the Superfund contract.

In order to both support state objectives and comply with the ADA, the EPA should have advised the states to fund these activities directly.

The EPA has determined that the responsible parties had no knowing or willful intent to violate the ADA. The Regional Administrators who signed these agreements with the states took diligent care to conduct the agency's activities within the limits of the agency's resources. The EPA records indicate that the officials worked carefully to ensure that the state-requested work to facilitate the reuse and development of communities would be at no additional cost to the federal government.

The EPA has imposed no administrative discipline because the responsible officials left the EPA many years ago and the agency found no evidence of intent to violate the ADA.

The EPA has taken and will continue to take a number of steps to prevent recurrence of this type of violation, including:

- Providing appropriations law training to Superfund program personnel;
- Updating Funds Control Officer and budget management training to more clearly explain appropriations issues, including statutory limitations on the purposes for which appropriated funds may be used;
- Revising the agency's manual on Administrative Control of Funds ("Funds Control Manual") to make clear the limits on accepting funds, possible ramifications of obligating accepted funds, and other associated administrative and financial rules;
- Issuing guidance to Superfund senior managers on appropriate actions to continue to encourage state cooperation in Superfund projects while remaining within the limitations of the EPA's statutory authority;
- Sharing the guidance noted above with the relevant state association, the Association of State and Territorial Solid Waste Management Officials;
- Updating CERCLA (Superfund) Education Center courses to include appropriate cost sharing mechanisms and how to address betterments and enhancements requested by the states; and,
- Including updated trainings at the Superfund Division Director Meeting, the National Association of Remedial Managers Program (which includes state officials), the Superfund Cost Recovery Conference, and the On-Scene Coordinator Academy.

Identical reports are being submitted to the President, the President of the Senate, and the Speaker of the House of Representatives, in accordance with the process set forth in OMB Circular A-11.

Sincerely,

A handwritten signature in black ink, appearing to read "Catherine R. McCabe". The signature is fluid and cursive, with the first name being the most prominent.

Catherine R. McCabe
Acting Administrator