



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

FEB 07 2005

REPLY TO THE ATTENTION OF:

R-19J

Steve Chester, Director
Michigan Department of Environmental Quality
106 W. Allegan Street
P.O. Box 30473
Lansing, MI 48909

RE: U.S. EPA Review of MDEQ's NPDES, RCRA, and Air Enforcement Programs -
Final Report

Dear Mr. Chester:

Region 5 would like to thank you and the Michigan Department of Environmental Quality's (MDEQ) staff for participating in U.S. EPA's Pilot State Enforcement Program Review. Both of our Agencies have gained valuable information in this process that will be useful in conducting reviews in the remaining states across the country.

The enclosed Enforcement Review Report contains an Executive Summary, as well as detailed findings and recommendations concerning MDEQ's NPDES, RCRA, and Air enforcement programs. Region 5 utilized U.S. EPA data reports, MDEQ data reports, and reviews of MDEQ enforcement case files in developing this Report.

As you can see, MDEQ's compliance monitoring and enforcement programs are successful in many areas. We also identify, and recommend, areas for improvement in the report. Region 5 and MDEQ actions that will occur as a result have been noted, where appropriate.

As we have mentioned to you previously, MDEQ staff will be contacted by members of a joint U.S. EPA and State work group in February 2005. The work group, tasked with evaluating the Pilot State Enforcement Program Review process, will be seeking MDEQ's observations and input concerning the review process.

Your participation in this effort has been very valuable and we look forward to working with you

during the pilot evaluation process. If you have any questions about what is contained in the report, feel free to contact me, or Tinka Hyde of my staff, at 312-886-9296. Her email address is hyde.tinka@epa.gov.

Very truly yours,



Bharat Mathur
Acting Regional Administrator

Enclosures

U.S. EPA-Region 5 Review of Michigan DEQ Enforcement Program Final Findings

February 4, 2005

A. BACKGROUND

In Fiscal Year 2004, the U.S. EPA Office of Enforcement and Compliance Assurance (OECA), all ten U.S. EPA Regions, the Environmental Council of States (ECOS) Compliance Committee and state representatives from each of the ten Regions developed a new tool to assess state performance in enforcement and compliance assurance: the State Review Framework. The purpose of the Framework is to provide a consistent mechanism by which EPA Regions, working collaboratively with our states, can ensure that states meet agreed upon minimum performance levels and provide a consistent level of environmental and public health protection across our nation. This Framework is meant to establish a dialogue on enforcement and compliance performance that will lead to improved program management and environmental results.

As a pilot, U.S. EPA Region 5 and the State of Michigan conducted a review of Michigan's NPDES, RCRA, and Air enforcement programs under the Framework focusing on the Federal Fiscal Year 2003. At the same time, U.S. EPA Headquarters and the other nine U.S. EPA Regions conducted reviews of states' and/or Federal enforcement programs. The purpose of the pilots was to assess whether the Framework provides an adequate amount of the right information in order to assess state performance in core enforcement programs. The Executive Summary below and its subsequent details provide the results of the pilot review with the State of Michigan. Upon the completion of the pilot review process, all U.S. EPA Regions and the states will jointly evaluate the framework implementation process, Federal and state resource implications of the assessment, how results from the assessments will be used to recognize and reward states' performance, and what steps were taken to work with states to improve areas of concern. After all states have been reviewed, a second evaluation phase will be conducted to harvest new lessons and foster continuous improvement.

B. EXECUTIVE SUMMARY

Overall Picture

- Michigan conducts an enforcement and compliance program throughout the state that follows established national and state policy. Inspections that reveal violations are followed by appropriate enforcement action in most cases.

Inspection Implementation

- Michigan would benefit from a more consistent documentation process in regard to enforcement files for RCRA and CWA. These files should contain an inspection report that fully explains the scope of the inspections, as well as the findings, and implications of those findings.
- CAA - Michigan's reported HPVs relative to the number of FCEs completed is low compared to the national average.

Enforcement Activity

- The gravity and economic benefit portions of penalties need to be fully documented for all programs (CAA, RCRA, CWA). It is not apparent whether or not the economic benefit and gravity portions of penalties were recovered. In some cases, penalty calculations were not included in the case files. In other cases, it was not clear how the initial penalty calculations were translated into the values in the final order or decree. In several instances, the state indicated that calculations had been performed but documentation was not made available to EPA staff.

Commitments in Annual Agreements

- CAA - All non-Title V and Title V HPVs should be resolved in a timely manner.

Data Integrity

- CWA - Complete and timely data entry in PCS has been an historical concern. However, it is being resolved with the enhancements recently made to the state data system.
- RCRA- State and EPA data counts in their respective data systems do not agree. Both EPA and MDEQ need to resolve these differences.
- CAA - Michigan is currently the only Region 5 state not uploading data into AFS/AIRS. EPA and MDEQ need to identify a mutually agreed upon resolution.

EPA Region 5 and MDEQ will work together to address the issues identified in this Executive Summary during the 2006 work planning process or as outlined in the "Recommendations and Actions" sections of this evaluation.

C. EVALUATION DETAILS

Program Evaluated: NPDES

Information Sources Included in the Review:

1. Selected Inspection Files;
2. Selected Case Files;
3. Data from PCS and OTIS, as summarized in the “*CWA Framework Metric Results*,” August 5, 2004 version;
4. *Michigan Program Integrity Profile*, October 2004;
5. *Enforcement Management System, Compliance and Enforcement Guidance for Permit and Non-Permit Programs*, December 2000;
6. DEQ Policy and Procedures Number 04-002, *Supplemental Environmental Projects (SEPs) for Penalty Mitigation*, November 10, 1997;
7. DEQ Policy and Procedures Number 04-003, *Compliance and Enforcement*, October 12, 2001;
8. DEQ Policies and Procedures Number 04-003, *Appendix A Compliance and Enforcement*, Revised October 12, 2001;
9. DEQ Policies Procedures, Number 04-004, *Parallel Proceedings*, February 23, 2004;
10. MDEQ Inspection Plan, draft;
11. MDEQ Workplan FY 2003;
12. E-mail from Timothy McGarry, January 19, 2005.

EPA Evaluators:

Joan Karnauskas	312/886-6090
Purita Angeles	312/353-5112
Allan Batka	312/353-7316
Susan Virgilio	312/886-4244

State Contact:

Peter Ostland	517/373-1982
---------------	--------------

Introduction:

Fiscal year 2003, the year covered by this assessment, was highly atypical for MDEQ in two significant respects. First, the MDEQ Surface Water Division was significantly understaffed in FY 2003. In FY 2004, the MDEQ filled 60 positions, the majority of these newly authorized under recently enacted fee legislation. In addition, during 2003 and continuing through 2004, the state has been in the process of making substantial enhancements to its NPDES permits and enforcement data management system (NMS). Enforcement related enhancements include provision for e-DMR (electronic discharge monitoring reports) reporting (June 2003), inspection tracking modules (October 2003) and other enforcement-related modules (October 2004). This meant that at times the data in PCS were incomplete, or not always updated in a timely manner.

Consequently, certain data metrics provided for this assessment, which were based upon PCS or OTIS may be suspect. Where ever possible, these data have been supplemented or corrected with data available in the MDEQ in-house data systems.

Section 1: Review of State Inspection Implementation

1. Degree to which the state program has completed the universe of planned inspections/evaluations:

Findings: Nationally, U.S. EPA has set an expectation that 100% of a state's majors are inspected each year, but will allow a trade off of two minor inspections for each major which is not inspected, as long as a minimum of 70% of the majors are inspected. U.S. EPA also sets an independent goal that states inspect at least 20% of their minors each year. In recent years, though Michigan routinely inspects more than 20% of its traditional minors each year, the state has inspected only approximately 50% of its majors. This is by design; the state has developed an inspection plan which they believe results in a more effective inspection program than one which is based upon meeting inspection coverage goals alone. The plan is designed to support MDEQ's watershed based permitting process, and calls for inspection of permittees two years prior to permit issuance both to verify compliance as well as gather information to supplement/verify the data in the permit application.

The Region notes that, in several cases, file reviews revealed that inspections had occurred, and these inspections were not reflected in PCS. Consequently, the actual number of inspections performed may be greater than reported. As noted previously, enhancements were made in October 2003, to record all such data in NMS. Future enhancements planned for FY 2005 will ensure that these data are all routinely transferred to PCS.

Citation of information reviewed for this criterion: Information sources 3, 4, 10 and 11

Recommendations and Actions: At this time, U.S. EPA does not recommend any corrective action to increase the number of majors inspections. This is because EPA is at the beginning stages of re-evaluating its NPDES compliance monitoring program and expectations, including those relating to inspection coverage requirements. EPA intends to approach the Association of State and Interstate Water Pollution Control Agencies (ASIWPCA) to solicit state participation in this process, and Region 5 recommends that MDEQ consider volunteering. Whether or not MDEQ participates through the ASIWPCA process, it would be helpful if MDEQ could inform the Region's participation in this process, by suggesting key attributes (or measures of success) of an effective compliance monitoring program, and then evaluating the MDEQ approach against those attributes. We would also suggest that MDEQ provide informed input into this process in terms of describing the way that automated tools such as NMS could or should

enhance a compliance monitoring program, particularly with respect to targeting the most significant environmental problems. The Region will follow up with MDEQ to solicit this input once the national workgroup is established.

2. Degree to which inspection/evaluation reports document inspection findings, including accurate identification of violations:

Findings: Ideally, this element would be evaluated through performance of oversight inspections; however U.S. EPA has performed no such inspections in Michigan in recent years. Nonetheless, anecdotal information from the file reviews is somewhat helpful in evaluating this element. In completing file reviews, EPA personnel have noted that several of the reports were very comprehensive, clear and well-written, particularly those for CAFO inspections. On the other hand, many of the reports were deficient. For example, in certain cases the inspection findings are not always well documented (e.g., the cover letter to the facility discusses findings that are not apparent in the inspection form), results of sampling are imprecisely presented (“phenols were found” with no indication of the level, or whether or not this was a violation or whether levels were otherwise of concern), or reports did not fully disclose all elements of the inspection. Additionally, though the state has developed excellent checklists, many files were missing the checklists. Several checklists were undated. Many of the report conclusions were ambiguous (e.g., the reports cited “deficiencies” or “areas of concern” but it was not clear whether or not there was permit limit exceedance). It is believed inspectors have been conducting inspections at the same facilities for years, and consequently rely on memory, rather than the content of the inspection checklists, to derive findings or conclusions. The MDEQ recognizes that this is a concern particularly since many new inspectors have recently been hired who will not have the benefit of historical knowledge.

The State Enforcement Management System (EMS) describes the type of reporting that should follow the various types of inspections; however, file reviewers found that the EMS was not always followed. MDEQ indicates that some of the reporting defined in the EMS was determined to be unnecessary, particularly where an inspection results in very minor findings. Consequently management informally had modified the EMS requirements. MDEQ plans to include these modified requirements in the next update of the EMS. U.S. EPA agrees with the state conclusions regarding modification of the EMS requirements.

Citation of information reviewed for this criterion: Information sources 1 and 5.

Recommendations and Actions: U.S. EPA recommends that: 1.) MDEQ should take steps to ensure that all inspection reports are “stand alone” documents, fully explaining the scope of the inspections, as well as the findings, and implications of those findings. These steps may include but are not limited to providing additional training of staff and periodic internal audits; 2.) U.S. EPA should conduct several training inspections, as

requested by MDEQ; 3.) U.S. EPA should subsequently perform several oversight inspections to further evaluate this element; 4.) MDEQ should proceed to modify the EMS to incorporate the revised inspection reporting requirements. MDEQ plans to include these modified requirements in the next update of the EMS. To the extent that full revision of the EMS will not be completed for some time, the MDEQ should consider adding an addendum, or appending a brief memo, explaining the revised requirements.

3. Degree to which inspection reports are completed in a timely manner, including timely identification of violations.

Findings: U.S. EPA could not find any requirements relating to the time frame for completing inspection reports in the state EMS. However the state's PCS data entry form indicates that Compliance Evaluation Inspection (CEI) reports are to be completed within 30 days, Compliance Sampling Inspections (CSIs) within 90 days, Diagnostic Inspections within 30 days, and Toxics Inspections within 120 days. In approximately half of the cases these deadlines either were not met or U.S. EPA was unable to determine if the deadlines were met because reports were not dated or it was unclear if the document (letter) reviewed was the inspection report. (See discussion above regarding dichotomy between EMS requirements for inspection reports, versus current practice. According to the state's EMS, a letter is only appropriate for a RECON, and more complete narrative reports are required for CEI's or CSI's. U.S. EPA was not always able to find anything other than a cover letter, even for CEI's or CSI's).

Citation of information reviewed for this criterion: Information sources 1 and 5

Recommendations and Actions: Now that the enforcement modules in NMS will be fully functional, U.S. EPA recommends: 1) the state monitor performance against its inspection plan more frequently to ensure that not only is field work completed when scheduled, but that reports are written consistent with the deadlines on the PCS entry form; 2) the state consider adding deadlines for report completion into its EMS during the next EMS update.

Section 2: Review of State Enforcement Activity

4. Degree to which significant violations are reported to U.S. EPA in a timely and accurate manner.

Findings: Historically, MDEQ has had difficulty in ensuring timely entry of data into PCS. This was due to the manner in which the state was obliged to enter data into PCS. As discussed above, the state has recently implemented many enhancements to its NPDES data management system which make this system vastly superior to the state's previous systems and current systems used by U.S. EPA and other states. (In fact, several states have approached MDEQ, seeking to purchase the system). Given the

considerable effort needed to develop the new system and bring it on-line, data entry into PCS has suffered. With the completion of many of these enhancements, Region 5 expects that the timeliness and accuracy of reporting will improve dramatically. As an attachment to this report, MDEQ has provided a schedule for completing the enhancements to its data system.

As part of the system enhancement, capacity for electronic (e-DMR) reporting was developed. At the time of this assessment, over 30% of the permittees were using e-DMRs. This will considerably enhance the ability of the state to ensure timely reporting of violations in PCS.

Citation of information reviewed for this criterion: Verbal communications; PCS database; hands-on demonstration of the new system (NMS), at the time of file review.

Recommendations and Actions: MDEQ will continue with enhancements to NMS.

5. Degree to which state enforcement actions require complying action that will return facilities to compliance in a specific time frame.

Findings: In all files reviewed, enforcement actions require complying action that will return facilities to compliance in a specific time frame.

Citation of information reviewed for this criterion: Information Source 2

Recommendations and Actions: None

6. Degree to which the state takes enforcement actions, in accordance with national enforcement response policies relating to specific media, in a timely and appropriate manner.

Findings: Per the CWA Framework Metric Results, during the 3rd quarter of 2004 (April-June 2004) 20% of Michigan's majors were on the Watch List. The national average is 8.3%. Region 5 and the state evaluated the list, and found many entries to be in error. It is believed that these errors were in part due to bringing the enhancements to NMS on-line, and that this percentage will decline significantly in future Watch Lists.

U.S. EPA is unable to assess the timeliness of responses through its file reviews, as the enforcement case files did not contain information needed to evaluate this issue. Formal enforcement responses generally seemed appropriate to the violations, in terms of mechanism selected. However, informal actions often seemed a bit too informal (e.g., a "notice letter" was used when a notice of violation (NOV) appeared to be more appropriate.) MDEQ central office managers indicate that the "notice letters" should include a clear statement that a violation has occurred and needs to be corrected. Therefore, the issue is not one of "notice letter" versus NOV, but rather one of

sufficiency of the notice letter. At the time of the file review, MDEQ Water Program managers indicated that they would ask district staff to review their notice letters to ensure that they include clear notice of violation. Subsequently, in correspondence dated January 19, 2005, MDEQ indicated: 1) that new templates have been developed for each of the three notice letters in use; and, 2) MDEQ staff will be provided specific training on the proper use of the documents to ensure clear notice when a violation has occurred.

Citation of information reviewed for this criterion: Information Sources 2, 3 and 12

Recommendations and Actions: MDEQ will proceed as planned to work with district staff to improve content of the notice letters.

7. Degree to which the state includes both gravity and economic benefit calculations for all penalties.

Findings: In FY 2003, according to Michigan's internal tracking system (and as verified by file reviews), the state concluded 25 formal enforcement actions, and of these, 72% imposed penalties. The affected facilities were all minors, and thus there is no requirement to enter the data in PCS. Consequently, the information in the CWA Framework Metric Results, elements 8a and 8b is an inaccurate representation of the number of FEAs and the percentage of cases with penalties in Michigan during FY 2003.

Of the files reviewed, none included both gravity and economic benefit calculations. At least 20% of the files included economic benefit calculations alone, and 20% included gravity calculations alone. The state indicates that they agree in principle that both gravity and economic benefit are elements of penalty development, and that their EMS requires these calculations be performed. However, prior to 2003, the state had not rigorously ensured that economic benefit calculations were conducted. In correspondence dated January 19, 2005, the state indicated that since 2003, a process has been in place that ensures that penalty calculations are properly developed and recorded. At the time of the file review, MDEQ staff were engaged in three days of penalty calculation training. The training was intended, in part, to ensure that economic benefit calculations are correctly calculated in the future. In addition, the state affirms, in their January 19, 2005 correspondence, that economic benefit calculations will be developed in all cases where applicable and appropriate. In enforcement cases that do not have an economic component (and consequently no economic benefit calculation), the file will contain documentation as to the reason for not performing the economic benefit calculation. The state confirms that gravity calculations are made in all cases.

Citation of information reviewed for this criterion: Information Sources 2, 5 and 12

Recommendations and Actions: U.S. EPA will affirm through future assessments that process changes continue to be implemented.

8. Degree to which final enforcement actions (settlements or judicial results) take appropriate action to collect economic benefit and gravity portions of a penalty, in accordance with penalty policy considerations.

Findings: Of the files reviewed, it is not apparent whether or not the economic benefit and gravity portions of the penalty were recovered. In some cases this was because the penalty calculations were not included. In other cases it was not clear how the initial penalty calculations were translated into the values in the final order or decree. In correspondence dated January 19, 2005, MDEQ clarifies that negotiated penalties may be significantly less than economic benefit where there are ability to pay issues, or where there is significant litigation risk.

Citation of information reviewed for this criterion: Information source 2, 12

Recommendations and Actions: Same as #7.

Section 3: Review of Performance Partnership Agreement or State/U.S. EPA Agreement

9. Enforcement commitments in the PPA/SEA (written agreements to deliver product/project at a specified time), if they exist, are met and any products or projects are complete.

Findings: Expectations in the MDEQ work plan generally relate to inspection commitments; expectations to keep the quarterly significant non-compliance (SNC) rate below 10%, and the Active Exceptions List (AEL) below 2%; expectations with respect to reporting (including populating PCS with the WENDB data elements); and, expectations with respect to special, infrequent or one-time activities (e.g., development of an EMS, or an SSO inventory). The MDEQ consistently meets most such expectations. Exceptions relating to inspection commitments, and database maintenance are discussed elsewhere, and U.S. EPA believes they have been adequately addressed.

Citation of information reviewed for this criterion: Information Source 11.

Recommendations and Actions: None

Section 4: Review of Database Integrity

10. Degree to which the Minimum Data Requirements are timely.

Findings: See Section 2, Part 4

Citation of information reviewed for this criterion: See Section 2, Part 4

Recommendations and Actions: See Section 2, Part 4

11. Degree to which the Minimum Data Requirements are accurate.

Findings: See Section 2, Part 4. In addition, MDEQ managers indicated that though not all enforcement actions are currently linked to violations in PCS, they will be by the end of 2005.

Citation of information reviewed for this criterion: See Section 2, Part 4. Also, personal communication with MDEQ managers at time of file review.

Recommendations and Actions: See Section 2, Part 4.

12. Degree to which the Minimum Data Requirements are complete, unless otherwise negotiated by the Region and state or prescribed by a national initiative.

Findings: The CWA Framework Metric results show that the entry rate in PCS for permit limits for majors was 74%. The Framework also reports a DMR entry rate for majors of 89% against a national goal of 95%. As indicated in Section 2, U.S. EPA believes that with the advent of Michigan's new database, these entry rates will be much higher. The Framework shows that the DMR entry rate for minors is 88%, which compares quite favorably to the national average of 68%. This is a highlight of the Michigan program, as there is no current national requirement to enter these data.

Citation of information reviewed for this criterion: Information Source 3

Recommendations and Actions: MDEQ will continue to work as planned to add modules to NMS and to ensure that data is transferred between NMS and PCS.

Program Evaluated: RCRA

Information Sources Included in the Review:

1. U.S. EPA's RCRA Info, RCRA Rep and OTIS Databases;
2. File Review;
3. MDEQ's FY 2003 RCRA Work Plan;
4. Region 5's FY 2003 RCRA Year-End Evaluation Report on Michigan;
5. Region 5 ECHO Error Tracking Database;
6. MDEQ's "Waste Management Division Compliance and Enforcement Policy, November 2001;
7. MDEQ's "Hazardous Waste Compliance Inspection Procedure Manual";
8. U.S. EPA's Revised RCRA Inspection Manual, 1998;
9. U.S. EPA's Hazardous Waste Civil Enforcement Response Policy (ERP);
10. MDEQ's RCRA Accomplishments Report for FY 2003;
11. August 5, 2004, RCRA Framework Metric Results;
12. RCRA Civil Penalty Policy;
13. Response to U.S. EPA's Review of Michigan's Hazardous Waste Compliance Monitoring and Enforcement Program, December 7, 2004 (MDEQ's Response).

EPA Evaluators:

Paul Atkociunas	312/886-7502
Bryan Gangwisch	312/886-0989
Paul Little	312/886-4460

State Contacts:

Tim McGarry	517/241-2050
Phil Roycraft	231/775-3960
John Craig	517/373-7923

Introduction:

The review of MDEQ's RCRA Hazardous Waste Compliance Monitoring and Enforcement Program included the review of 29 MDEQ inspection and enforcement case files (results were sent to MDEQ under separate cover), U.S. EPA data reports that provided national average and Michigan-specific information, and other related documents. Information from the file review and the data reports were utilized in responding to 12 review elements, as follows:

Section 1: Review of State Inspection Implementation

1. Degree to which the state program has completed the universe of planned inspections/evaluations.

Findings: Operating commercial Treatment, Storage and Disposal facilities (TSDs) are required to be inspected at least once every two years. Also, a goal of U.S. EPA's National Planning Guidance is that a Large Quantity Generator (LQG) be inspected at least once every five years (20% per year).

An August 18, 2004, RCRA Rep database report indicated that Michigan had 23 operating TSDs (not the 30 shown in the RCRA Framework Metric Results) and that only one had not received an inspection within a two year period. Thus 95.6% of Michigan's operating TSDs received required inspections during a two year period.

According to an August 18, 2004, RCRA Info database report, there are 749 LQGs in Michigan. In FY 2003, MDEQ conducted (according to the August 5, 2004, RCRA Framework Metric Results) 134 LQG inspections while U.S. EPA conducted 24 LQG inspections. The 158 combined number of inspections accounted for a 21.1% annual inspection coverage rate of the 749 LQGs in Michigan. Individually, MDEQ conducted inspections at 17.9% of its LQGs.

Over a 5 year period (10-1-98 through 9-30-03), MDEQ conducted inspections at 464 LQGs, or 61.9% of 749 LQGs. Combined with the 52 EPA inspections during the same period, the coverage rate is 516 (69%). The national average for combined LQG inspections for the same period was 49.6%. Also, during the same 5 year period MDEQ and U.S. EPA inspected, according to an August 5, 2004, RCRA Info report, 87.8% of Michigan's Small Quantity Generators.

Citation of information reviewed for this criterion: Information Sources 1 and 11.

Recommendations and Actions: RCRA Info's listing of operating TSDs does not match MDEQs list of operating TSDs in Michigan. U.S. EPA and MDEQ must reconcile the differences. As stated in correspondence dated December 7, 2004, MDEQ's Waste Permit and Enforcement staff agree to discuss/review the current status of operating TSDs with U.S. EPA and work toward reconciling discrepancies.

2. Degree to which inspection/evaluation reports document inspection findings, including accurate identification of violations.

Findings: All 29 files contained either inspection checklists, record review results, or other documentation and photographs which accurately identified violators. However, only 4 files (13.8%) included narrative reports. U.S. EPA's Revised Inspection Manual, 1998, describes inspection reports to be composed of three elements: a narrative discussion (including a description of facility operations and inspection findings); checklists; and supporting documents.

Citation of information reviewed for this criterion: Information Sources 2 and 8.

Recommendations and Actions: U.S. EPA recommends that MDEQ's inspection reports include a report narrative as described in U.S. EPA's Revised Inspection Manual, 1998. In correspondence dated December 7, 2004, MDEQ stated that while their documentation is consistent with report writing procedures contained in the Hazardous Waste Compliance Inspection Procedure Manual, MDEQ will also encourage all inspectors to "complete the checklists and/or the accompanying letter to the facility in a manner which provides thorough and accurate information about the facility and any violations found." U.S. EPA expects that completion of the inspection checklist will include written comments and specific details about violations, as noted in MDEQ's response.

3. Degree to which inspection reports are completed in a timely manner, including timely identification of violations.

Findings: Of 29 files reviewed, 28 (96.6%) were completed in a timely manner, i.e., meeting MDEQ's standard of sharing inspection results with an inspected facility within 10 business days.

Citation of information reviewed for this criterion: Information Source 2.

Recommendations and Actions: None.

Section 2: Review of State Enforcement Activity

4. Degree to which the state's significant violations are reported to U.S. EPA's national database in a timely manner.

Findings: According to OTIS information referenced in the August 5, 2004, RCRA Framework Metric Results, there were 683 inspections (combined U.S. EPA and MDEQ) conducted in Michigan in 2003. There were 21 Significant Non-Compliers (SNC) identified in Michigan in 2003, i.e., 19 by MDEQ and 2 by U.S. EPA. The SNC identification rate per inspected facilities was 21/683 or 3%. The national SNC identification rate was also 3%. Based on a TSD (23) and LQG (749) universe count, the SNC identification rate per universe was 21/772, or 2.7%. The national average was 1%.

Of the total 21 new SNCs that were identified by MDEQ and U.S. EPA during FY 2003, MDEQ reported five SNCs that were derived from criminal investigations. Due to the nature of those investigations, "Day Zero" was not determined for the criminal actions. However, a review of the 16 remaining combined SNC determinations indicated that all 16 SNC determinations were completed within 150 days of "Day Zero" per the ERP.

Additionally, of the 29 files reviewed, 25 of them indicated violation determinations. All 25 determinations were reported in a timely manner (100% timely). However, it appears that the degree to which the violator determination was appropriate was 23 out of 25 files

which is equivalent to 92%. In two cases, violators may have received informal enforcement actions when such violators should have received formal enforcement actions.

Citation of information reviewed for this criterion: Information Sources 1, 2, 4, and 11.

Recommendations and Actions: U.S. EPA recommended that MDEQ re-evaluate two cases that appear to be Significant Non-Compliers. In correspondence dated December 7, 2004, MDEQ stated that they re-evaluated the two cases and determined: 1) one facility was a low priority for escalated enforcement; and 2) one facility made significant progress toward compliance. U.S. EPA expects that MDEQ will adhere to Significant Non-Complier policy and enforcement guidelines contained in U.S. EPA's Hazardous Waste Civil Enforcement Response Policy, and MDEQ's Management Division Compliance and Enforcement Policy, as revised.

5. Degree to which state enforcement actions require complying action that will return facilities to compliance in a specific time frame.

Findings: Of the 29 files reviewed, 4 cases involved formal enforcement. All 4 cases included appropriate injunctive relief. Our file review also included the review of 21 informal enforcement actions issued by MDEQ. All 21 of the informal enforcement actions included complying action. All but one of the violators had returned to compliance by the time of the file review.

Citation of information reviewed for this criterion: Information Source 2.

Recommendations and Actions: None

6. Degree to which the state takes enforcement actions, in accordance with national enforcement response policies relating to specific media, in a timely and appropriate manner.

Findings: A July 2004, U.S. EPA OTIS Watch List indicates that of 21 recent formal actions taken in Michigan to address SNCs, two cases exceeded the RCRA ERP time frame of 360 days (from date of inspection or record review) for either entering a final formal enforcement order, or making a referral to the State Attorney General or to the DOJ. One case was MDEQ's and one was U.S. EPA's. Of the 20 MDEQ, 19 or (95%) were timely, while one case (5%) was not. Note however, that the national average indicates that only 66% of cases are timely. Also, the ERP permits exceedances of the time frame for up to 20% per year for cases with unique factors.

Also, of the 29 files reviewed, 4 case files indicated that the facilities were determined to be in compliance at the time of the inspection. The other 25 case files included enforcement actions. However, two case files identified violators that appeared to meet

the definition of a SNC, and not a Secondary Violator. Enforcement actions taken by MDEQ regarding the remaining 23 violators were appropriate.

Citation of information reviewed for this criterion: Information Source 2 and July 2004 OTIS Watch List.

Recommendations and Actions: Same as #4.

7. Degree to which the State includes both gravity and economic benefit calculations for all penalties.

Findings: Of the 29 files reviewed, 4 cases included formal enforcement. However, none of the four case files indicated how MDEQ calculated and documented penalties that included both gravity and economic benefit components.

Citation of information reviewed for this criterion: Information Sources 2, 6, 9, and 12.

Recommendations and Actions: U.S. EPA recommends that MDEQ maintain a file that includes gravity and economic benefit calculations for all formal cases. In the context of 2006 work planning, U.S. EPA will work with MDEQ to develop a protocol to ensure that economic benefit and gravity calculations are being performed consistent with Federal and state requirements. Such calculations will be made available to U.S. EPA during future reviews. U.S. EPA expects that MDEQ will adhere to the U.S. EPA RCRA Civil Penalty Policy and MDEQ's civil penalty policy, when determining penalties.

8. Degree to which final enforcement actions (settlements or judicial results) take appropriate action to collect economic benefit and gravity portions of a penalty, in accordance with penalty policy considerations.

Findings: Excluding Corrective Action Orders, MDEQ took 16 formal enforcement actions in 2003. All 16 formal enforcement actions (100%) included penalties. Also, of the 29 files reviewed, 4 case files included formal enforcement. Penalties were collected and documented in all four case files (100%). However, documentation of the final gravity and economic benefit calculations were not included in the four case files.

Citation of information reviewed for this criterion: Information Sources 1, 2, 6, 9, and 12.

Recommendations and Actions: Same as #7.

Section 3: Review of Performance Partnership Agreement or State/EPA Agreement

9. Enforcement commitments in the PPA/SEA (written agreements to deliver

product/project at a specified time), if they exist, are met and any products or projects are complete.

Findings: In its FY 2003 RCRA Work Plan, MDEQ committed to inspect the following: 82 inspections at 46 TSDs; 147 LQG inspections; 39 Transporter inspections; and 330 SQG inspections. According to MDEQ's FY 2003 RCRA Grant Accomplishments Report, MDEQ conducted the following: 79 inspections at 46 TSDs; 124 LQG inspections; 32 Transporter inspections; and 243 SQG inspections. In the same Accomplishments Report, MDEQ explained that it missed its inspection targets because of staffing problems caused by an agency reorganization, and the temporary unavailability of an inspector.

Citation of information reviewed for this criterion: Information Sources 1, 3, 4, and 10.

Recommendations and Actions: None.

Section 4: Review of Database Integrity

10. Degree to which the Minimum Data Requirements are timely.

Findings: MDEQ does not directly enter RCRA compliance monitoring and enforcement data into RCRA Info. Instead, MDEQ utilizes a "Translator" process by which MDEQ's RCRA data is translated into RCRA Info once a month. U.S. EPA has agreed to the data translation schedule whereby MDEQ is permitted up to 31 days in entry delay time in order to translate the data. MDEQ generally meets the monthly translation schedule.

Citation of information reviewed for this criticism: Information Source 1.

Recommendations and Actions: None.

11. Degree to which the Minimum Data Requirements are accurate.

Findings: A review of U.S. EPA's ECHO (Enforcement and Compliance History Online) database indicates that in 2003, MDEQ received 30 requests regarding RCRA Info data errors. Of the 30 requests, 17 (56%) were responded to (contacting the complainant) within 60 days, and 13 (44%) were responded to after 60 days. According to ECHO policy, average resolution time for errors should be less than 60 days. Also, of the 30 error requests received, MDEQ responded by correcting 18 errors.

The August 5, 2004 "RCRA Framework Metric Results" describes 63 facilities in violation for greater than 3 years. MDEQ does not agree with that count figure.

Of the 29 files reviewed, 27 had accurate data reported in RCRA Info (93%). For two

files there were discrepancies between file data and what was entered in RCRA Info.

Citation of information reviewed for this criterion: Information Sources 1, 2, and 5.

Recommendations and Actions: Because the ECHO database is accessible by the public to request attention/corrections to the RCRA Info database, U.S. EPA recommends that MDEQ strive to address error requests by the standard set for response to the public, i.e., within 60 days. Also, corrected information regarding the 2 previously mentioned files should be entered into RCRA Info. In correspondence dated December 7, 2004, MDEQ stated that they corrected the errors in the two files, and will strive to address error requests within 60 days. Also, the Enforcement and Compliance Assurance Branch, and the Information Management Section within the Waste, Pesticides and Toxics Division in Region 5 agree to work with MDEQ toward reconciling disagreements concerning the counts of RCRA violation and enforcement elements available in OTIS and RCRA Info.

12. Degree to which the Minimum Data Requirements are complete, unless otherwise negotiated by the Region and state or prescribe by a national initiative.

Findings: In comparing the RCRA data count figures listed in table 12a through g of U.S. EPA Headquarters' August 5, 2004, "RCRA Framework Metric Results" and data available in the OTIS database, MDEQ does not agree with the count figures in either database.

Citation of information reviewed for this criterion: Information Sources 1 and 11.

Recommendations and Actions: The Enforcement and Compliance Assurance Branch, and the Information Management Section within the Waste, Pesticides and Toxics Division in Region 5 agree to work with MDEQ toward reconciling disagreements concerning the counts of RCRA compliance monitoring and enforcement elements available in OTIS and RCRA Info. (See MDEQs December 7, 2004 response).

Program Evaluated: CAA

Information Sources Included in Review:

1. "CAA Stationary Source Compliance Monitoring Strategy," April 25, 2001;
2. MDEQ's FY'03 "Compliance Monitoring Strategy Plan," May 15, 2002;
3. High Priority Violators List (HPVL) and Region 5 records pertaining to HPV addition recommendations from MDEQ;
4. District Office and Lansing office files;

5. “The Timely and Appropriate (T&A) Enforcement Response to High Priority Violations (HPV),” December 22, 1998;
6. State consent orders and consent judgments found in Lansing enforcement files;
7. “Clean Air Act Stationary Source Civil Penalty Policy,” October 25, 1991;
8. MDEQ’s enforcement files located in Lansing;
9. AFS/AIRS database;
10. MDEQ Response dated December 7, 2004.

EPA Evaluator:

Jeffrey Gahris (312) 886-6794

State Contacts:

Gerald Avery (517) 373-7037
 Thomas Hess (517) 335-4615

Section 1: Review of State Inspection Implementation

1. Degree to which state program has completed the universe of planned inspections/evaluations.

Findings: For the FY’03 -’04 period, MDEQ committed to perform 491 FCE’s for all of the 491 Title V sources. It completed 176 FCE’s for Title V sources in FY’03. This level of activity in FY’03 would have required about 315 FCEs the following year to catch up on MDEQ’s 2-year commitment. OECA pulled FCE data for the FY’02 - FY’03 period, but MDEQ did not begin conducting and reporting FCEs until the second year of the same period. This may cause the state to appear severely behind schedule in conducting FCEs for Title V sources in order to meet its commitment to perform 491 FCEs by the end of FY’04.. The state has informed us verbally that it met the FY’03 - FY’04 commitment to perform 491 FCEs by the end of FY’04. We are in the process of working with the state to verify the inspection data.

For non-Title V sources, MDEQ committed to perform 97 FCEs per year over a five year period, for a total of 488 FCEs. MDEQ conducted 126 such FCEs in FY’03, exceeding its annual commitment.

Citation of information reviewed for this criterion: Information Sources 1 and 2.

Recommendations and Actions: None, pending reconciliation of FY ‘04 data, which is now under way.

2. Degree to which inspection/evaluations reports document inspection findings, including

accurate identification of violations.

Findings: The inspection reports generally appeared thorough. For the files reviewed, field inspection reports were timely in all instances. Of the violations found during the FCEs, MDEQ appeared to resolve all such violations through the enforcement process. Nevertheless, comparing MDEQ's reported HPVs to the number of FCEs completed in FY'03 suggests the state finds violations 3.6 percent of the time. This metric is a comparison of the number of HPVs added by state and U.S. EPA combined in FY'03, compared to the number of FCEs completed in FY'03 (which was 302). Of the 11 sources added to the HPV list in FY'03, 10 were added by the state. This metric falls below the national average of 10.3 percent. Since all of the district files reviewed involved subsequent HPV reporting, the findings do not reflect a review of FCEs that did not find HPVs, which limited our evaluation of why the HPV discovery rate seems low. MDEQ's annual report to the legislature lists about 70 cases resolved in FY'03, which would represent a mix of asbestos NESHAP cases (not reported to HPVL), HPVs and non-HPVs (such as odor cases).

MDEQ reported 13 HPVs during FY'04, representing a modest improvement over FY'03. U.S. EPA and MDEQ staff have discussed this phenomena in detail. One reason suggested by MDEQ is that some of the cases Michigan pursued in FY'03 were in fact HPVs, but not reported as such. Also, MDEQ has an aggressive escalated enforcement program involving the collection of civil penalties. Since MDEQ would automatically pursue penalties when any facility is placed in the HPV, it would naturally not place all violations on the HPV if escalated enforcement action and collection of penalties was deemed inappropriate, even if the violations may technically meet HPV criteria. The limited scope of MDEQ files reviews did not allow us to identify why the reported HPVs compared to the number of FCEs would be lower than average when compared to other states. See also additional explanation under No. 11 below.

Citation of information reviewed for this criterion: Information Source 3.

Recommendations and Actions: U.S. EPA recommends that the Lansing and District managers review the HPV guidance and associated implementation materials and ensure that it is being followed. Region 5 will provide any needed assistance in interpreting this policy guidance. Many of the 70 cases MDEQ pursued in FY'03 were not classified as HPVs. U.S. EPA will discuss this list with the state in greater detail during the second quarter, and work with the state to correctly identify HPVs.

3. Degree to which inspection reports are completed in a timely manner, including timely identification of violations.

Findings: Virtually all of the compliance and enforcement files reviewed showed a timely completion of reports by district office staff. Reports were typically completed within a week's time. Districts typically issued Findings of Violation within a few days

of concluding the inspection/compliance evaluation report. This is a good example of MDEQ's district staff's adherence to timely completion of reports and identification of violations.

Citation of information reviewed for this criterion: Information Source 4.

Recommendations and Actions: None.

Section 2: Review of State Enforcement Activity

4. Degree to which significant violations are reported to EPA in a timely and accurate manner.

Findings: District offices routinely refer cases to the Lansing office for escalated enforcement. This step occurs within 30 days, or in some cases, several months after one or more Letter(s) of Violation (LOV) is issued. Once referred to Lansing, the HPV is typically reported to U.S. EPA within a few days.

Citation of information reviewed for this criterion: Information Source 5.

Recommendations and Actions: U.S. EPA recommends that Michigan review its process for determining whether violations meet HPV criteria and assure prompt reporting of the information.

5. Degree to which state enforcement actions require complying action that will return facilities to compliance in a specific time frame.

Findings: For the 15 files reviewed, the sources that were subject to enforcement action generally returned to compliance promptly in response to MDEQ inspections, LOVs, or follow-up escalated enforcement actions.

Citation of information reviewed for this criterion: Information Source 6.

Recommendations and Actions: None.

6. Degree to which the state takes enforcement actions, in accordance with national enforcement response policies relating to specific media, in a timely and appropriate manner.

Findings: The enforcement actions were appropriate. There were no Supplemental Environmental Projects (SEPs) considered in any of the reviewed cases. It is our understanding that MDEQ, which considers itself "neutral" on the use of SEPs, provides information about SEPs during enforcement negotiations without necessarily promoting

them. MDEQ's settlement discussions, including the 30-day comment period for the negotiated consent orders, typically took longer than the 270-day period set forth in the T&A policy for timely enforcement actions. Still, some cases settled in around 300 days, which is not necessarily a bad result, particularly when considering MDEQ's aggressive escalated enforcement program involving the collection of civil penalties.

Citation of information reviewed for this criterion: Information Source 5.

Recommendations and Actions: U.S. EPA recommends that MDEQ put HPVs on the HPVL in a timely manner, and that MDEQ promote more SEPs as appropriate during enforcement negotiations for additional environmental results. In correspondence dated January 19, 2005, MDEQ stated it is already committed to pushing for quicker settlements or consider referral to the State Attorney General's office in some appropriate cases. MDEQ will also provide training to new staff on the use of enforcement documentation and case preparation in April 2005.

7. Degree to which the state includes both gravity and economic benefit calculations for all penalties.

Findings: MDEQ consistently followed U.S. EPA's Civil Penalty Policy for Clean Air Act violations in most instances by including both economic benefit and gravity components as appropriate in its initial penalty calculations. The files could document penalties more consistently. How did penalties meet or exceed a bottom line settlement amount under Policy? Sometimes there was no documentation at all in the file. In one or two cases, however, a detailed penalty calculation was sent to the company under cover letter, and documented in the file.

Citation of information reviewed for this criterion: Information Sources 7 and 8.

Recommendations and Actions: U.S. EPA recommends that MDEQ's formal case files include penalty worksheets that indicate gravity and economic benefit calculations, including settlement amounts. In the context of 2006 work planning, U.S. EPA will request a commitment from the state that it will work with U.S. EPA to develop a protocol to ensure that economic benefit and gravity calculations are being performed consistent with Federal and state requirements and that records that verify this are made available to U.S. EPA during future reviews. In correspondence dated December 7, 2004, MDEQ indicated that they intend to use economic benefit analysis where applicable and appropriate on a case-specific basis.

8. Degree to which final enforcement actions (settlements or judicial results) take appropriate action to collect economic benefit and gravity portions of a penalty, in accordance with penalty policy considerations.

Findings: Where documented, MDEQ appeared to consistently follow U.S. EPA's Civil

Penalty Policy for Clean Air Act violations in its final enforcement actions. The penalties were reduced 30 percent for cooperation, for settlement purposes, as a matter of course. The files did not document penalties consistently to show how final penalties meet or exceed a bottom line settlement amount consistent with the Policy. Sometimes there was no documentation at all in a file. In one or two cases, however, a detailed penalty calculation was sent to the company under cover letter, and documented in the file.

Citation of information reviewed for this criterion: Information Source 8.

Recommendations and Actions: Same as #7.

Section 3: Review of Performance Partnership Agreement or State/EPA Agreement

9. Enforcement commitments in the PPA/SEA (written agreements to deliver product/project at a specified time), if they exist, are met and any products or projects are complete.

Findings: The current State/U.S. EPA agreement contains Projected Program Accomplishments (PPA) for FY'04. Specifically, these include commitments for the performance of Michigan's compliance program in PPA-4-3 through 4-6. Among other things, MDEQ committed to following the Compliance Monitoring Strategy for stationary sources and the revised T&A/HPV Guidance. MDEQ and U.S. EPA provide updates to each other regarding enforcement status information for particular HPVs at monthly conference calls. MDEQ provides updates and HPV additions by means of e-mails messages or by mailing information packages. MDEQ committed to resolve by September 30, 2004, all non-Title V HPVs that were identified as of October 1, 2001. This commitment provides an extra year to resolve cases compared with the HPV policy.

Citation of information reviewed for this criterion: FY'04 - FY'05 grant agreement.

Recommendations and Actions: Since the PPA covers non-Title V sources only, EPA recommends an additional agreement with MDEQ that covers Title V sources. The state indicated their commitment to review the timeliness of its enforcement actions and to find opportunities for improvement, as discussed in Section 2 above.

Section 4: Review of Database Integrity

10. Degree to which the Minimum Data Requirements are accurate.

Findings: MDEQ does not enter data directly into AFS. However, MDEQ does send U.S. EPA Region 5 paper reports. Based on these paper reports, U.S. EPA Region 5 is

not aware of any problems with the accuracy of MDEQ's data.

Citation of information reviewed for this criterion: Information Source 9.

Recommendations and Actions: See recommendations in #12 below.

11. Degree to which the Minimum Data Requirements are complete, unless otherwise negotiated by the Region and state or prescribed by a national initiative.

Findings: MDEQ does not enter data directly into AFS. However, MDEQ does send U.S. EPA Region 5 paper reports. Based on these paper reports, U.S. EPA Region 5 is not aware of any problems with the accuracy of MDEQ's data.

Citation of information reviewed for this criterion: Information Source 9.

Recommendations and Actions: See recommendations in #12 below.

12. Degree to which the Minimum Data Requirements are complete, unless otherwise negotiated by the Region and State or prescribed by a national initiative.

Findings: A review of the AFS data for the selected case files does not indicate major data completeness issues. MDEQ has experienced further delays in developing computer software for uploading AFS data. Michigan is the only state in Region 5 not uploading its data.

Citation of information reviewed for this criterion: Information Source 10.

Recommendations and Actions: MDEQ is considering the use of a contractor to fully implement software development for AFS data entry. This is a priority activity that must be addressed expeditiously by the best practical means. MDEQ and U.S. EPA have begun a dialog, which we trust will lead to an agreed-upon schedule of actions to address this issue. U.S. EPA believes MDEQ has the technical capacity to begin entering data into AFS immediately at its headquarters level. Nevertheless, once MDEQ finalizes its software development for direct entry at the district office level, we will see an improvement in management control over the quality of the data, since the data will be readily accessible by a variety of individuals. This will also lead to a better understanding of data-related issues such as the reported number of HPVs (see No. 2 above), and may, as a result, lead to enhanced program performance.

ATTACHMENT 1

Due to limits on staff resources and development of our database (NMS), Michigan has experienced some difficulties in maintaining compliance data in PCS. Below is a description of the problem and how we plan to address it.

Michigan's database, NMS, contains all NPDES permit-related information (the application, the issued permit document, data fields including permit limits). It interacts with the e-DMR server which is used by facilities to electronically submit DMR reports to Michigan. Michigan also developed and uses a system to electronically transfer DMR data to PCS via the Michigan node and the Central Data Exchange (CDX). NMS compliance and enforcement functions are being developed and implemented, including violation tracking (automatic DMR violation flagging) and enforcement action processing.

Compliance Data Difficulties

Currently all DMRs (the monthly summaries) and daily results are being entered into NMS within a month of receipt. Electronic DMRs are being submitted by about 27% of the facilities (this data is transferred from the e-DMR database to NMS). Self monitoring data from paper submittals of DMRs and daily sheets are manually entered into NMS by DEQ staff. DMR data is automatically transferred from NMS to PCS via the Michigan Node and the Central Data Exchange (CDX) server for all NPDES facilities (majors and minors). Michigan is experiencing problems with the Michigan Node, and this resulted in the lack of data transfer from NMS to PCS for about 6 months. This situation is being addressed (we fixed one problem just to run into another).

When the automatic transfer of data to PCS is working, approximately 90% of the DMR data is transferred successfully. Because the coding in NMS doesn't always match the coding in PCS, some data is rejected. But the store procedure used to transfer the data can be corrected permit by permit, and the data transfer rate improved. This is what we plan to do, but this is a time consuming process. In the meantime, DEQ staff will routinely pull QNCRs to verify violations in PCS with major facilities (inaccurate violations will be corrected). Corrections to data transfer stored procedure will focus on Major facilities first (once the stored procedure is fixed for a particular problem, the system will automatically resend the rejected data to PCS).

During FY05 Michigan plans to enhance the data transfer from NMS to PCS for additional information, including inspection data, schedules (permit and enforcement), enforcement actions, biosolids data, and permit-related data. Until this happens, we are proposing to handle this data as follows:

- Permit data (permit number, issued date, permit limits, facility information, etc.): will be manually entered into PCS as well as NMS (both databases will be maintained)

- Inspection data: will only be entered into NMS (PCS will be updated when the data transfer becomes available). Inspection data has not been routinely entered in PCS since 10/1/03.
- Schedules of Compliance (permit and enforcement related): will only be entered into NMS (PCS will be updated when the data transfer becomes available). Schedules have not routinely been entered into PCS for a couple of years.
- Enforcement Actions: will be manually entered into PCS as well as NMS (both databases will be maintained). Enforcement actions have not been entered into PCS routinely for a couple of years.
- Biosolids data from annual reports: will be manually entered into PCS until the data transfer capabilities are developed.

Based on the above, PCS will not be maintained for schedules (permit or enforcement), for some DMR data for minor facilities (due to the 10% error rate in data transfer), and for inspection data. These problems should be corrected by the end of the fiscal year (September 30, 2005).

Until PCS is routinely maintained, DEQ will provide EPA information from our database upon request.

12/6/04 – Peter Ostlund

12/15/04 note: Biosolids data entry into PCS is being questioned because of delegation issues. This issue may be resolved in the near future.