



SUSPENSION AND DEBARMENT: Powerful Tools for Protecting Federal Funds

Presented by

Kathleen Timmins, Ross Phillips, and Roy Seidenstein

22nd Annual California CUPA Training Conference
February 3 - 6, 2020
South San Francisco



www.calcupa.org

WHAT IS SUSPENSION AND DEBARMENT?

- Actions taken by a Federal agency to prohibit a person or entity considered “not presently responsible” based on certain types of misconduct from participating in *future* Federal Government procurement contracts and “covered non-procurement transactions.”
- Exclusion can be extended to related entities via imputation and affiliation.
- Suspension and debarment (S&D) programs provide consumer protection for the federal government.
- The agency is making a business decision, not imposing punishment.

In 2019, the government spent \$4.45 trillion.ⁱ

USA Spending tracks federal spending to ensure taxpayers can see how their money is being used in communities across America. Learn more on how this money was spent with tools to help you navigate spending from top to bottom.

FEDERAL SPENDING ON HAZMAT CONTRACTORS IN CALIFORNIA

\$290,000,000

- FY-2019, California: Hazardous Waste Treatment and Disposal, Hazardous Waste Collection, Remediation Services

STATE OF CALIFORNIA FEDERAL FUNDS AWARDS

\$77,000,000,000

- FY-2019: State of California

\$18,700,000

- FY-2019: Toxic Substances Control

\$ 241,900,000

- FY-2019: Water Resources Control Board

FEDERAL SPENDING CALIFORNIA CONTRACTING EXAMPLES

\$6,000,000,000

- FY-2019: Aircraft Manufacturing in California

\$50,000,000

- FY-2019: Testing Laboratories in California

NEXUS

A Respondent's connection to federal funds.



is or has been a
“contactor”

is or has been a
“participant” or
“principal” in a non-
procurement covered
transaction

may reasonably be
expected to be a
contractor or a
participant or
principal in a non-
procurement covered
transaction

The stronger the nexus, the more effective the S&D
remedy.

S&D POLICIES

- **Enforcement:** the process of making sure people obey something such as a rule or law. (Source: Cambridge Business English Dictionary)
- **S&D:** An action taken by a Federal agency to prohibit a recipient from participating in Federal Government procurement contracts and covered non procurement transactions. (Source: 15 C.F.R. 29.630)

S&D POLICIES

- S&D's mandate is to ensure that the government conducts business with **responsible parties only**.
- Once a cause for S&D is established, the main issue is “**present responsibility**.”
 - Fraud, waste, abuse, and noncompliance with environmental laws show a lack of present responsibility.
 - Respondents are afforded the opportunity to prove that they have implemented effective remedial measures and are now responsible business partners.

S&D POLICIES

- To protect the government and public interest.
- Curb waste, fraud, abuse, poor performance, and environmental crime.
- Encourage compliance and better performance.
- Provide a formal system for excluding entities deemed not “presently responsible” that is efficient, government-wide, and provides due process.
- S&D action by any one federal agency applies government-wide to all federal agencies.

S&D AUTHORITIES

- Federal Acquisition Regulation (48 C.F.R. Subpart 9.4)(“FAR”) – contracts
- Non-Procurement Common Rule (2 C.F.R. Subparts 180 and 1532)(“NCR”) – grants, loans, other financial assistance
- Both regulations have a reciprocal effect.
- Some differences in how the regulations operate.

STATUTORY & DISCRETIONARY EXCLUSIONS

Statutory

- Mandatory debarment
- No agency discretion
- Clean Water Act (CWA) and Clean Air Act (CAA) criminal convictions (EPA)
- Applies only to “Violating Facility”
- Applies indefinitely, unless and until entity successfully petition for reinstatement showing correction of conditions giving rise to the conviction.

Administrative (“Discretionary”)

- Governed by the Federal Acquisition Regulation (48 C.F.R. Subpart 9.4) and
- The Non-procurement Common Rule (2 C.F.R. Subpart 180 and Subpart 1532 (EPA))
- Examples: Fraud, waste, abuse, incompetency, conviction of other crimes

DISCRETIONARY SUSPENSION

- Temporary, intended to protect the government while we determine whether misconduct has occurred.
- Often imposed based on criminal charges pending the outcome of an investigation, legal action, or debarment proceeding.
- “Adequate evidence” of wrongdoing; roughly equal to probable cause for a search warrant or arrest.
- “Immediate need” to protect the government or the public.

DISCRETIONARY DEBARMENT

- Final agency decisions imposed after due process, often imposed based on criminal conviction.
- Last a specified term of years, generally not to exceed 3 years, but can be longer or shorter.
- “Preponderance of the evidence” of wrongdoing: Wrongdoing more probable than not.

ADMINISTRATIVE AGREEMENTS

- Administrative Agreements (“AAs”) are an alternative resolution designed to ensure Respondents’ present responsibility and correction of conditions giving rise to violations, without the exclusionary effect of suspension or debarment.
- AAs generally require resolution of the criminal matter and adherence to appropriate remedial measures.

CAUSES FOR S&D

- **Indictment, information, conviction, civil judgments, etc.:**
- fraud
 - embezzlement
 - theft
 - forgery
 - bribery
 - falsification or destruction of records
 - making false statements
 - failure to pay debts
 - delinquent federal taxes
 - receiving stolen property
 - making false claims
 - obstruction of justice.

CAUSES FOR S&D

- **Indictment, information, conviction, civil judgments, etc.:**
- **“OFFENSE-BASED CATCH ALL”:** Any other offense indicating a lack of business integrity that affects a Respondent’s present responsibility.

CAUSES FOR S&D

➤ **Violation of the terms of a public agreement:**

- Willful failure to perform in accordance with the terms of a public agreement or transaction.
- History of failure to perform or unsatisfactory performance of one or more public agreements or transactions.
- Willful violation of a statutory or regulatory provision or requirement applicable to a public agreement or transaction.

CAUSES FOR S&D

- **“FACT-BASED CATCH ALL”**: Any other cause of so serious or compelling a nature that it affects a Respondent’s present responsibility.

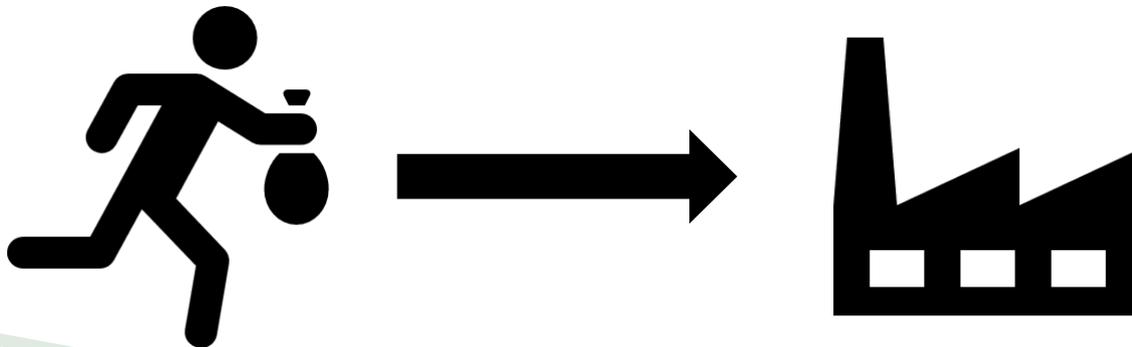
STANDARDS & BURDENS OF PROOF

- Cause for Suspension must be established by adequate evidence (indictment is sufficient).
- Cause for Debarment must be established by a preponderance of the evidence (greater than %50).
- The Government has the burden to prove cause for debarment.
- Then Respondent has burden to prove present responsibility.

EXTENSION OF CAUSE

Imputation from individual to company

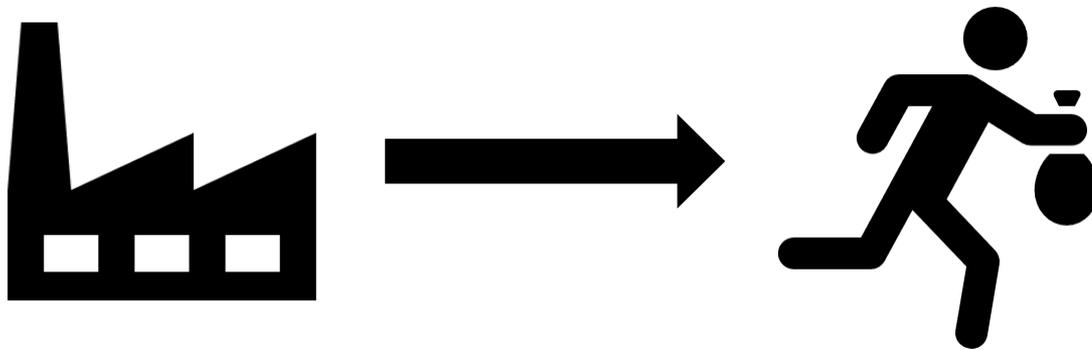
- Misconduct occurred in connection with the individual's performance of duties for or on behalf of the company or with the company's knowledge, approval, or acquiescence.



EXTENSION OF CAUSE

Imputation from company to individual

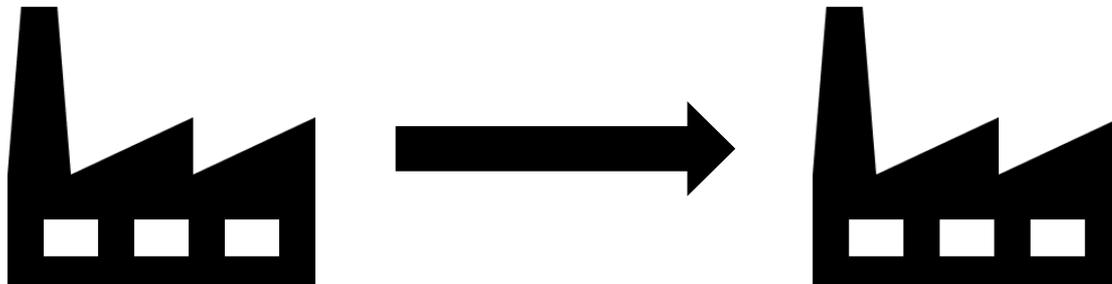
- Individual participated in, knew of, or had reason to know of the company's conduct.



EXTENSION OF CAUSE

Imputation from company to company

- Misconduct occurred for or on behalf of the joint venture or similar arrangement, or with the knowledge, approval, or acquiescence of the other participating company.



EXTENSION TO AFFILIATES

- All about CONTROL.
- Goal is to stop parties from avoiding S&D through work-shifting.
- Can show CONTROL through:
 - **(a)** Interlocking management or ownership;
 - **(b)** Identity of interests among family members;
 - **(c)** Shared facilities and equipment;
 - **(d)** Common use of employees; or
 - **(e)** A business entity which has been organized following the exclusion of a person which has the same or similar management, ownership, or principal employees as the excluded person.

EFFECT OF S&D

➤ **Ineligibility**

- Excluded entity placed on the System for Award Management (**SAM.GOV**) (previously the Excluded Parties List System--EPLS) and The Federal Awardee Performance and Integrity Information System (“FAPIIS”)

➤ **Entire Federal Government cannot:**

- Solicit/award contracts
 - Approve subcontracts
 - Award non-procurement benefits (e.g. grants, loans, leases, etc.)
- An Agency can grant an **Exception** for compelling reasons.

- ALERT - June 11, 2018:** Entities registering in SAM must submit a [notarized letter](#) appointing their authorized Entity Administrator. Read our [updated FAQs](#) to learn more about changes to the notarized letter review process and other system improvements.
- ALERT -** There may be a delay in data updates between the Small Business Administration (SBA) and SAM. If you notice any issues with your entity's SBA status or trouble on the SBA Supplemental page, please contact the Federal Service Desk.
- SAM users experienced intermittent connectivity issues with production web services the week of 12/17 - 12/20.** Full functionality has now been restored. If users experience intermittent connectivity issues with SAM web services and if the issue persists longer than 24 hours, please contact the Federal Service Desk.

Search Records

Search Tips to Get Started:

- Looking for entity registration records or entity exclusion records in SAM? Use **Quick Search** if you know an entity's Business Name, DUNS Number or CAGE Code. Use **Advanced Search** to structure your search using multiple categories and criteria.
- Are you a Federal government employee? Create a SAM user account with your government e-mail address and log into SAM before searching to see FOUO information and registrants who chose to opt out of the public search.
- Conducting small business-focused research? In addition to what is contained in SAM, small businesses can provide the Small Business Administration (SBA) supplemental information about themselves. Use the [SBA's Dynamic Small Business Search](#) to conduct further market research.
- Trying to find a contractor participating in the Disaster Response Registry? Use the **Disaster Response Registry Search** to locate contractors willing to provide debris removal, distribution of supplies, reconstruction, and other disaster or emergency relief services in the event of a national disaster.

Choose Quick Search or Advanced Search

QUICK SEARCH:

(Example of search term includes the entity's name, etc.)

DUNS Number Search:

CAGE Code Search:

SEARCH

[Need Help?](#)

ADVANCED SEARCH:

Use specific criteria in multiple categories to structure your search.

ADVANCED SEARCH - ENTITY

ADVANCED SEARCH - EXCLUSION

DISASTER RESPONSE REGISTRY SEARCH



IBM-P-20181206-1708
WWW4

[Search Records](#)
[Data Access](#)
[Check Status](#)
[About](#)
[Help](#)

[Disclaimers](#)
[Accessibility](#)
[Privacy Policy](#)

[FAPIS.gov](#)
[GSA.gov/IAE](#)
[GSA.gov](#)
[USA.gov](#)

Specific Case Examples: JARIV et al.

- James Jariv, Alexander Jariv, and Nathan “Nati” Stoliar
- Alleged biofuels producers and importers
- EPA’s Renewable Fuel Standard
 - Renewable Identification Number (“RINs”)
- IRS Tax Credits for Blending Biofuels with Petroleum Diesel
- USDA Advanced Biofuel Payment Program

JARIV et al.

- Canada Feedstock Supply LTD (claimed provider of raw material)
- City Farm Biofuel LTD (claimed producer and exporter of biofuels)
- VA&AR Corp. (claimed trucking company)
- Global E Marketing (claimed biofuel importer and blender)
- MJ Biofuels (claimed independent purchaser with connection to Jariv disguised)
- ZP Chemicals (claimed independent purchaser with connection to Jariv disguised)

JARIV et al.

- Three fraud schemes
 - Fraudulent claims of importation and collection of RINs (\$7,000,000 fraud)
 - Fraudulently selling B99 as B100 (\$1,500,000 fraud)
 - Export of biofuel without returning RINs to EPA (\$34,000,000 fraud)
- Total: over \$40 million in RIN fraud.
- The companies and individuals involved and multiple affiliates were debarred.

SANTA CLARA WASTE WATER COMPANY and GREEN COMPASS ENVIRONMENTAL SOLUTIONS

- Nonhazardous waste disposal company whose vacuum truck exploded when leaving its wastewater treatment facility.
- Company was attempting to move hazardous chemicals held in excess of its permit prior to an inspection.
- Over 1000 gallons of spilled chemicals. Many injuries. Shelter-in-place order for a three-mile radius around the blast.
- Companies debarred for 20 years along with multiple individuals.

CHEUNG and SHEARER

- Shearer was the director of Health and Environmental Safety at SFSU
- Cheung was the President of CHMT, a environmental services company specializing in hazardous waste management
- Shearer hires CHMT, Inc.
- From 2002 to 2009, while CHMT is under contract with SFSU, Shearer received numerous gifts from Cheung, including a Volvo, trips to China and Singapore, and cash.

CHEUNG and SHEARER

- In FY 2008, CHMT bills \$730,000 a year.
- In FY 2009, Shearer leaves SFSU; Cheung loses the contract; and costs fall to \$177,000.
- Whistleblower comes forward during 2009 audit which starts SFSU's investigation.
- Cheung pleads to 177 counts of commercial bribery and bribing a public official. Sentenced to 3 years and 8 months.
- Cheung currently debarred.
- Shearer is suspended. Charges are later dropped after he was deemed not competent to stand trial.

NEAL FEAY COMPANY

- Permit to treat and dispose of its wastewater which is contaminated with chromium.
- During process of moving to a new facility, nobody told employees that the treatment system was shut down.
- Employees dumped 400 gallons of industrial wastewater which bypassed treatment and went into the sewer.
- Root in the sewer line caused it to spill into neighboring property.
- Company calls a contractor to de-root the sewer, rather than the Sanitary District for the city as required by law.
- Neal Feay is subject to a statutory exclusion.

STARLITE RECLAMATION

- Wastewater treatment company with permit to discharge to a POTW.
- Alleged to have knowingly discharged untreated or insufficiently treated wastewater to the POTW.
- Indictment claims employees removed pH probe and ISCO sampler from sample box when untreated/insufficiently treated wastewater was being discharged and placed probe in a bucket of water and coffee.
- Currently suspended pending trial.

AK SCIENTIFIC

- AK Scientific sold laboratory chemicals.
- Shipped hazardous materials labeled as non-hazardous.
- Peiwen Zhou, the company founder and President, pled guilty to HMTA and TSCA violations and the company entered into a Deferred Prosecution Agreement.
- EPA entered into an Administrative Agreement that required significant remedial measures and new internal controls and required Mr. Zhou to limit his role in the company.

PROGRESS RAIL

- Intermodal repair work at Long Beach Terminal Island.
- Employees attempted to conceal the performance of unnecessary repairs by dumping train parts into the Port of Long Beach.
- United Industries, LLC, a subsidiary of Progress Rail, pled guilty to violating the Rivers and Harbors Act.
- Progress Rail ceased conducting intermodal repairs and entered into an Administrative Agreement with EPA that requires significant remedial measures if it resumes performing intermodal repairs.

OTHER COMPANIES

- **WALMART**
- **BP**
- **VOLKSWAGEN**
- **DUKE ENERGY**
- **IBM**

EPA'S S&D PROGRAM

- **Suspension & Debarment Division:**
- Compliance Specialists: Gather information and prepare cases for action. Monitor Administrative Agreements (“AAs”) for compliance.
- Debarment Counsel: Recommend and advocate for S&D actions, negotiate Administrative Agreements.
- Division Director and Deputy: Manage policy, training, and outreach initiatives.

EPA'S S&D PROGRAM

- **Suspension and Debarment Official's Office ("SDOO"):**
- Program Analyst: Manages statutory listings and SAM postings.
- Hearing Officers: Manage cases, schedule submission deadlines and PMIOs, counsel SDO, and preside over fact-finding hearings to determine disputed facts.
- Suspension and Debarment Official ("SDO"): Makes final agency decision, endorses AAs.

EPA'S S&D PROGRAM

- **Office of General Counsel**
 - Reviews fact-based suspensions and debarments for legal sufficiency and counsels SDOO as requested.

- **Office of Grants and Debarment (“OGD”) Director**
 - Presides over Appeals (Respondents may also appeal immediately to the U.S. District Court)

S&D PROCESS

SDD
Recommendation

SDO Review

Due Process

Decision



S&D PROCESS

Referral

- SDD Debarment Counsel develops the case, and drafts an Action Referral Memorandum (“ARM”).
- The ARM:
 - Establishes the cause(s) for suspension and/or debarment, including supporting evidence.
 - Recommends that the SDO take a specific action:
 - Show Cause Letter
 - Suspension
 - Proposed Debarment
 - Suspension and Debarment

S&D PROCESS

SDO Review

- Before taking action, the SDO considers SDD's recommendation and any aggravating or mitigating factors.
- SDO issues Show Cause letter, Notice of Suspension, Notice of Proposed Debarment, or Notice of Suspension and Proposed Debarment.
- If SDO declines a case, SDD has the opportunity to supplement the record.

S&D PROCESS

Due Process

- The Respondent has the opportunity to contest the action, and provide information on any remedial measures taken.
- If the action is based on an indictment, information, criminal conviction, or civil judgment, the Respondent does not get the opportunity to relitigate facts established by the court.
- If requested, the Respondent is entitled to a Presentation of Matters in Opposition (“PMIO”) to present evidence to the SDO in person.
- If any material facts are in dispute, a fact-finding hearing may be held.

S&D PROCESS

Decision

- Regulations require the SDO to issue a written decision within 45 calendar days of closing the record under the NCR or within 30 business days under the FAR.
- If the SDO suspends or debars the Respondent, that information is placed on the System for Award Management (“SAM”) and the Federal Awardee Performance and Integrity Information System (“FAPIIS”).
- The Respondent may appeal the decision to either the OGD Director or federal District Court.

S&D PROCESS

Alternative Resolution

- Because Respondents are highly motivated to avoid S&D, some cases are resolved with Administrative Agreements.
- Our AAs often require:
 - Resolution of the criminal/civil matter
 - Improved environmental management systems
 - Improved training programs
 - Improved corporate ethics policies and programs
 - Establishment of anonymous hotline/reporting systems
 - Non-retaliation policies
 - Independent, third-party monitors, auditors, and/or consultants

Suspension and Debarment Actions in FY 2018

Agency/Department	Suspensions	Proposed Debarments	Debarments*
Agency for International Development	1	43	32
Department of Agriculture	11	59	43
Department of Commerce	0	6	1
Department of Defense			
(U.S. Air Force)	19	60	67
(U.S. Army)	32	197	174
(Defense Logistics Agency)	6	111	46
(U.S. Navy)	64	166	149
Department of Education	6	11	9
Department of Energy	25	25	25
Department of Health and Human Services	13	40	24
Department of Homeland Security	16	177	129
Department of Housing and Urban Development	74	201	218
Department of the Interior	1	23	22
Department of Justice	5	6	7
Department of Labor	21	5	15
Department of State	9	27	39
Department of Transportation	67	72	64
Department of the Treasury	2	4	4
Department of Veterans Affairs	8	16	2
Environmental Protection Agency	34	75	112
Export-Import Bank	13	13	8
General Services Administration	20	134	96
National Aeronautics and Space Administration	3	7	4
National Nuclear Security Administration	0	5	5
National Science Foundation	9	10	8
Nuclear Regulatory Commission	0	0	0
Office of Personnel Management	0	4	2
Small Business Administration	21	45	29
Social Security Administration	0	0	0
Total Actions	480	1542	1334

**Appendix 3
Other Actions Related to Suspension and Debarment in FY 2018**

Agency/Department	Show Cause Notices	Referrals	Declinations	Administrative Agreements	Voluntary Exclusions
Agency for International Development	3	43	0	0	0
Department of Agriculture	3	70	27	0	0
Department of Commerce	0	6	0	0	0
Department of Defense					
(U.S. Air Force)	6	79	0	2	0
(U.S. Army)	17	410	7	3	0
(Defense Logistics Agency)	1	31	1	1	0
(U.S. Navy)	32	398	0	4	0
Department of Education	0	21	0	0	0
Department of Energy	0	10	1	0	0
Department of Health and Human Services	0	23	0	0	4
Department of Homeland Security	41	215	0	1	0
Department of Housing and Urban Development	0	154	0	5	0
Department of the Interior	0	24	0	1	0
Department of Justice	1	15	0	3	0
Department of Labor	0	43	2	0	0
Department of State	0	36	0	0	0
Department of Transportation	5	170	22	14	3
Department of the Treasury	0	0	4	0	0
Department of Veterans Affairs	1	24	0	3	0
Environmental Protection Agency	17	140	41	10	6
Export-Import Bank	1	17	9	0	0
General Services Administration	39	392	0	5	0
National Aeronautics and Space Administration	5	10	0	2	0
National Nuclear Security Administration	0	7	0	0	0
National Science Foundation	0	19	0	0	0
Nuclear Regulatory Commission	0	0	0	0	0
Office of Personnel Management	0	0	0	0	0
Small Business Administration	9	84	0	7	0
Social Security Administration	16	0	0	0	0
Total Actions	197	2441	114	61	13

BENEFITS OF EARLY REFERRALS

- S&D referrals are often received too late to be fully effective.
- We understand that criminal investigations require secrecy.
- Criminal, civil, and administrative remedies are more effective when there is cooperation.
 - Nobody can settle suspension and debarment.
 - Avoid the frantic phone call.
 - Delay can be used as a defense.

S&D's SUPERPOWERS

- Government-wide exclusion!!!!
- Imputation!!!!
- Affiliation!!!!
- Catch-All Cause Clause!!!!
- A lower standard or proof!!!!
- Public listing!!!!
- Leverage to negotiate remedial measures!!!

PARALLEL PROCEEDINGS

- Be careful with Grand Jury Materials! Coordinate with the prosecutor.
- For suspensions, we can often conduct “in camera” proceedings to avoid disclosure of investigative materials.
- If Respondent demands production of confidential materials, in the worst case scenario, we can just lift the exclusion.

CONTACT US!!!

Kathleen Timmins,
Director

timmins.kathleen@epa.gov

(202) 564-5292

Colby Stewart, R1, R2, &
R10

stewart.colby@epa.gov

(202) 564-6496

Ross Phillips, R3 & R9

phillips.ross@epa.gov

(202) 564-8178

Angelia Blackwell, R4

blackwell.angelia@epa.gov

[gov](mailto:blackwell.angelia@epa.gov)
(404) 562-8978

Roy Seidenstein, R5 & R9

seidenstein.roy@epa.gov

(202) 564-9274

Jennifer Lin, R6 & R7

lin.jennifer@epa.gov

(202) 564-9778

Carson Hodges, R8

Deputy Director

hodges.carson@epa.gov

(202) 564-5332