



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
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CHICAGO, IL 60604-3590

AUG 23 2007

REPLY TO THE ATTENTION OF:
R-19J

Brad Moore, Commissioner
Minnesota Pollution Control Agency
520 Lafayette Road
St. Paul, MN 55155-4194

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

Dear Mr. Moore:

Region 5 would again like to thank you and the Minnesota Pollution Control Agency (MPCA) staff for participating in the United States Environmental Protection Agency's (U.S. EPA's) enforcement program review of the Clean Air Act (CAA) Stationary Source, the Clean Water Act (CWA) National Pollutant Discharge Elimination System (NPDES), and the Resource Conservation and Recovery Act (RCRA) Subtitle C hazardous waste enforcement programs. We especially appreciate your staff's cooperation and assistance during this review.

Please find enclosed a final State Review Report (Report). This Report contains an Executive Summary, as well as detailed findings, recommendations, and actions concerning MPCA's enforcement programs. Region 5 utilized U.S. EPA data reports and reviews of MPCA case files in developing this final Report as well as information gained from a response from MPCA to the draft State Review Report. As you can see from the Report, both U.S. EPA and MPCA have committed to ensure follow-up actions occur in many areas.

If you have any questions or issues, feel free to contact me, or Tinka Hyde of my staff, at 312-886-9296. Her email address is hyde.tinka@epa.gov.

Sincerely,

A handwritten signature in black ink, appearing to read "Mary A. Gade".

Mary A. Gade
Regional Administrator

Enclosure

U.S. EPA – Region 5 Review of Minnesota PCA Enforcement Program
Federal Fiscal Year (FFY) 2006

August 15, 2007

A. EXECUTIVE SUMMARY

Background

The United States Environmental Protection Agency (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 other state representatives have jointly developed a method to assess state performance in the enforcement and compliance assurance program. This report reflects the review by Region 5 of the Minnesota Pollution Control Agency (MPCA) compliance and enforcement program utilizing the State Review Framework. This review has been a collaborative effort between the Region and State and captures both successes of the state's program as well as any identified areas that need improvement. Future reviews will look at performance as a comparison to the level documented in this baseline review.

The purpose of the State Review Framework assessment is to provide consistency in the level of core enforcement activity across the nation and thus in environmental protection and public health. It provides a consistent tool for Regions to use in overseeing state enforcement programs, and provides the basis for a consistent mechanism for U.S. EPA Regions to provide flexibility to states which can demonstrate an adequate core program.

The review consists of 12 critical elements which compare actual compliance and enforcement practices in the Clean Air Act (CAA) Stationary Sources Program, the Clean Water Act (CWA) National Pollutant Discharge Elimination System (NPDES) program, and the Resource Conservation and Recovery Act (RCRA) Subtitle C hazardous waste program with U.S. EPA policies and guidance. The 12 evaluation areas posed by this Framework are consistent with evaluation areas delineated in the 1986 guidance memorandum signed by Jim Barnes entitled "Revised Policy Framework for State/EPA Enforcement Agreements." Additionally, the Framework utilizes existing program guidance, such as national enforcement response policies, compliance monitoring policies, and civil penalty policies or similar state policies (where in use and consistent with national policy) to evaluate state performance and to help guide definitions of a minimum level of performance.

Process Followed in the Review

U.S. EPA, Region 5's evaluation of MPCA's core enforcement programs was conducted by staff from the Region's Air, RCRA, and Water enforcement programs using the Framework described above. Part of the review consisted of analyzing FFY 2006 data ("data metrics") regarding MPCA's enforcement programs which came from EPA's Online

Tracking Information System (OTIS). During the remainder of the review, EPA staff reviewed MPCA inspection and case files that were identified to provide a stratified random sample of inspections and case files for FFY 2006. Air reviewed 25 files, RCRA reviewed 35 files, and the Water program reviewed 32 files. The Evaluation Details section of this report contains findings of the review for each program and areas of concern - with a full explanation of these concerns along with recommendations for resolution.

Overall Findings

U.S. EPA has identified both strengths and areas for improvement in MPCA's enforcement and compliance program.

U.S. EPA has found that MPCA has the following strengths:

- MPCA's Enforcement Response Plan (ERP) gives detailed guidance for enforcement actions in all programs. Also, MPCA's use of forums gives the agency a good tool in regard to making compliance and enforcement decisions.
- In the RCRA program, MPCA has conducted the required number of Treatment, Storage, and Disposal Facility (TSDF) and Large Quantity Generator (LQG) inspections. Also, formal and informal enforcement actions are timely in accordance with the U.S. EPA Hazardous Waste Civil Enforcement Response Policy (ERP) and identification of Significant Noncompliers (SNCs) has exceeded that of the national average.
- In the Air program, MPCA exceeds the national average for completing compliance monitoring commitments. In addition, only a few reporting discrepancies were identified, leading to an overall assessment that MPCA is generally reporting the MDRs in a complete and accurate manner.
- In the Water program, MPCA has conducted the required number of major and minor inspections. Also, data shows a low SNC rate and low number of major facilities in SNC for more than 2 consecutive quarters. Finally, MPCA exceeds national expectations for entering self monitoring data (Discharge Monitoring Forms) for majors into PCS.

U.S. EPA believes that improvements are needed in certain MPCA programs, which are summarized below along with recommended corrective actions. (Not all findings and recommendations are listed here).

- Multimedia
 - U.S. EPA believes that inspection reports are often not complete in all the reviewed programs. They often lack specific detail that U.S. EPA believes is needed to support a finding of non-compliance or provide sufficient evidence necessary to support enforcement actions. MPCA does not agree that this detail is required in all cases for successful case management in Minnesota. U.S. EPA recommends, and MPCA agrees, that this issue be resolved by December 31, 2007 by one or more multi-program discussions that take into account both U.S. EPA and MPCA viewpoints and needs in regard to inspection reports. (Review Elements 2 and 3)

- RCRA and Air - the choice of an Administrative Penalty Order (APO) as an enforcement tool restricts the penalty to a maximum of \$10,000, which may not be appropriate in cases in which the severity and duration of violations require a higher penalty. MPCA should continue to discuss all enforcement options when serious violations are discovered, and Stipulation Agreements should be used when appropriate because of their ability to assess higher penalties. In response, MPCA states that it considers many variables beyond the penalty amount when it determines an enforcement action, but agrees to use the appropriate tool for violations and determine a suitable penalty, including the consideration of multi-day penalties as deemed appropriate. (Review Elements 7 and 8)
- RCRA
 - While the RCRA compliance monitoring and enforcement data in MPCA's Delta database and RCRAInfo/OTIS are closer than they ever have been, there remains room for U.S. EPA and MPCA to improve. U.S. EPA recommends, and MPCA agrees, that an ad hoc committee between U.S. EPA and MPCA be created to review the technical aspect of compliance monitoring and enforcement data translation from MPCA's Delta to U.S. EPA's RCRAInfo in order to give both agencies and the public a more accurate picture of RCRA activities in Minnesota. (Review Elements 1 and 12)
 - There is inconsistency in regard to the recording of alleged violations versus actual violations in regard to Alleged Violations Letters (AVLs) and Letters of Warning (LOWs), as well as inconsistency in determining what date to use for a violation date. This causes confusion as to the true status of cases and leads to data problems in RCRAInfo. U.S. EPA recommends that MPCA develop a procedure to classify the status of a violation (alleged or actual) and determine a consistent method by which to date a violation in Delta and RCRAInfo. MPCA concurs that this is an item of concern and recognizes the need for data entry policies and practices which provide for consistent and accurate enforcement case information to be translated across agencies.
- Air
 - MPCA is not reporting the noncompliance status for non-high priority violators (HPVs), and it is unclear in reviewing files whether a determination of HPV or non-HPV has been made in several cases. U.S. EPA recommends that HPV and non-HPV cases are designated as such in their files and properly reported to the Air Facility System (AFS). (Review Element 4)
 - Data from OTIS shows that a high number of HPVs are not addressed in a timely manner, although MPCA is achieving better than the national average in this area. U.S. EPA recommends that MPCA re-examine HPV enforcement activities for improvements in timeliness. (Review Element 6)

- Water
 - Based on reviewed case files, it is not clear that informal and formal enforcement actions are bringing sources back into compliance within a stated time frame. U.S. EPA recommends that the MPCA ERP be revised to ensure that the proper follow-up be made in cases where a facility does not return to compliance. (Review Element 5)
 - MPCA is not reporting all currently defined minimum data requirements (MDRs) into the Permit Compliance System (PCS) in a timely, accurate, and complete manner. It is anticipated that U.S. EPA will issue a new Policy Statement in early summer that specifies minimum data requirements for ICIS-NPDES, a database that supplants PCS. As part of this Policy Statement, the states will be required to develop transition plans that will, in part, specify deadlines for including all required data elements in ICIS-NPDES. U.S. EPA will review the MPCA transition plan to ensure it includes provisions for entering all required data elements, including those elements noted above, should they continue to be required under the new Policy Statement. As some of the current data elements may not be required under the new policy statement, and as the state will have to do extensive reprogramming to transfer all required data to PCS and then again perform reprogramming to transfer the data to ICIS-NPDES, the Region believes that the best course of action is for the state to continue to ensure all required data is recorded in Delta so that it can be efficiently transferred to ICIS-NPDES. This course of action may result in the Region requesting certain data pulls from the state data system, until the transition plan is fully implemented. (Review Elements 10, 11, and 12)

Recommendation Note: At times in this report, reference is made to the updating of MPCA's ERP or other related policies. U.S. EPA requests that updates be sent to the appropriate Region 5 contacts in this report for review.

B. INFORMATION REGARDING MPCA

Structure

MPCA has approximately 800 staff who work at eight offices throughout Minnesota. The state is broken up into six regions: North Central, Northeast, Northwest, Southeast, Southwest, and Metro. The agency receives operating guidance from:

- MPCA Citizens' Board. The Board sets agency policy and direction and takes action on certain other significant or controversial issues
- MPCA Commissioner. Under the authority of delegations from the MPCA Citizens' Board, the commissioner directs the day-to-day work of the agency's staff.

The Compliance and Enforcement activities are organized under the Municipal, Industrial, and Regional Divisions of MPCA. The Industrial Division operates the agency's core air quality and hazardous waste regulatory programs which work with large and small facilities to ensure they are in compliance with regulations. Water Quality compliance activities are split and fall into the Industrial, Municipal, and Regional Divisions. This split attempts to better serve the regulated community, including large municipalities and industry in programs such as feedlots, construction storm water, and individual septic treatment systems.

Delta Data System

MPCA's Delta system serves as the Agency's compliance and enforcement database. Delta facilitates the issuance of permits and tracks the Agency's compliance and enforcement activities. Data from Delta is manually transferred on a regular basis into U.S. EPA's program databases.

MPCA Enforcement Procedures

The severity of the enforcement action depends on the potential for harm, environmental impact of the violation, the extent of deviation from compliance, the history of the regulated party, the extent of economic benefit, and how quickly the problem is corrected, among other factors.

Several types of actions, as described in MPCA's Enforcement Response Plan (ERP), are available. Actions that are specifically mentioned in, or affect, this report are described below:

- Administrative Order (AO) – An enforceable document issued by the MPCA that describes a noncompliance situation and lists requirements to resolve the noncompliance. An AO is different from an Administrative Penalty Order (APO) in at least three important respects: (1) an AO may specify corrective action that takes more than 30 days to complete; an APO usually cannot specify action that exceeds the 30 day limit; (2) no penalty can be assessed in an AO; an APO can assess a penalty; and (3) after issuance, an AO can be appealed by the Regulated Party in the Court of Appeals.

- Administrative Penalty Order (APO) - An enforceable document issued by the MPCA that requires a regulated party to take and complete all corrective actions within 30 days and pay a penalty, which may be forgiven if the action is taken in the time and manner required. APOs for which penalties may be forgiven are referred to as “Forgivable APOs.” APOs for which penalties are not forgiven are referred to as “Nonforgivable APOs.” A portion of a penalty may be forgiven as well, and these APOs are called “Combination APOs.” The MPCA Commissioner has statutory authority to issue an APO assessing a penalty up to a maximum of \$10,000 for all violations identified during an inspection or other compliance review.
- Alleged Violations Letter (AVL) - Before being issued to a Regulated Party, nonforgivable, forgivable, and combination APOs are usually preceded by an Alleged Violations Letter (AVL), which contains a written allegation including a description of the violations observed by enforcement staff during an inspection or found by staff in conducting a file review. AVLs may request corrective action(s) and they document the MPCA’s allegation of violation(s). The Regulated Party is usually given ten days to disagree with the allegations.
- Letter of Warning (LOW) - A notice sent to the Regulated Party to document violations discovered during an inspection, complaint follow-up or review of submittals. The LOW may also require the Regulated Party to complete specific corrective actions to return the facility to compliance. When corrective action is required, the LOW usually gives the Regulated Party from 7 to 30 days to complete it.
- Notice of Violation (NOV) - A notice issued to a Regulated Party to document violations that are more serious or more numerous than those that are typically addressed in a LOW, or for cases that require corrective actions which take more than 30 days to complete and thus could not be resolved through an APO. NOVs do not contain a monetary penalty, although a subsequent document may do so.
- Notice of Noncompliance (NON) (Air Quality Performance Test Violations Only) - A notice to the Regulated Party which documents violations identified by a performance test. It is essentially a Notice of Violation that has been standardized for failed performance tests. It usually does not resolve the noncompliance; rather, it notifies the Regulated Party of the noncompliance and start timelines prescribed in Minnesota rules.
- Stipulation Agreement (STIP) - Negotiated settlements commonly used when violations are serious enough to warrant a civil penalty greater than \$10,000 or when a penalty is less than \$10,000, but the corrective actions needed to correct the problem will take more than 30 days to complete. In the latter case, an APO cannot be used. Stipulation agreements include a schedule the violator must follow to return to compliance with applicable regulations. Statutory limits on penalties established in Minnesota Statutes used for stipulation agreements are \$25,000 per day of violation in Hazardous Waste and \$10,000 per day of violation in all other media.
- Schedule of Compliance (SOC) - A negotiated settlement between the MPCA and the Regulated Party commonly used to resolve a noncompliance situation that does not require the upfront payment of a civil penalty for the initial noncompliance. For

example, an SOC may be used to extend a Regulated Party's performance testing schedule. While an SOC does not include upfront civil penalties, it does include stipulated penalties for failure to follow the SOC.

- Referral - Some violations can be referred to U.S. EPA for enforcement. A referral to U.S. EPA may be made if attempted negotiation of a stipulation agreement breaks down completely and the prospect of resolution at the state level is unlikely. Also, if the case involves Native American lands, national precedents, federal regulations with no parallel state rules, or interstate or U.S. EPA national initiatives, the MPCA may request federal intervention to facilitate resolution.
- Consent Decree - One way to resolve a case that has resulted in litigation is to use a Consent Decree, which is a negotiated agreement between the MPCA and a Regulated Party that is also signed by a judge who has been asked to take jurisdiction of the case settlement and entered as an order of a court (i.e., a decree of the court to which the parties consent). A Consent Decree states how the dispute between the MPCA and the Regulated Party is to be resolved, ordinarily this will include an obligation to pay penalties and to undertake corrective action within a specified time.
- Civil Legal Action - Another enforcement tool is to initiate civil legal action against a violator of rules, statutes, or permit conditions. In most cases, this is done after all other administrative efforts proved unsuccessful. In those cases where serious violations have occurred and the company is unwilling to enter into any comprehensive settlement (Stipulation Agreement, Compliance Agreement, or Corrective Action Agreement), or if a company signs an agreement but then refuses to comply with the terms, civil legal action may be necessary. Civil penalty authority has been granted to the MPCA which allows penalties to be assessed at \$10,000 per day of violation for all violations except for violations in hazardous waste, where penalties can be assessed at \$25,000 per day of violation. There is no maximum.
- Criminal Legal Action - Minn. Stat. ch. 115.071, subd. 2, grants the authority to pursue criminal legal action against companies or individuals who willfully or negligently violate an environmental standard, rule, variance, order, stipulation agreement, schedule of compliance, or permit. Criminal cases are handled by the MPCA case lead, the Criminal Division of the Office of the Attorney General, or the County Attorney and local authorities (sheriff, etc.) in the jurisdiction where the violation(s) occurred. Once sufficient evidence is gathered, a criminal complaint is filed in the District Court where the violations occurred. In Minnesota, the counties are given the first option to prosecute criminal cases.

As part of the compliance determination and enforcement response, a forum is convened. The MPCA uses the forum process to ensure consistency and promote group decision-making in a consensus-based approach to enforcement. A forum is an informal meeting held by MPCA staff and counsel to evaluate a noncompliance situation and select an appropriate enforcement response. The forum group consists of the inspector(s), experienced program staff and peers, supervisors, legal counsel, and others as pertinent to the case. Forums are generally used for cases where a Notice of Violation or other elevated enforcement actions are deemed appropriate. Forums are also used to conduct and

determine appropriate penalty calculations. A Case Development Form (CDF) and a Penalty Calculation Worksheet (when appropriate) is generated for each forum and is transferred to the enforcement file to document information and decisions relevant to the case.

C. EVALUATION DETAILS

Program Evaluated: RCRA Subtitle C

Information Sources Included in the Review:

1. Memorandum of Agreement, the State of Minnesota and the United States Environmental Protection Agency, June 4, 1991.
2. Minnesota Pollution Control Agency, Hazardous Waste Division, Hazardous Waste Enforcement Strategy, December 1991.
3. Minnesota Pollution Control Agency Enforcement Response Policy, various dates.
4. Environmental Performance Partnership Agreement, Minnesota Pollution Control Agency, U.S. Environmental Protection Agency, Region 5, October 1, 2004 – September 30, 2006, FFY 2005 – 2006, September 27, 2004.
5. OTIS Data pull, December 27 and 28, 2006.
6. 35 MPCA individual RCRA Enforcement Program files.
7. OTIS data-pulls for MPCA individual files, January 18, 2007.
8. RCRAInfo data-pulls for MPCA individual files, January 18, 2007.
9. Revised RCRA Inspection Manual, 1998.
10. U.S. EPA RCRA Civil Penalty Policy, June 2003.
11. Office of Enforcement and Compliance Assurance (OECA) National Program Manager Guidance (NPM) for FY 2006.
12. U.S. EPA Hazardous Waste Civil Enforcement Response Policy, dated December, 2003.

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Period Covered: Federal Fiscal Year 2006

Introduction

The review of MPCA's RCRA enforcement program included a review of a data metrics report pulled from U.S. EPA's Online Tracking Information System on December 12, 2006, and a review of MPCA's enforcement and compliance files that occurred from January 22 to 24, 2007, at the MPCA headquarters location in St Paul, Minnesota, as well as reports pulled from RCRAInfo.

MPCA provided a total universe of 547 files from FFY 2006, from which U.S. EPA could

select. The recommended selection protocol in state review guidance for a universe of 300 to 700 files suggested choosing a range of 20 - 35 files for review. U.S. EPA selected 35 files to represent a stratified random sample reflecting a mix of enforcement types from informal to formal enforcement actions, facility generator size including very small quantity generators (VSQG) to large quantity generators (LQG), and treatment, storage and disposal facilities. These files were split between 18 inspection files and 17 enforcement files per the state review guidance.

With the approval of U.S. EPA, MPCA exchanged two files due to the fact they were ongoing MPCA enforcement actions. One file was an active NOV, the other a compliance evaluation inspection (CEI), both open cases requiring the files to remain in the possession of the case developer during the file review timeframe. MPCA replaced the two files with files that reflected the same type of inspection and the same type of enforcement action.

Section 1: Review of State Inspection Implementation

- 1. The degree to which a state program has completed the universe of planned inspections (addressing core requirements and federal, state and regional priorities).**

Findings:

Treatment, Storage, and Disposal Facilities (TSDFs):

In accordance with Section 3007(e)(1) of the Resource Conservation and Recovery Act, 100% of all TSDFs must be inspected over two years. According to the OTIS data metrics report, MPCA and U.S. EPA have inspected a combined number of 17 of these sources over FY 2005 and FY 2006 under a workshare agreement between U.S. EPA and MPCA. Since MPCA reports that three of the 20 sources reported as the universe by OTIS are no longer operating TSDFs, MPCA and U.S. EPA have met the goal of inspecting 100% of the sources. The national average of TSDF inspections is 94.2%.

Large Quantity Generators (LQG) – Annual Inspections:

Per Office of Enforcement and Compliance Assurance (OECA) National Program Manager Guidance (NPM) for FY 2006, 20% of the LQG universe must be inspected each year. Although OTIS reports a universe of 302 LQGs, MPCA reported to U.S. EPA a LQG universe of 240 for FY 2006. U.S. EPA agreed to this universe as the benchmark for the Performance Partnership Agreement (PPA) negotiations for FY 2006. Also, MPCA reported to U.S. EPA that they have conducted 36 LQG Compliance Evaluation Inspections (CEIs), not 47 as reflected in OTIS. Additionally, U.S. EPA conducted 12 LQG CEIs, not 16 as reflected in OTIS. Based on this information, U.S. EPA and MPCA have inspected a combined number of 20.00% (48 out of a universe of 240) of these sources in FY 2006 under a workshare agreement between U.S. EPA and MPCA, thereby meeting the national goal. The national average of LQG inspections is 17%.

Large Quantity Generators (LQG) – 5 Year Inspection Coverage:

Per OECA NPM Guidance for 2006, 100% of the LQG universe should be inspected over a five year period. According to the data metrics, U.S. EPA and MPCA have inspected a combined number of 231 of these sources over FY 2002 – FY 2006 under a workshare agreement between U.S. EPA and MPCA. In actuality, MPCA has reported 170 LQG inspections in the last five years and EPA has reported 74, for a total of 244 inspections. This exceeds the 240 universe mentioned above (due to fluctuations in the universe over time) and meets the goal of 100% coverage. The national average of LQG inspections over the five years is 45.5%.

There are also LQGs in the state which have not been inspected within five years, but they are believed to be new LQGs which have elevated to this generator status within the last five years.

Metro Counties: The metro counties of Minnesota (Minneapolis-St. Paul area), including Anoka, Carver, Dakota, Hennepin, Ramsey, Scott, and Washington have their own pre-RCRA (1979) hazardous waste programs that execute county authorities delegated to the counties by state statute. Each metro county has also adopted the Minnesota hazardous waste rules by ordinance.

Metro county programs work in partnership with, and with assistance from, the MPCA to develop and implement consistent and appropriate compliance inspections and enforcement actions. However, inspections conducted by these counties are currently not counted by MPCA or U.S. EPA as part of the hazardous waste program in Minnesota. MPCA is now working with the counties and U.S. EPA to formally acknowledge the inspections and present a truer picture of Minnesota hazardous waste facility compliance.

MPCA has formally requested that current and future LQG inspections conducted by the counties be counted toward the MPCA one-year and five-year requirements of LQG inspections. This would allow MPCA to use a fraction of its resources currently allocated to LQG inspections for other inspections or activities. MPCA and U.S. EPA are currently discussing the available options under this request.

Information Sources Used for this Element: 4, 5, 6, and 11.

Recommendations and Actions: U.S. EPA commends MPCA for meeting national goals for TSDF and LQG inspections. However, during the review, it was noted that Delta, RCRAInfo, and OTIS do not reflect the same universe and number of TSDF and LQG inspections. These discrepancies must be corrected, and U.S. EPA and MPCA must review procedures for inactivating RCRA sites in Delta and RCRAInfo to ensure the RCRAInfo active universe is correct. U.S. EPA recommends that an ad hoc committee be organized to review the technical aspect of compliance monitoring and enforcement data translation from MPCA's Delta to U.S. EPA's RCRAInfo in order to give both agencies and the public a more

accurate picture of RCRA activities in Minnesota. This review would address all data discrepancies listed in this report. U.S. EPA recommends a start date of October 1, 2007, with a goal of synchronizing all systems by September 30, 2008.

As stated above, U.S. EPA and MPCA are currently discussing options in regard to county inspections that are currently being conducted or may be in the future.

2. The degree to which inspection reports and compliance monitoring reviews document inspection findings, including accurate description of what was observed to sufficiently identify violations.

Findings: Of the 35 inspection reports reviewed, 14 (40%) of the reports were deemed to be complete with regard to U.S. EPA guidance. According to this guidance, inspection reports are considered complete if they contain: 1) a narrative that clearly explained and supported observations and findings during the inspection; 2) a completed checklist if the inspection was a compliance evaluation inspection (CEI); and 3) photographic evidence or other documentation if necessary to support observations and findings. This standard was chosen to remain consistent with guidance in the Revised RCRA Inspection Manual, 1998.

In regard to U.S. EPA guidance, the remaining 21 files were deemed incomplete because they were missing narratives. Of the 14 files with narratives, all of these were undated and unsigned by the authors.

Inspection reports often lack a narrative as well as signatures and/or dating which U.S. EPA believes is needed as evidence necessary to support enforcement actions. MPCA states that its inspections utilize a combination of preinspection reports, inspection checklists, pictures, inspection notes, Case Development Forms, Penalty Calculation Worksheets, and occasionally inspection narratives to document the vast array of cases managed by compliance and enforcement staff across all media. It is MPCA's position that this package of information has served MPCA well over the years to document violations and to record a defensible position from which to manage cases on many levels, therefore MPCA believes that there is no need for narratives with signatures and/or dating for a majority of inspections. U.S. EPA does not agree with MPCA's position.

Information Sources Used for this Element: 6 and 9.

Recommendations and Actions: U.S. EPA recommends, and MPCA agrees, that what should be contained in an inspection report be resolved by December 31, 2007 by one or more multi-program discussions that take into account both U.S. EPA and MPCA viewpoints and needs in regard to reports.

3. The degree to which inspection reports are completed in a timely manner.

Findings: State Review Framework program guidance for this Element connects a report written in a timely fashion with meeting the requirement in the U.S. EPA Hazardous Waste Enforcement Response Policy (ERP) that a violation determination be made within 150 days of the inspection.

MPCA does not have a requirement in the MPCA ERP for an inspection report to be completed in a certain time period. MPCA states that it has more often focused on the timeliness of an enforcement action and has laid out timeline goals for steps in most enforcement actions. Based on this and based on the fact that MPCA does not use a dated narrative for inspection reports, U.S. EPA does not have a metric to measure for this Element.

Information Sources Used for this Element: 3, 6, and 9.

Recommendations and Actions: U.S. EPA recognizes the timeliness goals that MPCA has set for its enforcement cases, but recommends that MPCA establish a specific timeframe for completion of an Inspection Report. This time frame should be created and entered into policy by December 31, 2007. The topic of dating inspection reports will be part of the U.S. EPA/MPCA discussions mentioned in Element 1.

Section 2: Review of State Enforcement Activity

4. The degree to which significant violations and supporting information are accurately identified and reported to EPA national databases in a timely and accurate manner.

Findings: U.S. EPA's ERP establishes two categories of violators under its classifications for noncompliance: Secondary Violator (SV) and Significant Non-Complier (SNC). A SNC determination is reserved for significant violations and should be addressed through formal enforcement. The ERP states that a SNC or SV determination is considered timely if it is completed within 150 days of Day 0 (1st day of the inspection) and entered into the RCRAInfo database as soon as possible.

According to the OTIS data metrics report, 4.7% of sites (14 sites) inspected by MPCA during FY 2006 were determined to be Significant Non-Compliers (SNCs). MPCA reports that the number of identified SNCs is actually 16, raising the rate to 5%. In either case, MPCA exceeds the national average of 3%. In regard to the timeliness of the SNC determinations, the Data Metric (4b) is not yet available for evaluation under this element.

Of the 35 files reviewed, 29 files were deemed relevant to this metric because MPCA found noncompliance. MPCA made the classification for noncompliance for all 29 files.

Of the 29 for which MPCA undertook the classification for noncompliance, 28 had appropriate classifications of noncompliance, and 20 had timely reporting into the RCRAInfo database. In one case, MPCA misclassified the violator as SV instead of SNC, and thus was neither timely nor accurate. In 8 of the 28 files where the classification of noncompliance was revealed to be appropriate, the data was never reported into RCRAInfo and therefore was not timely (28.6%). Possible causes for the untimely reporting to RCRAInfo are a failure of inspectors to record all violations present in the file in Delta (or to document the removal of a violation in the file), and/or a failure of translation from Delta to RCRAInfo.

Of the SVs, violation determination dates for Alleged Violation Letters (AVLs), Letters of Warning (LOWs), and Notices of Violations (NOVs) are inconsistent in the MPCA files and in RCRAInfo. The dates entered in RCRAInfo are not always the same dates indicated in the MPCA case files. MPCA may use the date of the inspection or the date of the forum as the violation determination date. MPCA may also use the date of the AVL or the date of the forum as the violation determination date. Additionally, it is not clear when violations that are alleged in AVLs were determined to have been such. Nor is it clear how they are documented and dated if a NOV is not used to document them. Accurately recording violations is important because it assures that MPCA, U.S. EPA, and the public all have access to data that truly represents the status of an inspected entity.

In addition, MPCA inspectors have stated to U.S. EPA that LOWs are also used to document *alleged* violations. As a result, when the violations are found to be unsubstantiated, MPCA inspectors remove the violations from Delta causing SV letters to exist in RCRAInfo without a link to any violation(s). This is not consistent with the MPCA ERP, which states that, "A Letter of Warning is a notice sent to the Regulated Party to document violations discovered during an inspection, complaint follow-up or review of submittals." U.S. EPA interprets this to mean that only actual violations should be documented with this enforcement action. Therefore, violations listed in a LOW (or NOV) should not be removed from Delta when found to be unsubstantiated, as is the current practice, but instead should be entered as returned to compliance in Delta for translation to RCRAInfo. This will prevent the existence of SV actions in RCRAInfo without violations linked to the actions.

Information Sources Used for this Element: 3, 5, and 6.

Recommendations and Actions: To ensure identification and timely reporting of significant violations, MPCA and U.S. EPA should ensure that translation between Delta and RCRAInfo is as accurate as possible (see recommendation to Element 1). As part of this, MPCA and U.S. EPA should develop a method to remove violations that do not exist in Delta from RCRAInfo, and a method to return violations to compliance in RCRAInfo that are no longer open in Delta. MPCA should also ensure that all violations pertaining to a case are entered into Delta.

In addition, MPCA should develop a procedure by September 30, 2007, to document the determination date of actual violations after evaluating the information received in response to the alleged violations handled through the use of an AVL by September 30, 2007.

Similarly, MPCA should immediately discontinue the practice of removing violations from Delta that are documented in a LOW or NOV. This will prevent the existence of informal enforcement actions for SVs without violations being linked to the actions in RCRAInfo.

MPCA recognizes that differences between the federal and MPCA data entry policies exist and that those differences have significant implications. They include both the accurate portrayal of enforcement case status, public information policy, and potential case considerations such as defining enforcement history at a given company or responsible party. MPCA will work with U.S. EPA toward developing appropriate solutions to this recently identified concern.

5. The degree to which state enforcement actions include required corrective or complying actions (injunctive relief) that will return facilities to compliance in a specified time frame.

Findings: Of the 33 enforcement cases that were reviewed, 17 were handled through informal enforcement for SVs, including LOWs in 11 cases, NOVs in four cases, and Administrative Penalty Forgivables (APFs) in two cases. (The 33 enforcement cases exceeds the number of enforcement files selected for this review as a result of cases that were reviewed as part of the selected inspection files). All 17 cases handled through these informal enforcement actions resulted in compliance achieved within the 240 day time frame stated in the U.S. EPA Hazardous Waste Civil Enforcement Response Policy (ERP).

Thirteen enforcement cases, all but one designated SNC (the one later determined to be a SNC as a result of this review), were handled through formal enforcement by use of other Administrative Penalty Orders (APOs) or Stipulation Agreements (STIPs), including 11 APOs, of which eight were Combination Forgivable/Non-Forgivable Administrative Penalty Orders (APCs) and two were Non-Forgivable Administrative Penalty Orders (APNs). The three remaining enforcement cases were handled by the use of STIPs; one case is closed, and two cases are still unresolved/open. All of the closed cases included proper injunctive relief and compliance was achieved within the time frame stated in the ERP. For the two unresolved/open cases it was impossible to measure them against this metric as they were in process and U.S. EPA is unable to evaluate what may be done.

Although this is not an issue for this review, U.S. EPA notes that the MPCA ERP does not restrict the use of APFs to only SVs, but allows for their use for SNCs as well. U.S. EPA considers the use of APFs for SNCs to be inappropriate.

Information Sources Used for this Element: 3, 5, and 6.

Recommendations and Actions: MPCA should continue the practice of requiring corrective or complying actions (injunctive relief) that will result in violators achieving compliance in accordance with the specified timeframe in the U.S. EPA ERP. In addition, MPCA should review the two unresolved cases to ensure proper closure or to add missing documentation to the file.

6. The degree to which a state takes timely and appropriate enforcement actions, in accordance with policy relating to specific media.

Findings: The data metrics for timeliness are not yet available for evaluation under this element. The ERP requires all unilateral formal enforcement actions to be completed by Day 240 (240 days after the 1st day of the inspection [Day 0]), and all referrals to the Department of Justice/State's AGO or entrance into final orders with the violator to be completed by Day 360. However, the ERP allows these limits to be exceeded for 20% of the cases when justified.

In regard to the 13 files reviewed in which SNC determinations were made, none was addressed using MPCA's informal enforcement procedure.

In 13 files that were addressed with formal administrative actions, two remain open. Of the 11 closed files, 10 of these actions (91%) were appropriate because they were addressed with APOs that assessed proper penalties for the severity and number of violations. One action was not deemed by U.S. EPA to be appropriate because the formal administrative action should have been a STIP instead of an APO because EPA believes the nature of the violations in this case substantiated a potential penalty exceeding \$10,000. By state statute, MPCA is limited in its use of APOs to a total penalty of \$10,000, whereas with STIPs, MPCA could recover up to \$25,000 for the gravity component and up to \$25,000 per day for the multi-day component, including an amount for economic benefit.

MPCA states that as a matter of policy, it considers multi-day penalties and has utilized them as appropriate. In the one action discussed above, MPCA did not feel that the multi-day component was appropriate to the hazardous waste generator in question, given its obvious intent to not be a permitted facility, its small size, and the nature of the violations. The MPCA believed a sufficient penalty was sought and collected to recover any economic benefit and to deter future noncompliance.

All of these actions (100%) were timely because they were completed within 240/360 days of Day 0. As stated in Element 4, MPCA misclassified one SNC as an SV. However, MPCA did address this case with a formal enforcement action.

Information Sources Used for this Element: 3, 5, and 6.

Recommendations and Actions: MPCA should continue to conduct timely and appropriate enforcement actions on all identified violators in accordance with the U.S. EPA ERP.

7. The degree to which a state includes both gravity and economic benefit calculations for all penalties, using the BEN model or similar state model (where in use and consistent with national policy).

Findings: Of the 15 formal enforcement actions reviewed that contained monetary penalties, 13 (87%) included documented calculations for the gravity and economic benefit portions of the penalty or statements as to why economic benefit was not considered. One file did not contain documented penalty calculations of any kind; the other file contained a documented penalty calculation that did not appear to consider economic benefit.

During discussions with MPCA enforcement staff, U.S. EPA confirmed that MPCA has the practice of selecting the enforcement tool, often an APO for formal actions, prior to conducting a penalty calculation, but is limited to a penalty cap of \$10,000 as discussed in Element 6. However, it is understood by MPCA case developers that if the penalty calculation exceeds the statutory penalty cap for APOs, the case developer will reconsider the use of the tool and discuss with management the use of a stipulation agreement.

Information Sources Used for this Element: 6

Recommendations and Actions: While 87% of the files had penalty calculations, MPCA should include calculations of assessed penalties as part of each enforcement file. This could be achieved through a penalty calculation worksheet, briefing memorandum, or both. In addition, MPCA should continue its policy of calculating the economic benefit for enforcement cases where appropriate. For those situations in which MPCA does not feel an economic benefit consideration is appropriate, it should document the rationale in the enforcement case file. These changes should be implemented by September 30, 2007.

The choice of an Administrative Penalty Order (APO) as an enforcement tool restricts the penalty to a maximum of \$10,000, which may not be appropriate in cases in which the severity and duration of violations require a higher penalty. MPCA should continue to discuss all enforcement options when serious violations are discovered, and Stipulation Agreements should be used when appropriate because of their ability to assess higher penalties. In response, MPCA states that it considers many variables beyond the penalty amount when it determines an enforcement action, but agrees to use the appropriate tool for violations and determine a suitable penalty, including the consideration of multi-day penalties as deemed appropriate.

8. The degree to which penalties in final enforcement actions include economic benefit and gravity in accordance with applicable penalty policies.

Findings: According to the OTIS data metrics report, MPCA assessed a total of \$48,177 in penalties during FY 2006. According to MPCA records, MPCA assessed \$149,025 in penalties which includes \$45,607 forgivable penalties (APO), \$72,218 non-forgivable penalties (APO), and \$31,200 civil penalties (STIPs). 87% of MPCA formal enforcement actions included some penalty compared to the national average of 43%. 100% of MPCA *final* enforcement actions included some penalty, compared to the national average of 81%.

As discussed under Element 7, penalty calculation and documentation are areas where improvement is warranted.

In regard to penalty collections, of the 15 files reviewed where a penalty was due, 13 files contained documentation of penalties collected or scheduled to be collected. Two did not have documentation supporting the penalty calculations and subsequent collection.

Information Sources Used for this Element: 6.

Recommendations and Actions: See the recommendation for Element 7. MPCA should also continue to document collection of penalties in case files.

Section 3: Review of Annual Commitments

9. The degree to which enforcement commitments in the PPA/PPG categorical grants (written agreements to deliver a product/project at a specified time) are met and any products or projects are completed.

Findings: Region 5 considered MPCA performance under its FY 2006 Performance Partnership Agreement (PPA). In FY 2006, MPCA and U.S. EPA committed to the following activities:

Activity	Page	Complete?
MPCA and USEPA will conduct an annual face to face discussion between EPA and MPCA leadership including program Division Directors	6	Yes
MPCA and USEPA prepare and retain an annual written summary of the joint assessment	6	Yes
MPCA and USEPA will ensure Compliance and Enforcement activities are included in the detailed State program plans.	6	Yes
USEPA will perform an on-site audit (review) of MPCA's enforcement program in 2006 (now 2007)	7	Yes
MPCA will implement the hazardous waste disposal coupon program	26	Yes

MPCA will conduct 80 RCRA inspections at SQGs ¹	28	Yes
MPCA will conduct 100 compliance assistance visits at VSQGs ²	28	Yes
MPCA will inspect 50% of TSDFs	28	Yes
MPCA will inspect 10% LQGs	28	Yes
MPCA will manage the data collected on Hazardous Waste Generators	28	Yes
MPCA will coordinate policy with Metropolitan Counties	28	Yes
MPCA will ensure all required data is correct and entered in accordance with State and federal commitments ³	28	See Note 3

¹ OTIS reports 88 SQG inspections on September 19, 2006.

² OTIS reports 134 VSQG inspections on September 19, 2006.

³ Some enforcement data entered in MPCA's Delta are not always translated into RCRAInfo (e.g., open violations in RCRAInfo which are already closed in Delta).

Based on this data, MPCA achieved its intended inspections at TSDFs, LQGs, SQGs and VSQGs.

Information Sources Used for this Element: 4.

Recommendations and Actions: See Element 1 in regard to recommendations for data in Delta and RCRAInfo.

Section 4: Review of Database Integrity

10. The degree to which Minimum Data Requirements are timely.

Findings: The U.S. EPA ERP requires that determinations be entered into RCRAInfo as soon as possible, but no later than 150 days from Day 0 (1st day of the inspection). To measure this standard of timeliness, the OTIS data metrics have flagged SNC entries made greater than 60 days after designations.

According to the OTIS data metrics report, 0% of the SNC determinations entered into RCRAInfo were entered more than 60 days after the determination was made. Using the standard of timeliness mentioned above, MPCA has been timely in SNC inputs 100% of the time during this reporting period.

Out of the 13 enforcement files with SNC determinations that were reviewed, 5 were not entered into RCRAInfo at all and were therefore not timely. Of the remaining 8, all were entered into RCRAInfo in less than 60 days after the determination was made.

Information Sources Used for this Element: 5, 6, and 7.

Recommendations and Actions: MPCA should ensure data entry into RCRAInfo related to compliance monitoring and enforcement activities is completed in accordance with the U.S. EPA ERP timelines. This practice should begin immediately.

11. The degree to which Minimum Data Requirements are accurate.

Findings: According to the OTIS data metrics report, none of the SNC determinations made by MPCA in FY 2006 occurred on the date, or within one week, of the issuance of the formal enforcement action. This is the desired result, which follows the requirement in the U.S. EPA ERP that SNC determinations should not be withheld until the formal action is completed.

Of the 35 compliance monitoring and enforcement files reviewed, 26 of the files revealed RCRAInfo data reporting errors (e.g. the date of the inspection, date of determination, date of return to compliance).

Also, the following issues were found in regard to Delta and its transfer of data to RCRAInfo:

1. Violations that are no longer open in Delta still exist as open violations in RCRAInfo.
2. LOWs and AVLs currently include alleged violations that can be removed from Delta. However, these alleged violations become actual violations when translated to RCRAInfo, and sometimes remain in RCRAInfo after violations have been removed from Delta. This leads to informal enforcement actions that are not linked to any violations because the violations no longer exist in RCRAInfo.
3. MPCA enters various dates into Delta for actual violations. Enforcement staff may use the date of the inspection, the date of the LOW, AVL or NOV, and at times, a date for reasons that cannot be determined from the case file. This leads to inconsistency in how a violation date is determined.

Information Sources Used for this Element: 3, 5, 6, and 7.

Recommendations and Actions: See recommendations for Elements 1 and 4.

12. The 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 purpose of the OTIS data metrics under this Element are to report to the State selected universe and action counts from OTIS and ensure that the State and U.S. EPA agree with the information in the national database. If there is a

disagreement about the counts, further evaluation should be performed to determine the source of the discrepancy.

On December 28, 2006, MPCA was provided the OTIS data metrics for all applicable Elements, including Element 12. MPCA responded with comments to the USEPA numbers. These items are listed below.

Table 1: Counts for Element 12 for FY 2006 (According to Data Metrics)

Description of Data	U.S. EPA RCRA Info Count	U.S. EPA OTIS Count	MPCA Delta Count
12.a. # of operating TSDFs	21	20	17
12.a. # of active LQGs	274	302	240
12.a. # of active SQGs	7,446	7,459	1,750
12.a. # of all other active Handlers in RCRA Info	17,035	17,581	18,388
12.b. # of inspections CEI	297	299	319
12.b. # of facilities inspected CEI	293	295	317
12.c. # of facilities with violations	214	667	
12.d. # of facilities receiving a State NOV	9	19	212 ¹
12.d. # of State NOVs issued	9	19	212 ¹
12.e. # of new facilities in SNC status	8	14	16
12.e. # of facilities in SNC status	14	26	13
12.f. # of facilities with formal actions	8	8	25
12.f. # of formal actions	8	8	27
12.g. Total penalties assessed		\$48,177	\$149,025 ²

¹ 212 total NOVs includes 60 Compliance On-Site Letters, 75 LOWs, 27 AVLs, and 49 NOVs.

² \$149,025.00 includes \$45,607 forgivable penalties (APO), \$72,218 non-forgivable penalties (APO), and \$31,200 civil penalties (STIPs).

Information Sources Used for this Element: 5, 6, 7, 8, 11, and 12.

Recommendations and Actions: See recommendation for Element 1.

Program Evaluated: CAA

Information Sources Included in the Review:

1. Minnesota Pollution Control Agency Enforcement Response Plan (MPCA ERP)
2. Environmental Performance Partnership Agreement (EnPPA), Minnesota Pollution Control Agency, U.S. Environmental Protection Agency Region 5.
3. MPCA Compliance Monitoring Strategy (CMS).
4. MPCA Organizational Chart.
5. MPCA Delta Inspection Report Compliance Status Definitions and Compliance Determination Guide.
6. MPCA files located at MPCA Air Quality Compliance and Enforcement Unit, Headquarters Office in St. Paul, Minnesota.
7. U.S. EPA Guidance, "Issuance of the Clean Air Act Stationary Source Compliance Monitoring Strategy (CMS)," April 25, 2001.
8. U.S. EPA Guidance, "The Timely and Appropriate (T&A) Enforcement Response to High Priority Violations (HPVs)," June 23, 1999.
9. U.S. EPA Guidance, "Clean Air Act Stationary Source Civil Penalty Policy," October 25, 1991, and "Clarification of the Use of Appendix I of the Clean Air Act Stationary Source Civil Penalty Policy," July 23, 1995.
10. U.S. EPA Guidance, "Final FY2006 Update, National Program Managers' Guidance, Office of Enforcement and Compliance Assurance", June 2005, revised October 2005.
11. U.S. EPA Guidance, "Clean Air Act Stationary Sources Program Guidance and File Review Metrics", June 24, 2005.
12. OTIS State Review Framework Drill Down, CAA Metrics.
13. U.S. EPA Compliance Monitoring Strategy Evaluation form.
14. Air Facility System (AFS) National Database.
15. U.S. EPA AFS Information Collection Request (ICR) approved July 2005.
16. U.S. EPA Guidance, "State Review Framework Workshop Notebook," April 3 and 4, 2006.
17. MPCA Training and Procedures Manual.

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Period Covered: Federal Fiscal Year 2006

Introduction:

The review of MPCA's Air Quality Compliance and Enforcement Unit included a review of a data metrics report pulled from U.S. EPA's Online Tracking Information System on December 21, 2006 and a review of Minnesota Pollution Control Agency (MPCA) enforcement and compliance files that occurred on January 23 through 25, 2007, at the MPCA Headquarters Office in St. Paul, Minnesota.

MPCA provided a universe of 169 air enforcement cases, 32 multimedia enforcement cases, and 204 air inspection files for a total of 405 files from FFY 2006 from which U.S. EPA could select files for review. The recommended selection protocol in state review guidance for a universe of between 300 and 700 files suggests choosing a range of 20 to 35 files for review. Twenty-five files were selected to represent a stratified random sample reflecting a mix of industrial sectors, geographic area, and type of case.

These files were split between 12 inspection files and 13 enforcement files per the state review guidance. Ten major and two synthetic minor facilities were chosen from the inspection files. Enforcement cases were chosen from the entire universe of sources (major, synthetic minor, and minor) to have a representative cross-section of MPCA enforcement activities. The enforcement files chosen consisted of eight major sources, two synthetic minor, and three minor sources. Sources were selected from the lists provided by the MPCA Air Quality Compliance and Enforcement Unit, thus assuring that samples of the work from each regional office within MPCA, as well as a good geographic distribution of sources, were represented. Three inspection files had associated enforcement actions which were also reviewed.

The MPCA Air Quality Compliance and Enforcement Unit gathered all of the files and provided additional information requested for the review in Minnesota. The inspection and enforcement files are maintained at MPCA's headquarters office. In addition to the case files, the review included discussions with MPCA managers and staff about their data and procedures for compliance and enforcement. Staff interviewed included inspectors as well as staff responsible for data management. The review also included discussions with staff located in one regional office to better obtain their perspective.

Section 1: Review of State Inspection Implementation

- 1. Degree to which state program has completed the universe of planned inspections/evaluations (addressing core requirements and federal, state, and regional priorities).**

Findings:

Evaluations at Title V Major Sources:

Per U.S. EPA's "Issuance of the Clean Air Act Stationary Source Compliance Monitoring Strategy (CMS)," April 25, 2001, full compliance evaluations (FCEs) should be conducted at 100% of the major source universe at least once every two years. MPCA's CMS for FY 2006 targets Full Compliance Evaluations (FCEs) at

all major sources that had an FCE performed in FY 2004, remaining sources listed in AFS as synthetic minor that have not been inspected in FFYs 2002 through 2005, and all newly constructed major and synthetic minor sources. This strategy would equate to FCE coverage of 100% of sources over two years.

According to the OTIS data metrics report from December 21, 2006, MPCA evaluated 93.7% (296 out of a universe of 316 sources) of these sources in FY 2005 and 2006. MPCA's review of its own data revealed that MPCA has evaluated 96.4% (297 out of a universe of 308 sources). The national average of FCEs for the 2 fiscal years ending FY 2006 is 80.0%. MPCA stated that only completed inspection reports are counted toward the FCE totals. Additionally, for FY2006, Minnesota has conducted FCEs at approximately 55% of its major sources and thus is on target to once again evaluate all majors during the FY2006-FY2007 two year cycle.

Evaluations at Synthetic Minor Sources:

Per U.S. EPA CMS policy, FCEs should be conducted at 100% of synthetic minor sources that emit or have the potential to emit at or above 80 percent of the Title V major source threshold, once every five years. MPCA's FY 2006 CMS plan requiring synthetic minor evaluations that have not been inspected in FFYs 2002 through 2005 is similar in scope. According to the OTIS data metrics report, MPCA has evaluated 90.7% (272 out of a universe of 300 sources) of these sources in the required five-year timeframe. MPCA's review of its own data revealed that MPCA has evaluated 94.6% (282 out of a universe of 298 sources). The national average of FCEs over the same timeframe is 84.8%.

Title V Annual Compliance Certifications (ACCs) Reviewed:

Per U.S. EPA CMS policy, 100% of Title V self-certifications should be reviewed every year. According to the OTIS data metrics report, MPCA reviewed 100% of the 267 certifications received, as well as entered all five elements concerning certification data. The national average is 81.2%. In addition, MPCA issued 47 alleged violation letters to sources with delinquent annual compliance certifications. All delinquent certifications were received and reviewed, but as an oversight, the information was not submitted to AFS. On February 15, 2007, these certification reviews were submitted to AFS.

Number of Sources with Unknown Compliance Status

The number of sources (9) in "automatic unknown" compliance status is a relatively small percentage of the overall universe of sources. This is also a good indicator of state evaluation coverage.

Information sources used for this Element: 3, 6, 7, 10, and 12.

Recommendations and Actions: Overall, the state's evaluation coverage for major and synthetic minor sources is consistent with regional expectations and national goals/averages. The state is close to the national goal and above the national average for full compliance evaluation coverage for both majors and

synthetic minor 80% sources. U.S. EPA has no recommendations regarding MPCA evaluation coverage and commends MPCA for this aspect of its program.

The state has reported that all Title V self-certifications received have been evaluated, which meets the national goal (100%) and exceeds the national average. As stated above, MPCA has already taken steps to ensure that delinquent certifications are reported to AFS in a timely manner. No further recommendations are required at this time.

2. Degree to which inspection reports and compliance reviews document inspection findings, including accurate description of what was observed to sufficiently identify violations.

Findings: U.S. EPA reviewed 12 compliance monitoring reports (CMRs), all of which were FCEs. MPCA stated that they do not always complete reports for partial compliance evaluations (PCEs). Of the CMRs reviewed, one was from the North Central Region, two were from the Northeast Region, one was from the Northwest Region, three were from the Southeast Region, one was from the Southwest Region, and four were from the Metro Region. Files were chosen based on the concentration of permitted facilities in each region. The Metro Region, which includes the Minneapolis/St. Paul metropolitan area, had the highest concentration of regulated facilities. Two CMRs reviewed were for synthetic minor sources, while the remainder of the evaluations reviewed were for major sources.

MPCA's Training and Procedures Manual (TAPM) provides chapters on FCEs and inspection procedures for inspectors. FCE guidance includes the facility file review requirements for inspection preparation, including review of records, enforcement history, previous inspection reports, Delta database information, stack test summaries, correspondence, and other information. The training manual also includes guidance for conducting inspections and post inspection procedures, as well as a summary of the U.S. EPA HPV policy for HPV determinations. Training in the use of Delta for air quality inspectors is also included in the manual.

The format that MPCA uses for CMRs is similar in all six regions as it is based on the Delta inspection database. The database format lists each regulatory requirement for every permitted emission source, similar to the layout of the MPCA Title V permit. Inspectors print out a template from the database for their inspection, fill in the template by hand, and then enter the data into Delta after the inspection takes place.

According to U.S. EPA CMS policy, CMRs should have seven elements. The seven elements include: (1) general information (date and level of evaluation); (2) facility information (name, location, address, and contacts); (3) applicable requirements; (4) inventory and description of regulated emission units and processes; (5) enforcement history; (6) compliance monitoring activities (on-site

observations and compliance assistance); and (7) findings observed and discussed with the facility during the inspection.

None of the reviewed CMRs had all required elements. The CMRs are printed from MPCA's DELTA database system and do not include several elements. The CMR seems to be a checklist rather than a document that is to be used by inspectors to fully discuss their findings and provide sufficient narrative. Specifically:

1. Most of the reports reviewed did not note the compliance monitoring category (FCE, PCE, or investigation) as it is not a field that is printed in the report from Delta. Of the 12 inspection files reviewed, three CMRs stated they were a FCE or a full air quality evaluation in the comment area at the first page of the report. MPCA stated that they will provide discussion and training to staff to insure that the inspection category is noted in future reports.
2. For facility information, neither EPA ID nor Title V designation was included in the printed reports reviewed. MPCA stated they would work with staff to add a location for this designation in the report.
3. An inventory of all regulated emission units was included, but most emission sources did not include a detailed description of each emission unit in the paper copy. According to MPCA a detailed description of each emission unit is available in Delta, and they plan to investigate the utility of having staff print out all emission units and their brief description from the Delta Facility Description table.
4. No information on previous enforcement actions was included in any of the printed reports reviewed with one exception. One CMR reviewed for a FCE stated in the comment section that it was a follow-up from a previous enforcement action to ensure compliance with the terms of the action. The MPCA TAPM requires the review of enforcement history prior to the completion of an FCE. Enforcement history is also detailed in Case Development Forms for any facility where enforcement action is expected to be taken.
5. Findings and recommendations were generally limited in the report itself. Some of the reports included findings in the comments area at the beginning of the report. In other reports, findings and recommendations were included in the letter that was sent to the company after the evaluation, as MPCA stated that the reports were not normally sent to the facility. However, a letter was not included in two of the inspection files reviewed. The TAPM requires a post inspection letter within 30 days, and MPCA stated that staff will be reminded of the importance of post-inspection letters.

Delta inspection reports included all applicable regulatory requirements for each facility as they were pulled directly from the Title V requirements for the major facilities. A code was listed by each requirement based on the result of the FCE. The codes are compliant (the company is meeting the conditions of the permit requirement); noncompliant (the company is not meeting the conditions of the

permit requirement); advisory – discussed or not discussed (the permit requirement provides guidance and is not currently inspectable and the inspector either discussed or did not discuss the requirement during the evaluation); not applicable; shut down; or indeterminate.

The format of the Delta inspection reports provided a consistent template for inspectors of each region within MPCA; however, the structure needs some modifications. In addition to the issues noted above, there does not seem to be a mechanism in the inspection reports to identify any new equipment that might be installed without the proper permits, although MPCA training in the TAPM requires inspectors to confirm that no new emission sources have been added during the inspection. The format of the CMR appears to be dependent on the permit, and if the permit is missing information, inspectors who only follow the CMR may not be fully evaluating the facility. The MPCA agrees this information is important, and should be included in the Comments section of the report.

Information sources used for this Element: 1, 5, 6, 7, and 12.

Recommendations and Actions: MPCA should determine how the additional information that should be included in their CMRs according to U.S. EPA guidance can be included in the printed version of the Delta inspection reports, and has begun taking steps to do so. The minimum information that should be included within the CMRs should include the seven elements required by the U.S. EPA CMS Policy. Enforcement history should also be included as a field to be entered in Delta as well as included in the final printed report. A description of each permitted emission source should also be included in the printed report. Conversations with MPCA during the file review revealed that some of the information requested is available in the database itself, but printing it out would add several additional pages to each report.

U.S. EPA is concerned that with the lack of narrative in the CMRs, it may be difficult to properly develop and defend an enforcement action that was based on the evaluation findings. MPCA states that it utilizes a combination of pre-inspection reports, inspection checklists, pictures, inspection notes, Case Development Forms, and Penalty Calculation Worksheets, to document the vast array of cases managed by compliance and enforcement staff. This package of information has served the MPCA well over the years to document violations and to record a defensible position from which to manage cases on many levels. The MPCA continues to believe that the U.S. EPA method for completing inspection reports, while it works for U.S. EPA, should not be the only method accepted.

U.S. EPA recommends, and MPCA agrees, that what should be contained in an inspection report be resolved by December 31, 2007 by one or more multi-program discussions that take into account both U.S. EPA and MPCA viewpoints and needs in regard to inspection reports.

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

Findings: According to U.S. EPA’s “Clean Air Act Stationary Sources Program Guidance and File Review Metrics, June 24, 2005,” compliance monitoring reports (CMRs) should be completed within 60 days of the inspection. MPCA policy requires the completion of inspection reports in Delta within 14 days of the inspection. MPCA policy also states the report should be printed out and sent to the file.

Using MPCA’s measure, eight of the 12 inspection reports reviewed (67%) were completed in a timely manner. Using the U.S. EPA guidance, 10 of the 12 inspection reports reviewed (83%) were completed in a timely manner.

The date of inspection report creation is not always apparent based on the files reviewed. In some cases, it appears that reports were printed and placed in the file after the date of creation in Delta. For example, for one company, the date of evaluation was June 2006, and the letter explaining the results of the evaluation was sent within 30 days. However, the date of the inspection report in the file was December 2006.

The discrepancy in the dates of Delta inspection reports in the files was discussed with MPCA at the time of the file review. MPCA stated the Delta inspection reports include the date the inspection was conducted, but do not list the original date of report creation or completion. MPCA stated there is a separate database which is currently used for tracking the date of inspection and the date of entering into Delta for the initial report creation, which they plan to merge with the Delta system.

Not every inspection file contained violations. For inspections where violations were found, the violations were described in the CMR next to the applicable requirement. However, the violations were not necessarily summarized at the beginning of the inspection reports, and in the case of one company, the inspection report was well over 100 pages in length, with the violations noted in the report next to the applicable requirement. The reports generally have one area for comments at the beginning of the report rather than a narrative section. This format makes it difficult to quickly assess all violations at a facility when reviewing the paper inspection report. According to MPCA, any specific noncompliance documented in the report, for any permit requirement or term, is automatically referred for enforcement follow-up by the Delta system. They also stated that MPCA staff routinely summarizes compliance status in an electronic email announcing inspection completion.

Information sources used for this Element: 1, 6, 7, 11, 12, and 16.

Recommendations and Actions: Improvements should be made in the timeliness of CMRs. MPCA should also ensure that inspection reports are promptly printed and sent to the file after completion in the Delta database in order to properly date the reports. The CMR could also be revised to include the date of CMR completion on the document itself rather than having to rely solely on the report being promptly printed and sent to the file in order to have a correct date. Based on MPCA statements, MPCA is working on how to address the date issue in Delta. MPCA should provide a plan addressing these recommendations to U.S. EPA by December 31, 2007.

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:

Pre-Enforcement Procedures:

Once an inspection report is input into MPCA's Delta database, any noncompliance is marked in Delta and then referred to the Referral Listing Screen in the database. MPCA may determine that facilities warrant further response based on the violations noted in the Referral Listing Screen.

Accurate Identification of HPVs:

According to the OTIS data metrics report, the High Priority Violation (HPV) discovery rate per FCE coverage at major sources for MPCA in FY 2006 was 6.4%. MPCA provided a revised discovery rate of 7.6% after a review of their data (13 out of a universe of 172 sources). U.S. EPA's goal is that the rate be above half of the national average for the time period. Since the national average for FY 2006 was 8.7%, MPCA was above the goal.

Thirteen enforcement files were reviewed, of which five were listed by MPCA as HPV. Of the five HPV enforcement case files reviewed, U.S. EPA found that in three files, MPCA had both accurate HPV identification and timely reporting into AFS. In two other files, identification of HPV was appropriate but the reporting was not timely (40%). These two facilities were designated as HPV in Delta, but not reported to U.S. EPA as HPVs. U.S. EPA believes that in none of the cases reviewed, identification of HPV was not made when it should have been. One criterion for HPV determinations are violations that involve testing, monitoring, recordkeeping, or reporting that substantially interfere with enforcement or determining the source's compliance with applicable emission limits. The non-HPV enforcement cases reviewed that involved such testing, monitoring, recordkeeping, or reporting violations did not appear to substantially interfere with compliance determinations.

In addition, three files reviewed did not have an HPV or non-HPV designation listed in the MN database as that field was left blank. However, as these were synthetic minor or minor facilities, it appears the HPV designation would not be applicable.

It was also noted during the review that MPCA is not reporting the noncompliance status for non-HPVs. None of the non-HPV cases reviewed were reported as non-compliant in AFS for the period of time they were out of compliance. Discussions with the state revealed that MPCA was not changing this data field in AFS during the period of noncompliance. During the file review, MPCA agreed to look at their enforcement action reporting process to ensure compliance status changes for non-HPVs are reported to AFS in a timely manner. MPCA noted that HPV designations are noted for enforcement actions in Case Development Forms (CDF).

Information sources used for this Element: 1, 6, 8, 12, and 16.

Recommendations and Actions: MPCA should ensure that HPV and non-HPV cases are properly reported to AFS. In addition, for major sources, it would be useful to have in the CDF a short explanation as to why the violations are not considered HPV. MPCA stated that they currently only provide an explanation for those cases which have been classified as an HPV, including listing under what criteria the classification as an HPV was made.

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

Findings: MPCA has several different enforcement tools to choose from for noncomplying sources. The ERP has a well-defined summary of the enforcement tools as well as guidance for selecting the appropriate tool. However, MPCA has a limited amount of time with its compliance schedules for pursuing cases administratively. For an APO, any corrective actions must be completed within 30 days. NOV's may allow longer than 30 days for completion of corrective actions; however, no penalty may be associated with that action. Stipulated Agreements are generally used in actions with penalties when corrective actions take more than 30 days to complete.

Of the 13 enforcement cases that were reviewed, six were handled through informal enforcement by use of a NOV. One additional company was issued a NOV; however, MPCA is attempting to determine if the facility is closed. For non-HPV cases, MPCA will use a NOV as a resolution tool with corrective actions included to bring the responsible party (RP) back into compliance. The follow-up is generally a letter from MPCA documenting the completion of corrective actions. However, MPCA stated that escalated enforcement actions above the NOV are used as appropriate for non-HPV cases.

In these six cases, which were all non-HPV, four came back into compliance within the time frame stated in the NOV - generally 30 days. One other case was resolved with corrective actions that took place prior to issuance of the NOV. The NOV acknowledged that the corrective actions had already been completed. In the remaining case, the company requested, and was granted, an extension of the 30-day period to complete one portion of the corrective actions cited in the NOV.

The remaining six enforcement cases, five of which were HPV, were handled through formal enforcement by use of an APO, Stipulation Agreement, or Schedule of Compliance (SOC). One case has not yet been finalized but has a stipulation agreement drafted. In the five closed cases, four had proper injunctive relief and came back into compliance within the time frame stated in the MPCA ERP, normally 30 days. One case received a Notice of Noncompliance (NON) and SOC with no penalty for a air quality performance test failure. The facility was retested and found to be in compliance.

Information sources used for this Element: 1, 6, 8, 12, and 16.

Recommendations and Actions: MPCA enforcement actions for both HPV and non-HPV facilities generally require a complying action that will return the facilities to compliance in a specific time frame. U.S EPA has no recommendations.

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: When MPCA staff becomes aware that a Regulated Party has violated environmental standards or requirements, they determine what enforcement response is appropriate to the violations in question. The MPCA ERP lists categories of violations and, for each category, cites an appendix. The appendices suggest approaches staff should use to assess the seriousness of the violation and to determine an appropriate enforcement response. For enforcement actions the MPCA has developed a Case Development Form (CDF) which defines the case history, enforcement history at the facility, penalty explanation if needed, and rationale of the enforcement choice. As the next step of the enforcement response, a forum is convened. The forum is an informal meeting held by MPCA staff and counsel to evaluate a noncompliance situation and select an enforcement response. The CDF is discussed at the forum in order to help select the enforcement choice. Forums are used for most enforcement matters and are generally scheduled promptly after completion of the Case Development Form (CDF).

MPCA has noted that certain violations are common, such as stack test failures. In order to expeditiously resolve such violations, generic enforcement decisions have been made by MPCA. The decisions were made to address specific violation(s) and defined what specified criteria needed to be met for the generic decision to apply.

The decisions were finalized in a generic forum and consensus was reached by the forum members. Guidance for each of the generic enforcement decisions is available as appendices in the ERP. The guidance includes rationale for enforcement choices, including responses for repeat violators. Generic CDFs have also been developed for the generic forums.

Timeliness

Per U.S. EPA's HPV Policy, HPVs must be addressed with a formal action within 270 days of Day 0. Under the HPV Policy, Day 0 will ordinarily be no later than 45 days from the day the violation was discovered. For violations requiring additional information, Day 0 is 90 days from the date the violation is discovered, or the date of receipt of the additional information, whichever is earlier. If a violation is self-reported, Day 0 will be 30 days from the date the agency receives the information.

According to the OTIS data metrics report, 38.5% of HPVs in FY 2006 were addressed beyond 270 days of Day 0. MPCA's review of its own data returned a result of 41.7% that were addressed beyond 270 days, which is better than the national average. The national average is 49.1% for FY 2006.

In regard to the enforcement files reviewed that identified HPVs, three of the five (60%) were timely because they were addressed within 270 days of Day 0. One file reviewed that resulted in a formal action beyond 270 days was a multimedia case that, according to MPCA, was delayed as a result of needing to obtain agreements on corrective actions and penalties primarily for the other media. The other case reviewed is currently being addressed in a stipulation agreement for violations over a span of 2 years. According to MPCA, the case was also delayed due to the length of time of coordination with U.S. EPA in a concurrent federal case.

The timeliness for non-HPV cases was also reviewed. In one case, a NOV was not issued in a timely manner as it was issued for a facility after the case had been resolved. The inspection took place in December 2004, at which time it was discovered that the facility made modifications without obtaining the proper permits. The facility submitted a Title V amendment in December 2005, and an NOV was issued after the permit was issued in May 2006. In another case, MPCA records do not show a case as closed although the corrective actions had been completed and documented in the NOV.

Appropriateness

For the five enforcement files reviewed that identified HPVs, none were addressed using a preliminary enforcement action such as a Letter of Warning, Notice of Violation or Notice of Noncompliance as a final resolution. One HPV case is still pending, and a Stipulation Agreement has been drafted. The other cases were resolved with an APO, Stipulation Agreement, or SOC. Four of these actions (80%) were appropriate because they had a penalty (the draft Stipulation Agreement has a proposed penalty) and CDF that defined the reasoning for the choice of enforcement action. However, of the three closed HPV actions with penalties, two

had penalties assessed of under \$5,000, which may have been too low to provide deterrence from future violations.

The only closed enforcement HPV case reviewed that did not result in a penalty, was for a failed stack test for a synthetic minor facility. The facility was retested and found to be in compliance and was issued a SOC without a penalty. However, a penalty may have been appropriate in this case due to the fact that the source exceeded its permitted limits and was classified as an HPV (the facility was listed as an HPV in Delta but not reported to AFS as an HPV). The MPCA ERP states that a performance test failure is considered an HPV for a synthetic minor source if the pollutant at issue is one for which the source is considered a synthetic minor. Discussions with MPCA after the review noted that this facility has returned to compliance by installation of emission controls, and MPCA is pursuing a stipulation agreement for the original test failure.

The violations cited for the eight non-HPV cases were generally recordkeeping, reporting, labeling violations, or failure to submit emission inventory fees. The violations were resolved with an APO in one case and a NOV in the other seven cases. It appears that in these cases, the chosen enforcement tool was appropriate according to MPCA's ERP. However, four of the non-HPV cases that were resolved with a NOV and no penalty were for major sources. In these cases, a penalty may have been appropriate to serve as deterrence from future violations. One of the cases was issued an AVL and NOV for failure to submit annual reports and deviation reports, perform the annual calibration of the oxidizer, and perform the proper calculation of VOC content. The CDF stated there was no environmental impact from these violations; however, given the number of violations a penalty may have been appropriate.

Information sources used for this Element: 1, 6, and 12.

Recommendations and Actions: For the HPV cases reviewed, it appears that MPCA is completing actions in a timely manner, as the two reviewed cases not resolved in the 270 day time frame had extenuating circumstances. However, the data metric for HPV cases shows that around 40% of the HPV cases were not resolved in a timely manner, although MPCA exceeds the national average in timely resolution of HPVs. U.S. EPA recommends that MPCA re-examine HPV enforcement activities for improvements in timeliness. In addition, for HPV and non-HPV cases, U.S. EPA recommends that MPCA submit a plan to U.S. EPA by September 30, 2007 for better tracking of case completion and entering the data into AFS.

MPCA has well defined guidance in its ERP with respect to identifying and determining next steps for violations. The reasoning behind the choice of an enforcement response is generally well documented. However, U.S. EPA is concerned that the frequency of, and low amount of, penalties issued for non-HPV as well as HPV cases are not providing a proper deterrence for cited facilities. For

the non-HPV cases reviewed, MPCA commonly used a NOV as the resolving enforcement action. The use of an NOV meant that no penalties would be collected. However, MPCA policy is that alleged violations may be pursued in an escalated action, including penalties, if similar non-compliance continues. Most of the violations cited were recordkeeping and reporting violations with no reported environmental impact; however, some facilities had numerous violations cited. MPCA should consider the use of an APO with at least forgivable penalties for facilities which are major and have been cited with numerous violations. In regard to penalties for HPV cases, penalties for cases resolved with APOs may not be sufficient to provide for a goal of deterrence from future violations. See Element 7 below for further explanation. MPCA's ERP Guidance should be reiterated and revised, if necessary. MPCA should submit a plan to U.S. EPA by September 30, 2007 addressing these recommendations.

MPCA stated that it considers many variables, beyond just penalty amount, when determining an appropriate enforcement action, including the nature and time need to complete the corrective actions imposed (if more than 30-days an APO cannot be used), the effectiveness of the enforcement tool as a deterrent, is a face to face meeting necessary to make the regulated party understand (unilateral order vs. negotiated document where more discussion takes place), and timeliness. MPCA staff use the appropriate tool for the violations and determine a suitable penalty, including the consideration of multi-day penalties as deemed appropriate.

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

Findings: Of the five formal enforcement actions reviewed that contained monetary penalties, all (100%) included documented calculations for both the gravity and economic benefit portions of the penalty, or statements as to why economic benefit was not considered. The MPCA ERP guidance for APO and stipulation agreement penalty calculations states that the penalty amount must address the economic benefit the violator realized from the noncompliance. Generally a statement was included in the CDF stating that economic benefit was considered and the reasons why it was or was not included in the penalty, in accordance with MPCA ERP policy. One inspection file and associated enforcement action reviewed had an economic benefit calculated, which was from the underpayment of emissions inventory fees.

In regard to the cases reviewed, mitigation of penalties generally occurred in APOs for forgivable penalties only. Explanations of penalty calculations were not included for the stipulated agreement cases reviewed. MPCA explained that less detail is written for stipulated agreement penalties as they are negotiated documents that record penalty calculations that are discussed during live negotiations.

There are discrepancies between the U.S. EPA Stationary Source Civil Penalty Policy, which is used for the calculation of administrative penalties at the federal

level, and the MPCA ERP penalty calculation guidance for APOs. U.S. EPA guidance for the gravity component of the penalty allows for a dollar range of \$5,000 to \$50,000 based on actual or possible harm for each violation, with separate calculations for duration of the violation, amount of pollutant, and sensitivity of the environment. The gravity component may be further adjusted based on willfulness, history of noncompliance, and other factors. MPCA APO guidance only has a range of \$0 to \$10,000 for minor to major potential for harm, based on deviation from compliance, with adjustments as necessary for willfulness, history of past violations, economic benefit, and other factors. Separate penalties may be calculated for each violation or may be considered together for similar violations.

MPCA stipulated agreements have the ability to assess penalties over \$10,000. MPCA penalty guidance allows for penalties under statute of up to \$10,000 per day of violation for stipulation agreements, while U.S. EPA statutory penalty provisions allow for penalties up to \$32,500 per day per violation after March 1, 2004.

An additional discrepancy exists between the U.S. EPA penalty policy and the MPCA penalty guidance with regard to penalty adjustments for inflation. The U.S. EPA civil penalty policy was modified in 1997 and 2004, stating the purpose was to “preserve the deterrent effect of civil statutory penalty provisions by adjusting them for inflation.” Neither the Minnesota State statute allowing for penalties up to \$10,000 for APOs (passed in 1987), nor MPCA’s penalty guidance allowing for penalties under statute of up to \$10,000 per day of violation, have an inflationary adjustment clause.

In regard to mitigation of penalties, U.S. EPA guidance allows very few options for the complete removal of a penalty for certain enforcement actions. The MPCA ERP, on the other hand, states that for APOs, if a violation is neither repeated nor serious, then the penalty must be forgivable if the corrective actions are completed on time. Stipulated agreements include a negotiated penalty that can be mitigated for different factors.

In summary, while MPCAs use of APOs according to its ERP are sometimes appropriate, there are situations in which U.S. EPA believes that the penalty should not be forgiven or in which the proper calculated penalty exceeds \$10,000 and a stipulation agreement should be used instead. However, as APOs are unilateral orders and stipulation agreements are negotiated documents, U.S. EPA understands that APOs may provide a quicker resolution for cases that do not require an extensive amount of time for complying actions.

Information sources used for this Element: 1, 6, 9, and 12.

Recommendations and Actions: MPCA generally provides clear, written rationale for its penalty calculations based on the files reviewed. However, MPCA is limited by state statute for the penalties they may assess for APOs. MPCA should reconsider the use of APOs in some cases that may require a larger penalty.

MPCA should provide U.S. EPA a response by September 30, 2007 addressing the suggestions made by U.S. EPA.

MPCA stated that it considers many variables, beyond just penalty amount, when determining an appropriate enforcement action. MPCA staff use the appropriate tool for the violations and determine a suitable penalty, including the consideration of multi-day penalties as deemed appropriate. MPCA staff noted that, at any stage in the case, the choice of enforcement tool is reconsidered if another tool is determined to be more appropriate.

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

Findings: According to the December 21, 2006, OTIS data metrics report, MPCA assessed a total of \$443,191 in penalties during FY 2006. A discrepancy was noted for one facility reviewed, as a large portion of the penalty was recorded as an air penalty when most of the amount was for other media violations. MPCA's corrected number of penalties assessed for air violations is \$155,801. 92.3% of actions at HPVs included some penalty compared to the national average of 77.0%. U.S. EPA's goal is for states to issue penalties for greater than 80% of HPV actions.

In regard to penalty collections, of the four files reviewed where a penalty was due, all files contained documentation of penalties collected or scheduled to be collected. One file has been referred to Minnesota Department of Revenue for nonpayment, while the other files either contained a copy of the payment, or a letter from MPCA stating that payment was received.

Information sources used for this Element: 1, 6, and 12.

Recommendations and Actions: MPCA is generally diligent in collecting penalties in enforcement actions after issuance. MPCA is also exceeding national averages and the national goal for issuing penalties to HPV cases. However, MPCA should ensure penalties are reported correctly for multi-media cases.

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

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

Findings: Region 5 considered MPCA performance under its FFY 2005-2006 Environmental Performance Partnership Agreement (EnPPA). In FY 2006, in addition to the FCE and Title V Annual Compliance Certification commitments discussed in Element 1, MPCA issued 47 alleged violation letters to sources with delinquent annual compliance certifications. All delinquent certifications were

received and reviewed, but as an oversight, the information was not submitted to AFS. On February 15, 2007, these certification reviews were submitted to AFS.

Information sources used for this Element: 2, 3, 7 and 12.

Recommendations and Actions: Following their review of the delinquent certifications, MPCA staff committed in a February 15, 2007 email message to ensure that in the future, data pertaining to these activities will be followed up on and reported in a timely manner. MPCA staff will periodically check that this is being done.

Section 4: Review of Database Integrity

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

Findings: According to the 2005 AFS Information Collection Request (ICR), federally reportable data is to be provided to the national database within 60 days of the date of occurrence. According to the OTIS data metrics, the percent of HPVs entered into AFS over 60 days as required in FY 2006 was 30.8%. MPCA's own review of data has revealed that 62% of HPVs were entered over 60 days. This is close to the national average of 57.6% and shows that MPCA was only timely in 38% of the cases.

During their review of the OTIS data metrics, MPCA identified several compliance evaluations that were not reported to AFS. Between December 2006 and January 2007, MPCA added these missing evaluations to the system, but not within the 60 day reporting timeframe. While these evaluations had been completed, the compliance monitoring reports had not been finalized or had not been entered into the state's Delta system. Under MPCA's procedures, only completed Delta records are selected and submitted to AFS.

Information sources used for this Element: 8, 12, 14 and 15.

Recommendations and Actions: As stated in a January 19, 2007 email message, MPCA will ensure that for FY 2007 and beyond, all Delta records are complete and that compliance evaluation data is submitted in a timely manner. With regard to reporting HPVs, MPCA needs to ensure that HPVs are reported to AFS no later than 60 days from the date of the identification of the violation. MPCA has stated that staff will periodically check that this is being done.

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

Findings: According to the OTIS metrics report, during FY 2006, the number of HPVs exceeded the number of sources with a noncompliance status. A review of the data found that while MPCA was identifying and reporting HPVs, the corresponding compliance status was not always updated for the sources in

violation. This was also a Finding under Element 4 with respect to non-HPV cases.

In addition, MPCA collects and reports to AFS the dates of stack tests and the test results. According to the OTIS data metrics report, during FY 2006, MPCA was only missing a result code in 1.5% of the 137 stack tests. This is well below the national average of 17.1%. A review by MPCA of the two missing codes resulted in MPCA adding the appropriate result code for one of the facilities. For the second facility, it was discovered that a Regional action type used by MPCA is incorrectly mapped as a stack test. Region 5 is looking at this action type and will be working with HQ to correct the mapping by April 30, 2007.

Out of the 25 compliance monitoring and enforcement files reviewed, four sources failed to have an accurate compliance status. All files reviewed had accurate facility information (e.g. name, address, classification, government facility code, etc.).

Information sources used for this Element: 6, 7, 8, 11, 12, and 14.

Recommendations and Actions: See Recommendations for Element 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 purpose of the OTIS data metrics under this Element are to report to the State selected universe and action counts from OTIS and ensure that the State and U.S. EPA agree with the information in the national database. If there is a disagreement about the counts, further evaluation should be performed to determine the source of the discrepancy.

On December 21, 2006, MPCA was provided the OTIS data metrics for all applicable Elements, including Element 12. These items are listed below.

Table 1. Counts for Element 12 for FY 2006. (According to Data Metrics)

Description of Data	USEPA Count	MPCA Count
AFS Operating Majors	314	314
AFS Operating Majors w/Air Program Code	312	312
Source Count: Majors	314	314
Source Count: Synthetic Minors	309	309
Source Count: NESHAP Minors	19	19
Sources with FCEs	193	202

Number of FCEs	198	209
Number of PCEs	167	9 (see note below)
NOVs issued	118	98 (see note below)
Sources issued an NOV	110	92 (see note below)
New HPV pathways	14	15
New HPV sources	13	14
Formal actions	46	47
Sources with formal actions	41	43
Assessed Penalties	\$ 443,191	\$155,801 (see note below)
Sources missing CMS policy applicability	5	5

The discrepancy in the Number of FCEs was resolved between December 2006 and January 2007 when MPCA added several compliance evaluations to AFS that were not previously reported.

The discrepancy in the Number of PCEs has been resolved as of this writing. MPCA did not include in their count the reviews of FESOP annual compliance certifications which are mapped to the off-site PCE action type.

The discrepancy in the Number of NOVs issued has been resolved as of this writing. MPCA did not include in their count the number of Letters of Warning issued. This also explains the difference in EPA and MPCA counts for the Sources issued an NOV.

In addition, as noted in Element 8, the discrepancy between assessed penalty amounts has been reviewed and corrected in AFS.

Information sources used for this Element: 3, 6, 12, 14, and 15.

Recommendations and Actions: Overall, only a few minor discrepancies remain between the EPA and MPCA data. MPCA may want to consider developing a quality assurance review of their data in AFS on a periodic basis in order to ensure that the data quality continues to remain at a high level.

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, December 27, 2006 version.
4. Data in PCS as of 12/27/06.
5. Minnesota Pollution Control Agency (MPCA) Enforcement Response Plan (ERP)
6. FFY 2005-2006 MPCA US EPA Region 5 Environmental Performance Partnership Agreement (EnPPA).
7. Conversations with MPCA Staff.
8. U.S. EPA Enforcement Management System National Pollutant Discharge System Clean Water Act USEPA Office of Water, (1986 as revised 1989).
9. National Pollutant Discharge Elimination System Compliance Inspection Manual, July 2004.

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Introduction

The review of the Minnesota Pollution Control Agency (MPCA) National Pollutant Discharge Elimination System (NPDES) program includes the evaluation of a data metrics report pulled from U.S. EPA's Online Tracking Information System (OTIS) on 12/21/06 and a review of MPCA enforcement and compliance files that occurred on 1/22-24/07 at the MPCA offices in St. Paul Minnesota.

For FFY 2006, MPCA provided a total universe of 1168 files from which U.S. EPA could make selections. The recommended selection protocol in the review guidance, for a universe of over 700 files, suggests choosing a range of 25-40 files for review. Thirty-two files were selected to represent a stratified random sample reflecting a mix of industrial, municipal, and agricultural cases as well as major and minor facilities.

The files were divided into two (2) categories: inspections and enforcement actions.

Sixteen inspection files and 16 enforcement files were reviewed using the state review guidance.

This report includes reviews of traditional point source, storm water and feedlot activities. Reviewers have, at the request of MPCA, attempted to identify which findings apply to each of the categories identified above. Reviewers note, however, that due to the small sample size, conclusions relating to specific program areas cannot be made with the same degree of confidence as can the conclusions made for the overall program.

Inspections

The 16 Inspection files were randomly selected from files provided by the MPCA on 1/3/07. They were chosen from 991 total inspection files reflecting 5 types of inspections:

- 7 Compliance Evaluations (non-sampling) Inspections from a universe of 285
- 1 Compliance Evaluations (sampling) Inspections from a universe of 44
- 1 Reconnaissance (RECON) inspection from a universe of 58
- 1 Storm water inspection from a universe of 15
- 5 Construction inspections from a universe of 196
- 1 Undefined inspection type from a universe of 27

The inspection files reviewed consisted of 12 minor facilities from a total of 895, and 4 major facilities from a total of 97. The facilities included Industrial, Municipal, Non-Municipal, and Agricultural operations.

During the file review, reviewers determined that the storm water inspection listed above consisted of an off-site annual report review rather than an inspection as the term was defined in 2006. (Under the soon to be published federal *Compliance Monitoring Strategy* this type of evaluation will, under certain circumstances, be considered an inspection in the future). Consequently, as the review is conducted against guidance in effect during 2006, the storm water file was not included in the universe of files from which the findings below were derived.

The review team selected the above 5 construction inspections with belief they were associated with storm water construction activities. These construction activities were actually related to feedlot operations and a prefill inspection of a gravel filter. As such, these inspections were not actual NPDES compliance-related inspections. Consequently, these files were not included in the universe of files from which the findings below were derived. As a result, the universe of inspection files reviewed was limited to 10, none of which were storm water-related inspections.

The review team noted during this review several instances of PCS data entry problems, namely a blank inspection type, differences in how inspections are documented in its Delta database, and the recording of certain facility visits as inspections, which are not considered inspections by U.S. EPA.

Enforcement Actions

Sixteen enforcement case files were reviewed. MPCA provided a list of 177 case files which were subject to various enforcement actions between 10/01/05 – 09/30/06.

Enforcement options included Administrative Penalty Orders (APOs), Letters of Warning (LOWs), Notices of Violation (NOVs), Schedules of Compliance (SOCs) and Stipulation Agreements (STIPs). Files reviewed included:

- 3 APOs from a universe of 32
- 9 LOWs from a universe of 110
- 2 NOVs from a universe of 20
- 1 SOC from a universe of 5
- 1 STIP from a universe of 10

Section 1: Review of State Inspection Implementation

1. Degree to which state program has completed the universe of planned inspections (addressing core requirements and federal, state and regional priorities).

Findings: Historically, U.S. EPA had set a goal of inspecting 100% of all major NPDES facilities each year. In guidance issued in 2003, U.S. EPA modified this goal to allow states the option to trade-off two minor inspections for each major facility not inspected with the provision that a minimum of 70% of the major facilities be inspected. Historically, U.S. EPA had also required that these inspections be compliance evaluation inspections (CEIs) or the equivalent, but in the 2003 guidance, this requirement was modified to include use of reconnaissance (RECON) inspections to the extent that the facility being inspected had not been in Significant Non Compliance (SNC) for any of the four quarters prior to the inspection, the facility was not a primary industry as defined by 40 CFR Part 122 Appendix A, and the facility was not a municipal facility with a pretreatment program. This additional flexibility was welcomed by most states but made inspection planning and EnPPA negotiations somewhat more uncertain. For example, it was not possible to predict at the beginning of the year which facilities would be in noncompliance during the year.

The MPCA-Region 5 FFY 2005-2006 Environmental Performance Partnership Agreement (EnPPA) commitment was to conduct annual inspections at 70% of major permit holders and 20% of traditional (800) minor permit holders. This EnPPA commitment fully addresses the above national goal of 100%, including use of a two-for-one minor/major trade-off.

U.S. EPA Region 5 provided MPCA an OTIS data pull dated 12/27/06. MPCA raised concerns regarding the accuracy of the inspection coverage as well as other data metrics summarized in that OTIS data pull. MPCA subsequently provided a response with adjusted values. This response used both information from a second

OTIS data pull of 2/5/07 and data in its Delta system.

Data from the 12/27/06 OTIS pull indicates that during the 2006 NPDES inspection year (7/1/05 thru 6/30/06), MPCA conducted inspections at 68.1% of its 91 major facilities. Additionally, MPCA inspected 24.4% of its non-major facilities, exceeding its goal of 20% for traditional minors.

It should be noted however, that the data from OTIS do not accurately report the State's accomplishments against EnPPA commitments. Two significant discrepancies between the EnPPA commitment and the basis for the OTIS-derived metric relate to the universe of majors (OTIS uses a universe based upon the current universe of majors, rather than the universe of majors that existed during the period covered by the file review) and the timeframe for the data metric (the OTIS data are based on the federal *inspection* year, while the EnPPA commitment is based on the federal *fiscal* year).

Further discussions with MPCA show that Minnesota began FFY06 with a universe of 89 Major facilities, rather than the 91 facilities reported in the OTIS pulls. Basing its EnPPA commitments on this universe (89), MPCA would need to have conducted inspections at 62 Major facilities to meet the 70% goal. MPCA additionally reports that it conducted CEIs at 84 facilities and RECONS (which comply with the criteria listed in the 2003 program guidance discussed above) at the balance of its major facilities during FFY 06. This exceeds the EnPPA commitment. (During FFY06, three minor facilities were re-designated Majors but were not inspected).

As noted above, U.S. EPA notes that it intends to issue a revised interim Compliance Monitoring Strategy in July 2007, and that strategy will be effective on a pilot basis in 2008. It is not expected that the goals in the interim strategy will differ significantly from those in the April 2007 draft of the strategy that had been sent to the states for review. In order to proceed expeditiously with inspection planning for 2008, the Region is recommending that the State develop an interim inspection strategy consistent with the goals expressed in the April 2007 draft Compliance Monitoring Strategy.

Information Sources Used for this Element: 1, 3, 4, 6 and 7.

Recommendations and Actions: The Region recommends that MPCA complete an inspection strategy, effective FFY 2008, that is consistent with the draft national Compliance Monitoring Strategy dated April 30, 2007. This strategy should be submitted to U.S. EPA for review by August 30, 2007.

2. **The degree to which inspection reports and compliance monitoring reviews document inspection findings, including accurate description of what was observed to sufficiently identify violations.**

MPCA indicates that certain policies and practices relating to conducting

inspections exist. However, these were not available to file reviewers at the time of the review. Consequently, reviewers evaluated inspection reports against national guidance, the NPDES Compliance Inspection Manual (July 2004). This document states that:

“Although specific information requirements for an inspection report will vary, most reports will contain the same basic elements:

- NPDES Compliance Inspection Report Form (3560)
- Supplementary narrative information
- Copies of completed checklists
- Documentary support
- Inspection Conclusion Data Sheet”

The form 3560 delineates information needed to record the inspection in PCS. The form itself does not need to be completed; however the information requested on the form must be recorded. Further, as noted in the guidance, the Inspection Conclusion Data Sheet relates to U.S. EPA inspections only, and is generally not completed by state inspectors. Finally, the guidance notes that the purpose of a narrative report is to factually record the procedures used in, and findings resulting from, the evidence-gathering process, and that for routine inspections, this report may be as simple as a memorandum (Chapter 2 pages 36-38). This guidance was used by reviewers in evaluating the quality of the inspection reports. As noted in the introduction, six of the inspection files reviewed were for activities not recognized by U.S. EPA as inspections. The findings below pertain to the remaining ten files.

Findings: Of the 10 inspection files reviewed, six (60%) included reports that were consistent with the Compliance Manual. All of these were traditional point source facilities.

The remaining four inspection files did not contain inspections reports consistent with the manual. Four of these files consisted of Compliance Monitoring Survey (CMS) reports appended to various enforcement action letters/notices. These combined reports/enforcement actions lacked required inspector signatures on the report forms and associated evidence (completed checklists, photos, record of conversation etc.). These four files are related to one storm water and three traditional point sources. While the Delta (electronic) database does not reflect inspector signatures, MPCA reports that the traditional point source program files contained an inspection checklist. Upon re-examination, MPCA also reports that signatures were present on the CMS forms for all but one file.

Further discussions with MPCA show some staff was unaware of the 2004 NPDES Compliance Inspection Manual. The MPCA has agreed to consider the U.S. EPA inspection manual when updating its procedures.

Information Sources Used for this Element: 1, 3, 4, 5, 7, and 9.

Recommendations and Actions: The MPCA will review its current practices and policies as well as the July 2004 NPDES Inspection Manual and develop a comprehensive State Inspection Manual. The Region requests the MPCA submit a draft for its review by 6/2008. In addition, the Region and State will meet (in person or via conference call) to discuss the desired content of narrative reports. This meeting will be held by December 31, 2007.

3. Degree to which inspection reports are completed in a timely manner.

Findings: The traditional MPCA Point Source program compliance and enforcement program guidance for CMS report distribution has historically been 30 days. This guidance was documented in individual work plans. In January 2007, the program included a written statement in Delta guidance to require a 30 day distribution. National guidance (Information source 9) does not include a specific timeframe for completing an inspection report, but does state on page 2-36 that with respect to the Compliance Inspection Report Form, that “*Copies should be sent to the permittee in a timely manner (generally within 30 days of the inspection) except when formal enforcement procedures are underway.*”

MPCA states that inspection reports are often combined with informal actions in the traditional point source program rather than providing individual inspections reports followed by written notifications of an informal action. The MPCA reports that this practice, while potentially prolonging turnaround times for inspection reports, is more efficient and simplifies efforts to communicate with facilities.

Our file review showed that six of the 10 inspection reports were completed within the recommended 30 day time period. Of the four files for which inspection reports were prepared later than the recommended deadlines, two were associated with enforcement actions and this is an acceptable reason for the delay.

Information Sources Used for this Element: 1, 3, 4, 5, 7, and 9.

Recommendations and Actions: See the recommendation for Element 2. We recommend that the MPCA Inspection Manual include instructions for appropriate report turnaround time.

Section 2: Review of State Enforcement Activity

4. Degree to which significant violations (e.g., significant noncompliance and high priority violations) and supporting information are accurately identified and reported to EPA national databases in a timely manner.

In evaluating this element, two questions are considered. The first is whether all Significant Noncompliance (SNC) that has occurred is reported in PCS. The second is whether or not all SNC reported in PCS is truly SNC (e.g., does PCS

reflect that a DMR has not been received, when in actuality the DMR was received on time, but the State has not yet entered it into PCS).

Determination of SNC in the NPDES program involves violations of NPDES permit conditions of substantial concern to the Agency including:

- Violations of monthly and non-monthly effluent limits by 20 percent for toxic pollutants such as metals, and 40 percent for conventional pollutants such as total suspended solids, for 2 or more months during 2 consecutive quarterly review periods;
- Non-effluent violations such as bypasses or unpermitted discharges, which cause or have the potential to cause a water quality problem (e.g., beach closings);
- Permit schedule violations;
- Reporting violations including failure to submit timely discharge monitoring reports (DMRs) (filing a DMR more than 30 days late); and
- Violations of existing enforcement orders, including judicial or administrative orders.

The majority of these violations are self-reported by permittees on their periodic reporting forms.

Additionally, significant noncompliance may result from Single Event Violations (SEVs). SEVs are documented through compliance inspections, collection of information requests, state/tribal referrals, Discharge Monitoring Report comments, annual reports, and noncompliance reports. SEVs include one-time events and long-term violations. The Interim Single Event Violation Data Entry Guide for PCS was issued to Regional Water and Enforcement Branch Chiefs for distribution to their States on September 30, 2005. The Final Single Event Violation Data Entry Guide for the Permit Compliance System (PCS) was issued on May 22, 2006. Identification and inclusion in PCS of SEVs is important because it could (correctly) cause a facility to be in SNC status.

Findings: For the subject review period, the OTIS pull showed that no single-event violations (SEVs) were identified. (U.S. EPA notes that the SEV data entry guide was not issued until eight months into the review period, and this may explain the lack of SEV data in OTIS.) To determine if SNC was under-reported, four major facility inspection files were reviewed. Three of these files were associated with SNC violations. Two of the three SNC determinations were made from a review of the Delta database (missing reports/DMR violations) and were accurately recorded. The third SNC identified was a SEV, the result of an off-site annual report review, not an inspection. As noted above, this SNC was not recorded in PCS. The fourth major Recon inspection did not have a violation. The single instance of non-recorded SEV is insufficient to draw general conclusions as to whether or not SNC is under-reported. Generally, however, U. S. EPA notes that as States implement the SEV guidance, SNC rates may increase.

In terms of assessing whether or not SNC is over reported, the reviewers evaluated the rate of manual overrides. Manual overrides are used to correct errors in PCS. During the review period, 12 major facilities (13.2%) were reported in SNC status, which is less than the national average of 20.2%. The OTIS pull also shows that there were no instances of SNC manual overrides. This rate of manual override is extremely low. This is believed to be indicative of high quality, timely data entry as reviewers found no instances of incorrectly identified SNC.

Information Sources Used for this Element: 1, 2, 3, 4, 5, 6, and 7.

Recommendations and Actions: None. MPCA has begun to enter SEVs into its Delta database and provisions for transferring these into ICIS-NPDES will be included in the State's ICIS-NPDES transition plan.

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

MPCA's ERP describes the requirement for sources to come into compliance within a specific time frame. This requirement covers both formal and informal enforcement actions as described in the Executive Summary.

Findings: Of the 16 enforcement cases that were reviewed, seven were handled through the use of a NOV, APO, SOC, or STIP. All of these cases had associated compliance schedules.

- Three facilities (43%) came back into compliance within the time frame stated in the MPCA ERP.
- A total of four facilities had not come back into compliance as of the date of our review.
 - One case failed to identify a timeframe for compliance.
 - Two other facilities ceased operation during the enforcement process and one of the two filed for bankruptcy.
 - The final case is pending review at forum.

The current review has stimulated discussion with MPCA regarding follow-up for bankruptcy cases. The Region and MPCA agree that some enforcement actions associated with a bankruptcy may still require injunctive relief or may have appropriate penalties still to be collected. In these cases, a claim in the bankruptcy proceedings may be appropriate.

Of the 16 enforcement cases that were reviewed, nine were handled through informal enforcement by use of the LOW.

- In two (22%) of the cases reviewed, the facilities came back into compliance within the time frame stated in the MPCA ERP.

- In five (56%) of the cases reviewed, the files did not contain enough documentation to determine the outcome of the action. According to information provided subsequently by MPCA, three of these cases involved traditional Point Sources. For one of these, the Regulated Party did not respond and the MPCA has not followed up. For the second, the Regulated Party responded on June 14, 2006 and the file reflects this. The third was just a CMS report with no violations cited. Of the remaining two cases, one was for a Feedlot and the other was not a facility in Delta.
- The eighth (11%) case (involving a feedlot) reviewed was closed by MPCA personnel by way of email notification which lacked the depth of the required Case Conclusion Letter or Administrative Closure Memo (see MPCA ERP Chapter VII).
- The ninth case (11%) (also involving a feedlot) reviewed could have potentially been elevated to formal enforcement action, but was not. This file contained documents confirming that the violator did not meet the corrective action requirements set forth in the LOW. There was no explanation in the file for not elevating enforcement action.

Information Sources Used for this Element: 2, 5, 6 and 7.

Recommendations and Actions: The Region recommends that by December 31, 2007, MPCA include in its inspection manual a link to established file procedures to ensure that appropriate documentation is included in files.

6. Degree to which a state takes timely and appropriate enforcement actions, in accordance with policy relating to specific media.

According to U.S. EPA's EMS, a major permittee reporting SNC violations should return to compliance within the quarter following the SNC violation or the facility generally must receive a formal enforcement action from the administering authority prior to the end of the second quarter.

The U.S. EPA's EMS also defines a formal enforcement action as one that:

- Requires a facility to take action to achieve compliance;
- Specifies a timetable;
- Contains consequences for noncompliance that are independently enforceable without having to prove the original violations; and
- Subjects the facility to adverse legal consequences for noncompliance

Additional provisions relating to the appropriate response for non-SNC violations are also included in the EMS. An upcoming policy statement the "wet weather SNC policy" due to be issued in mid-2007 will define SNC for wet weather sources, and expectations for timely and appropriate enforcement responses for these violations.

The MPCA EMS also describes a range of appropriate responses to non-SNC

violations.

Findings:

Timeliness

According to the OTIS data pull, three major facilities (3.3%) were in SNC for more than 2 consecutive quarters in FFY 2006. This is above the national goal of less than 2% and below the national average of 9.1%. MPCA believes that this rate is in error, due to violations associated with a minor facility that has subsequently been identified as a major facility. The adjusted rate would then change to 2.2%, which is slightly above the national goal

The MPCA ERP specifically addresses the number of days MPCA staff are allowed to sign agreement documents and also addresses the three year statute of limitation to conclude the case from date of discovery. Additionally, the MPCA ERP includes an enforcement response matrix for both major and minor facilities.

The major facility enforcement response matrix classifies type of violation, nature and extent of violations, and provides the range of enforcement actions. The major facility response matrix also acknowledges that the gravity of a serious violation may warrant immediate action. However, the response matrix does not identify specific timeframes for the state to initiate an action to bring a facility back into compliance. The minor facility response matrix, in a similar fashion, identifies SNC violations and appropriate responses, but does not provide timeframes for the state to act. The MPCA appears to rely solely on the Forum mechanism to address enforcement timeliness issues and response escalation.

None of the 16 enforcement files included in our review were at major facilities. Since U.S. EPA guidance does not address timeliness in regards to minor facilities, nor does MPCA ERP address timeliness criteria, the file review cannot appropriately assess the state's performance in this area.

Appropriateness

Seven case files were addressed with the final enforcement actions described in Element 5. All of these actions (100%) were appropriate because they met the MPCA enforcement response requirements.

Information Sources Used for this Element: 2, 5, 6 and 7.

Recommendations and Actions: Although U.S. EPA did not review any enforcement files regarding major facilities, the size of the AEL was slightly above our joint goal of 2%. To ensure that the size of the AEL remains low the MPCA will include the SNC enforcement timelines as identified in 40 CFR in the newly revised ERP for Major Facilities.

7. Degree to which the State includes both gravity and economic benefit (BEN) calculations

Findings: Minnesota Statute. § 116.072, the MPCA ERP, and the U.S. EPA Clean Water Act Settlement Penalty Policy, dated 1995, provide guidance for calculating the amount of a penalty for various environmental violations. These policies ensure violators do not obtain an economic advantage over their competitors, ensure penalties are consistent across the country, and provide for a logical calculation methodology.

Of the four enforcement actions reviewed that contained monetary penalties, file reviewers found that two (50%) included documented calculations for both the gravity and economic benefit portions of the penalty or statements as to why economic benefit was not considered, and that in the other 2 cases, neither gravity calculations nor economic benefit were documented.

MPCA reports that it is their practice to calculate BEN and gravity in all cases, and that the lack of penalty calculations in one of the latter two cases was due to archived file retrieval problems rather than failure to perform the calculations. Where economic benefit is considered and not calculated, the MPCA has agreed to provide statement to that effect, as well as a memo for penalty mitigation.

Information Sources Used for this Element: 2, 5 and 7.

Recommendations and Actions: None. As noted above, MPCA has already taken actions to address the findings

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: According to both OTIS data pulls, MPCA either did not assess any penalties, or did not appropriately enter them into PCS during FY 2006. MPCA acknowledged during our exit interview that they input penalty data into a comment field as opposed to the appropriate numeric field, which would cause no penalties to show up in OTIS. In reality, MPCA reports that 30 (60%) of its enforcement actions in FY 2006 contained penalties.

Our file review showed that one (25%) of the four formal enforcement actions and three (25%) of the 12 informal actions reviewed included a penalty component.

In regard to penalty collections, of the four files reviewed where a penalty was due, two files contained documentation of penalties collected or scheduled to be collected. No penalties were documented as collected for the remaining two files. These files were documented as out of business and bankrupt companies.

In MPCA's response to U.S. EPA's initial OTIS data pull, they agreed to enter penalty data into the appropriate PCS numeric fields.

Information Sources Used for this Element: 2, 3, 4 and 7.

Recommendations and Actions: None. As noted above, actions taken by MPCA to enter penalty data in PCS address all findings.

9. Enforcement commitments in 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: Region 5 considered MPCA performance under its FFY 2005 - 2006 Performance Partnership Agreement (PPA). In FY 2006, MPCA committed to performing 70% of major and 20% of minor inspections and maintain the SNC rate for majors below 10%. In addition, MPCA committed to maintain the size of the active exceptions list below 2%. Both of the latter statistics were to be met on a quarterly basis.

Actual results for FY 2006 as shown under Element 1 indicate that MPCA has met its EnPPA commitments for inspections. However, during the review period, 12 major facilities (13.2%) were in SNC status. With the relatively low number of Major facilities, one or two facilities that experience SNC violations can have a significant impact on the percentage. In this case, 3.2% equates to two facilities. In addition, the OTIS SNC rate is calculated on an annual basis while the EnPPA commitment is quarterly. The MPCA has met these quarterly EnPPA commitments.

Information Sources Used for this Element: 1, 2, and 5.

Recommendations and Actions: None.

10. Degree to which minimum data requirements are timely

Findings: The Permit Compliance System (PCS) policy statement that prescribes the minimum data requirement for entry into PCS was issued in 1985.

Timeliness of data is based on a review of Quarterly Non-Compliance Reports (QNCRs), since these reports are used nationally to judge regional and state performance.

One subset of the minimum required data is the DMR data for major facilities. U.S. EPA has set a goal of a 95% entry rate for these data. As reported in the OTIS data pull, MPCA inputs DMR data at a rate of 98.1% for majors. The state is not required to, nor does it, enter this data for minor facilities. Data regarding minors that is found in PCS is a result of Region 5 recording the issuance of several minor

permits for tribal facilities within the Minnesota boundaries.

Another facet of data entry relates to inspections. Inspections conducted at permitted majors and minors facilities are required to be entered in PCS. Our review confirmed that inspections were conducted within the inspection evaluation period, but not always entered in PCS in a timely fashion based on a comparison of the first and second set of OTIS data pulls mentioned earlier in this report. Inspections for non-permitted facilities are not required to be entered in PCS with the exception of inspections that result in enforcement actions. Our file review confirmed that most of these inspections were not entered.

The OTIS pull identified one SEV in PCS for a minor facility. Our exit interview with MPCA confirmed that MPCA is not currently entering SEVs into PCS. U.S. EPA acknowledges that expectations regarding entry of these violations were ambiguous, and consequently issued interim guidance in September 2005 and final guidance in May 2006 (nearly eight months into the current file review period).

MPCA indicated that they have the Final Single Event Violation Data Entry Guide for the Permit Compliance System (PCS) and have begun to enter data into their Delta database with the expectation of transferring this information into ICIS at a future date.

Formal Enforcement actions for major facilities are required to be entered in PCS. The initial OTIS pull (nearly three months after the end of the review period) showed 37 formal enforcement actions were taken in FY 2006 and that six were at major facilities. The second OTIS data pull (two months later), on the other hand, showed 51 formal enforcement actions; seven were at major facilities. Similar to the inspection findings noted above, there appears to be a delay in entering enforcement actions into PCS.

In regard to our file review of 16 enforcement cases, our random selection process did not include any major facilities. Seven (43.8%) of the 16 enforcement files selected were formal actions. Six (34.7%) of these were entered into PCS in a timely fashion.

The OTIS pull shows that no penalties were assessed. MPCA informed the review team during the exit interview, and separately in its response to the initial OTIS pull, that penalties are assessed and documented. However, they are not recorded in the appropriate field within PCS, and therefore not represented in the OTIS pulls.

Information Sources Used for this Element: 1, 2, 3, 4 and 7.

Recommendations and Actions: MPCA states and EPA acknowledges that there are accuracy issues in the PCS to OTIS/ECHO data extraction and that there are inherent risks in using simple metrics to represent complex data. Nevertheless the Region requests MPCA to continue to improve its existing processes, to ensure that

all required data is entered into PCS in a timely fashion. As mentioned in the Executive Summary, MPCA is required to develop a transition plan, consistent with the timeframes and specifications included in the ICIS-NPDES Policy Statement scheduled to be issued in early summer. It is expected that the transition plan will be due within a year, and that it will cover all areas of concern mentioned above, to the extent that the requirements giving rise to the areas of concern are continued in the revised policy statement.

11. Discuss the degree to which the minimum data requirements are accurate.

Findings: The current national goal is for 80% or more of the enforcement actions found in PCS to be linked to violations. According to the OTIS pull (dated 12/27/06), MPCA has linked 18.9% of enforcement actions found in PCS to violations. The second OTIS pull indicated that 21.6% were linked to violations.

DMR data is a primary source of enforcement actions. MPCA reports that the action linked to violations percentage is low, because DMR data for minors are not required data elements and as such, only Major facility DMR information is currently entered into PCS by the MPCA. Consequently, enforcement actions related to effluent and reporting violations at Minor facilities are not linked to DMR violations.

Of the 32 compliance monitoring and enforcement files reviewed, 4 of the files revealed PCS data reporting errors (e.g. the date of the inspection, violator determination, and/or enforcement activity reported in PCS do not agree with information contained in the file).

Information Sources Used for this Element: 1, 2 and 5.

Recommendations and Actions: MPCA should implement data quality procedures by the end of FY 2007 to ensure that enforcement actions are linked to violations, especially for major facilities, in order to create an accurate QNCR and Watch List. U.S. EPA will continue to assess the QNCR and Watch List on a quarterly basis.

12. Discuss the degree to which the minimum data requirements are complete, unless otherwise negotiated by the region and state or prescribed by a national initiative.

Findings: On 1/04/2007, U.S. EPA Region 5 provided MPCA an OTIS pull dated 12/27/06 for all applicable data metrics, including Element 12. This OTIS pull was intended to form the basis of the review. U.S. EPA asked MPCA to review the OTIS pull for accuracy and consistency with their records. MPCA responded with the input listed in the chart below, using both data from a second OTIS pull of 2/5/07 and data in its Delta system. The MPCA counts appear to reflect additional state data entry activity and OTIS data updates. Of particular note is the following:

- The State maintained a 98.1% entry rate for major DMRs which exceeded both the national average of 92.4% and the national goal of 95%.
- The MPCA has a 92.3% entry rate for correctly coded permit limits, slightly below the national goal of 95%, but above the national average of 91.1%. MPCA believes that 100% of their permits are correctly coded in PCS if extenuating conditions, such as processing newly reissued permits, managing facilities not yet constructed, and controlling permits without traditional requirements are taken into account.
- The 12/27 and 2/5 OTIS pulls identify 37 and 51 formal actions respectively, while MPCA states that there were 52 actions for the review period. This discrepancy illustrates potential translation difficulties between Delta, PCS, and OTIS.
- MPCA historically entered penalties in a non-numeric field in PCS. This created the appearance in the OTIS pull that penalties are not being assessed or collected. MPCA has since begun entering penalty data in the numeric fields.
- The ICIS-NPDES Policy Statement mentioned previously will contain provisions requiring enhanced data entry for minors DMR data. MPCA currently enters no minor data in PCS. The OTIS data pull indicates that MPCA has a minor DMR entry rate of 45.1%. However, these data are for Tribal permits issued by Region 5, and for which the Region has entered the DMR data.

Table 1. Counts for Element 12 for FY 2006. (According to Data Metrics)

Description of Data	OTIS Database 12/27/06 Count	OTIS Database 2/5/07 Count	Delta Database Count
Active NPDES Majors	91	91	91
Active NPDES Minors	810	802	802
Majors: Correctly coded limits	92.3	92.3	91
Majors: DMR entry rate	98.1%	98.1%	N/A
Majors: SNC override rate	0	0	N/A
Non Major: DMR entry rate	45.1%	45.1%	N/A
Facilities inspected	373	389	389
Number of inspections	440	463	463
Sources issued	0	0	0

a NOV			
NOVs issued	0	0	0
Formal Actions: # of facilities	35	47	47
Formal Actions: # of actions	37	51	52
Penalties: Actions with penalties	0	0	30
Penalties: Total penalties	0	0	\$465,386

Information Sources Used for this Element: 3, 4, and 7.

Recommendations and Actions: See Recommendations in Elements 10.