



Office of Inspector General
Report of Audit

**Final Report of Audit on the
Maryland Department of the Environment
Leaking Underground Storage Tank Program**

E3LLL7-03-0009-7100290

September 17, 1997

**Inspector General Division
Conducting the Audit:**

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Philadelphia, PA**

Program Offices Involved:

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September 17, 1997

MEMORANDUM

SUBJECT: Final Report of Audit on the
Maryland Department of the Environment (MDE)
Leaking Underground Storage Tank (LUST) Program
Report Number E3LLL7-03-0009-7100290

FROM: Carl A. Jannetti /^s
Divisional Inspector General for Audit (3AIOO)

TO: W. Michael McCabe
Regional Administrator (3RA00)

Attached is a copy of the subject report including the complete Region 3 and MDE responses. This audit report provides findings and recommendations regarding MDE's administration of their LUST program. This report contains important issues and recommendations.

This report contains findings that describe problems the Office of Inspector General (OIG) has identified and corrective actions the OIG recommends. This report represents the opinion of the OIG. Final determinations on matters in this report will be made by EPA managers in accordance with established EPA audit resolution procedures. Accordingly, the issues contained in this report do not represent the final EPA position, and are not binding upon EPA in any enforcement proceedings brought by EPA or the U.S. Department of Justice.

ACTION REQUIRED

In accordance with EPA Order 2750, you as the action official are required to issue a final determination on the costs questioned and any other recommendations in this report within 90 days of the final report date. Your response should address all recommendations, and include milestone dates for corrective actions planned but not yet completed. Where you consider a position on the report findings that differs from our recommendation, we would appreciate the opportunity to discuss management's position before the determination is issued to the grantee. A copy of the final determination should be provided to our office when issued.

^s As signed by Carl Jannetti on September 17, 1997.

We have no objection to the release of this report to the public. Should you have any questions about this report, please contact Carl A. Jannetti, Divisional Inspector General for Audit, or Mark S. Phillips, Auditor-in-Charge, on (215) 566-5800.

Attachment

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PURPOSE

We have performed an audit of MDE's administration of its LUST program. The purpose of our audit was to determine whether MDE had adequately accounted for LUST Trust Fund monies and complied with the conditions in the cooperative agreement (CA) received from EPA. Our specific objectives were to determine whether MDE's:

- ◆ Reporting procedures assured accurate and timely reporting of LUST program performance data;
- ◆ Accounting system and cost recovery procedures were adequate to ensure recovery of LUST Trust Fund expenditures from responsible parties (RPs);
- ◆ Costs claimed were allowable, allocable, and reasonable; and
- ◆ Resources were directed to high priority sites and were effectively used to oversee the cleanup of LUST sites.

BACKGROUND

Congress passed Underground Storage Tank (UST) legislation in 1984 and 1986. In 1984, the Hazardous and Solid Waste Amendments established the UST program under Subtitle I of the Resource Conservation and Recovery Act. The Superfund Amendments and Reauthorization Act (SARA) of 1986, Section 205, amended the Solid Waste Disposal Act and established the LUST Trust Fund to finance the cleanup of petroleum releases from USTs.

SARA authorizes EPA to provide LUST Trust Fund monies through CAs awarded to states for the cleanup of leaking underground storage tanks. These agreements between EPA and the states provide the basis for EPA's oversight and management of LUST Trust Fund monies. The agreements identify the amount of funds allocated to each state and establish LUST program performance requirements. States may use LUST funds to pay costs for; site corrective actions, enforcement actions against owners and operators (i.e., responsible parties), cost recovery of LUST expenditures, and reasonable and necessary administrative expenses directly related to these activities.

Region 3 awarded LUST CA No. LS003383-07 to MDE on September 19, 1995. The CA's purpose was to provide funding for MDE to conduct timely and appropriate corrective actions at LUST sites, and implement cost recovery procedures at sites where LUST Trust Fund monies had been expended for a cleanup. MDE submitted its financial status report (FSR) on December 20, 1996. Total project costs were \$1,556,631. This amount consisted of \$1,321,601 authorized under the CA (EPA's share of \$1,189,441 and MDE's share of \$132,160) and an additional \$235,030 that came from MDE's cost recovery account. The cost recovery account consists of funds used for performing additional LUST activities, which MDE recovered from RPs.

To help the reader to obtain a proper understanding of the report, we defined ineligible costs as:

Costs questioned by the OIG because they were incurred and claimed contrary to a provision of a law, regulation, contract, grant, cooperative agreement or other document governing the expenditure of funds.

SCOPE AND METHODOLOGY

We conducted a performance and financial audit. Our survey began on October 15, 1996, and ended on March 17, 1997. Because of the survey, we initiated an audit on March 18, 1997. We completed fieldwork on May 30, 1997. We conducted audit work at EPA Region 3 and MDE's office in Baltimore, Maryland. The scope of our work was limited to activities under the LUST CA.

To accomplish our objectives, we reviewed EPA and MDE policies and procedures. We also interviewed responsible LUST program officials at EPA and MDE. As criteria we used the Code of Federal Regulations, Part 31; Office of Management and Budget (OMB) Circular A-87; Office of Solid Waste and Emergency Response (OSWER) Directives 9610.10A and 9650.10A; and the conditions in the CA.

We conducted a performance audit of selected elements of LUST CA No. LS003383-07. We performed this audit according to *Government Auditing Standards* (1994 Revision) for performance audits issued by the Comptroller General.

We reviewed records maintained by MDE. The scope of the audit covered reports and records prepared from October 1, 1995 through September 30, 1996 (FY 1996). The records reviewed included 1) MDE's and EPA's cooperative agreement files, 2) LUST semiannual progress reports (Strategic Targeted Activities for Results System - STARS), 3) MDE's LUST site files, and 4) MDE's LUST Trust fund cost recovery records.

The site files that we reviewed were judgmentally selected. We selected sites reported as cleanups completed in FY 1996. We selected sites completed throughout the year and sites that reflected the various types of LUST cleanups such as, tank pulls, soil contamination, and groundwater contamination.

The results of our performance audit are presented in the findings:

- 1) *Improvements Needed in The Reporting of Program Accomplishments,*
- 2) *Documentation Lacking for Less Than Full Cost Recovery Settlements,* and
- 3) *Other Matters.*

We also conducted a financial and compliance audit of the CA to determine if the costs incurred and claimed by MDE were eligible, reasonable, and allocable under the CA's terms and conditions and in accordance with laws and regulations. The audit represents a final audit of costs claimed. This portion of our review was conducted in accordance with the *Government Auditing Standards* (1994 Revision) for financial related audits issued by the Comptroller General of the United States. Accordingly, the audit included tests of the accounting records and

other auditing procedures as we considered necessary. Other than the issues discussed in this report, no other significant issues came to our attention that warranted expanding the scope of our audit.

We obtained an understanding of MDE's internal control structure, used in administering Federal financial assistance programs, to determine the nature, timing, and extent of our testing. We relied on the Statewide Single Audit Report for the State of Maryland for the fiscal year ended June 30, 1995, to the extent possible. We analyzed a sample of incurred costs and related internal controls to assure compliance with federal statutory and regulatory criteria and with MDE's policies and procedures. Because of the inherent limitations in any system of internal accounting control, errors or irregularities may occur and not be detected. Except for the questioned costs and issues discussed in this report, no other issues came to our attention that would cause us to believe that MDE's procedures were not adequate for our purposes.

To determine the reasonableness, allowability, and allocability of the costs claimed under the CA, we tested a judgmental sample of the costs claimed. We selected items in each category of cost, i.e., personnel, fringe, and travel. We reviewed the source documentation for all sampled transactions including purchase orders, payment invoices, travel vouchers, and timesheets. We also tested transactions to determine MDE's compliance with federal laws, regulations, and the LUST CA conditions. We reviewed MDE's compliance with the CA's program and financial reporting requirements and interviewed MDE personnel to determine whether policies and procedures were appropriately implemented.

The results of our financial and compliance audit are presented under the heading *Other Matters*.

On June 25, 1997, we issued the draft report. We received a response from Region 3 on July 31, 1997 and additional responses dated August 27, 1997 and September 11, 1997. Additionally, we received a response from MDE on July 24, 1997 and additional responses dated July 31, 1997 and August 25, 1997. We conducted an exit conference with Region 3 personnel on August 13, 1997 and with MDE personnel on September 16, 1997.

We summarized the comments received from MDE and Region 3 after each finding and recommendation. We included MDE's and Region 3's complete responses as Appendixes A and B to this report. Because they were voluminous, we did not include Region 3's attachments. These attachments are on file in our office and are available upon request.

PRIOR AUDIT COVERAGE

There has been no prior audit coverage of MDE's LUST program. However, there has been extensive OIG audit coverage of LUST programs in several other states. This prior audit coverage was summarized in the August 6, 1996, OIG audit report entitled *Consolidated Report on EPA's Leaking Underground Storage Tank Program* (Report No. E1LLF5-10-0021-6100264).

RESULTS OF AUDIT

Improvements Needed In The Reporting Of Program Accomplishments

When reporting FY 1996 program accomplishments to EPA, MDE significantly overstated the number of confirmed releases, cleanups initiated, and cleanups completed under its LUST Program. This over reporting occurred during an extended period, and as a result, we estimate that EPA erroneously paid MDE as much as \$1.4 million. MDE agreed that it needed to change its methodology for reporting program accomplishments and has revised procedures to correct this situation. We believe the erroneous reporting of program accomplishments is a systemic problem and has been the subject of OIG reports issued over the past several years.

Documentation Lacking For Less Than Full Cost Recovery Settlements

MDE did not document the reason for accepting settlement amounts that were less than full cost recovery. Cost recovery records show MDE did not recover all costs on the three recovery cases completed in FY 1996. MDE did not recover \$616,990 (47 percent) of the \$1,304,490 of costs associated with the three sites. Because the required documentation was not prepared and maintained, we could not determine whether MDE effectively used LUST Trust Fund resources. When States do not recover cleanup costs from responsible parties, the State is: 1) relieving the RP of their financial obligation; 2) removing the financial incentive to cleanup contamination; and 3) shifting the burden of cleanup costs to the Federal government.

Information Was Reported Untimely

The STARS reports erroneously included LUST program data that occurred in previous reporting periods. In our sample of 53 cleanups reported as completed in FY 1996, we found 10 sites were completed in previous FYs. For these sites, the actual cleanup work was performed before FY 1996 and the sites were formally closed and reported in FY 1996. To provide EPA managers reliable information, MDE must ensure that it reports LUST Program activity information timely and for the proper reporting period. MDE personnel estimated that 732 or 21 percent of open LUST cases, as of April 1997, could be closed. These cases represent sites where the actual cleanup work was completed and the case only needs to be administratively closed out.

Questioned Costs

Our review of the total costs on MDE's FSR revealed that most costs were eligible. However, we noticed several nonrecurring mistakes resulting in \$7,883 of questioned costs. The effect of the questioned costs resulted in MDE having an additional \$7,883 available in their cost recovery fund to perform LUST activities.

IMPROVEMENTS NEEDED IN THE REPORTING OF PROGRAM ACCOMPLISHMENTS

When reporting FY 1996 program accomplishments to EPA, MDE significantly overstated the number of confirmed releases, cleanups initiated, and cleanups completed under its LUST Program. This over reporting occurred during an extended period, and as a result, we estimate that EPA erroneously paid MDE as much as \$1.4 million. MDE agreed that it needed to change its methodology for reporting program accomplishments and has revised procedures to correct this situation. We believe the erroneous reporting of program accomplishments is a systemic problem and has been the subject of OIG reports issued over the past several years.

OSWER Directive 9650.10A, requires states with LUST CAs to submit semiannual STARS progress reports showing LUST program activities. EPA Headquarters (HQs) uses the information in these reports to; make nationwide funding recommendations, report program progress to Congress, and report the results of the program in the Agency's financial statements. Region 3 also uses the STARS reports to monitor program progress.

STARS reports should include, among other statistics, the following performance data: 1) number of confirmed releases, 2) number of cleanups initiated, and 3) number of cleanups completed. EPA's FY 1996 Financial Statements provide the Agency's definitions for the three major LUST program activities:

- ◆ **Confirmed releases** are incidents where the owner/operator identified a release from a petroleum underground storage tank, reported the release to the state or other designated implementing agency, and the implementing agency verified the release.

- ◆ **Cleanups initiated** are confirmed releases at which the state or responsible party (under state supervision) initiated management of petroleum contaminated soil, removal of petroleum in monitoring wells, or management or treatment of dissolved petroleum contamination.

- ◆ **Cleanups completed** are confirmed releases where the cleanup has been initiated and where the state has determined that no further cleanup actions are necessary to protect human health and the environment.

Each year, EPA apportioned the total funding available for the LUST Program among the states. HQ's funding recommendations for states during FY 1994 consisted of a "base" amount, a "need" amount and a "bonus" amount. The base amount was \$300,000 per state. Fifty percent of the need amount was based on the number of confirmed releases a state reported in FY 1993, and the number of confirmed releases reported nationwide. The bonus amount of \$4 million was based on each state's performance in FY 1993. HQs divided the bonus among states that initiated a specified percentage of cleanups, or completed a specified percentage of cleanups.

While funding changed in each year, HQs used the same methodology and the FY 1993 statistics to compute the amounts each state received from FYs 1994 through 1997.

Our review of the FY 1996 accomplishments MDE reported to EPA via STARS, disclosed that the MDE significantly overstated accomplishments. For example, MDE reported that it completed 480 cleanups. We estimate that the cleanups completed were overstated by nearly 50 percent. We reviewed the list of 480 cleanups completed and found MDE double counted 22 sites. This occurred because the data system allowed a site previously marked closed to be entered as closed a second time. From the remaining 458 sites (480-22), we reviewed the state's files for a sample of 53 sites. This review disclosed 24 or 45 percent did not have a confirmed release and therefore should not have been reported as a completed cleanup.

The 24 sites that had no confirmed release consisted of:

- 10 Sites MDE assumed tank pulls had confirmed releases;
- 3 Sites MDE counted Heating Oil Tanks that are not reportable;
- 3 Sites Sites were cleaned up and counted in a previous fiscal year;
- 2 Sites MDE received anonymous calls but could not find a release,
 and;
- 6 Sites Miscellaneous other situations where there was no evidence
 of a confirmed release.

Based on the results of our review, we estimated that 206 (458 X 45 percent) of the 458 reported cleanups completed were erroneously counted as such.

During the same fiscal year, MDE reported 878 confirmed releases in STARS. Because our sample of 53 sites disclosed that 45 percent of the confirmed releases were overstated, we estimated that only 483 should have been reported. MDE erroneously assumed all incidents resulted in a confirmed release and reported them as such in STARS. This reporting procedure conflicted with EPA's definition of confirmed releases that requires that the incident be identified, reported, and verified.

MDE also reported 761 cleanups initiated in STARS. To calculate this number, MDE estimated that 90 percent of the sites with confirmed releases, resulted in a cleanup initiated. In actuality MDE wanted to report 790 cleanups initiated (878 X 90 percent), but a math error reduced the reported number to 761. In any event, neither number represented the actual number initiated by the MDE. MDE's reporting error occurred because the number of confirmed releases was overstated by 45 percent, and MDE applied 90 percent to the overstated number. Based on our audit results, MDE potentially could have reported about 430 (790 X 55 percent) cleanups initiated. In effect, MDE considered some cleanups initiated even when there was no hazard to clean.

MDE acknowledged that the data reported in STARS was inaccurate and has begun the following procedures to correct the situation:

- ◆ **Confirmed Releases** Procedures have been revised which now require inspectors to verify that a release has occurred.
- ◆ **Cleanups Initiated** MDE now requires inspectors to certify whether a cleanup has been initiated for every site.
- ◆ **Cleanups Completed** The accurate identification of confirmed releases should help ensure the accuracy of cleanups completed. Regarding the problem of double counting, MDE has revised their case tracking database to preclude this situation from occurring in the future.

Based on need, MDE received \$4.6 million from Region 3 for FYs 1994 through 1997. Half of the need amount was awarded to states, such as Maryland, based on confirmed releases. Because we found 45 percent of cleanups completed did not have a confirmed release, we estimated that Region 3 should not have awarded \$1 million to MDE because MDE's "need" was overstated.

Moreover, we estimated that MDE received \$400,000 between FYs 1994 through 1997, for bonuses that they may not have earned. The bonus portion of the funding recommendation was divided among states that met certain percentages of cleanups initiated or cleanups completed. As stated previously, we found that the number of cleanups initiated and cleanups completed was inaccurate. Because an accurate accounting could not be determined, it is questionable whether MDE should have received any of the \$400,000 bonus funding.

EPA plans to change the funding allocation formula for FY 1998. In allocating FY 1998 funds, HQs will:

- ◆ use the most recent data available for all factors;
- ◆ include an incentive and reward for State Program Approval; and
- ◆ place more emphasis on completing cleanups.

Aside from these changes, the new allocation formula still places heavy emphasis on confirmed releases, cleanups initiated, and cleanups completed. The erroneous reporting of program accomplishments is a systemic problem with the Agency. An OIG report issued August 6, 1996 entitled *Consolidated Report on EPA's Leaking Underground Storage Tank Program*, cited six other states for similar reporting inaccuracies. It is essential that the STARS data is accurate so that states receive their equitable share of the funding. Therefore, it is imperative that MDE take immediate action to ensure correct STARS data is submitted to EPA.

RECOMMENDATIONS

We recommend that the Regional Administrator:

1. Review MDE's new procedures to determine if they will result in accurate STARS reporting of cleanups completed, confirmed releases, and cleanups initiated.
2. Perform program reviews of all the state LUST programs within Region 3 and make appropriate adjustments to the funding levels to correct any inequities that resulted from inaccurate reporting of program accomplishments.

MDE RESPONSE

MDE has implemented needed improvements in the way program accomplishments are counted. These changes were implemented for FY 1997. We believe the newly implemented procedures will track closures more accurately.

MDE is committed to maintain accurate reporting by ensuring that the data in the STARS is a true picture of the MDE program. Some of the new procedures will include: the use of the new tank closure form with the method of detection of the confirmed release included; the counting of the actual closed case files; periodic review of inspectors' cases to determine project status; and annual random sampling of the program's data to assure quality.

MDE strongly disagrees with the recommendation to adjust the amount awarded to Maryland, and believes it is not justified, and would jeopardize the MDE's ability to adequately address potential oil contamination. MDE believes that it did not erroneously receive \$1.4 million because Region 3 does not allocate monies solely based on program accomplishments, but utilizes other factors which qualified Maryland for the funds it has received. MDE does not believe that the amount of funds received would have significantly changed if the information it reported was correct. Additionally, this recommendation was not made for similar findings in the Consolidated Audit Report .

The draft report stated that 45 percent of the reported confirmed releases should not have been reported. MDE disagrees because in Maryland any amount of oil discharged is reportable. At the removal of non-upgraded systems, staff always finds some degree of contamination. However minimal the spills may be, MDE factually lists them as confirmed releases. MDE recognizes that in some past cases inspectors may have not documented the small amounts of oil spilled. To properly document the confirmed releases, MDE changed the applicable forms to include an entry that records a release if it has been found. Further, if you remove the 10 tank pull cases, only 26 percent (14 out of 53 total) would have had reporting issues, instead of the 45 percent reported by the OIG.

MDE does not find the recommendation to review and correct previous STARS reports appropriate because the alleged 45 percent overstatement may be less than 17 percent and the substantial amount of resources necessary to make this correction would not offset any minor

benefits received.

REGION 3 RESPONSE

The Region has confirmed with EPA Headquarters that MDE's new procedures will more accurately document confirmed releases. Moreover, the Region does not believe there is good reason to have MDE review past data. The effort associated with such a task would be better invested in addressing current releases.

Region 3 points out that the OIG's consolidated audit report did not require a retroactive, historical overhaul of STARS data. The administrative difficulty of reviewing past case files, and because such a recommendation is different from the one recommended by the consolidated audit prompted Region 3 to suggest that prospective corrective action is the appropriate course.

Region 3 is committed to evaluate MDE's new procedures regarding the verification of confirmed releases to ensure proper documentation is included in case files. Region 3 is also committed to review MDE's STARS data on a continuing basis to ensure that MDE consistently follows EPA's definitions. The Region has committed to conduct program reviews of all Region 3 states to identify how prevalent the national issues are in Region 3 states. Protocols to perform these reviews are currently under development and are awaiting conclusion of this audit before they are finalized and employed.

Region 3 agrees with MDE's contention that our sample is not representative for the confirmed releases and cleanups initiated. They contend the OIG findings are based on an assessment of only 53 case files in relation to a total universe of almost 10,000 confirmed releases. These 53 sites, represented only about 0.5 percent of the entire universe of confirmed release case files. Region 3 disagrees with the conclusion that Maryland should not have received up to \$1.4 million of LUST grant funds. If Maryland did receive excess funds, they were not used for ineligible activities. The audit supports that nearly all costs were eligible.

If Maryland did overstate the number of confirmed releases and influenced the calculation of the State's share of the national grant award budget, it would not necessarily directly impact what Region 3 offers to Maryland as an annual grant award amount. State allocations are combined to give each Region a total allocation. Then, the Region has discretion to distribute grant funds across the regional states as it deems appropriate.

Region 3 contends Maryland continues to lead other Region 3 states in cost recovery amounts, facility inspections, confirmed releases, and cleanups completed even if these numbers are adjusted downward because of reporting inaccuracies.

OIG EVALUATION

As a result of our audit, MDE has implemented numerous needed improvements in the way program accomplishments are reported. Thus, we concur with MDE's and Region 3's proposed

actions regarding the recommendation to ensure accurate STARS reporting.

MDE and Region 3 now agree that our sample of cleanups completed was a fair and representative sample. Moreover, we believe that the 45 percent error rate of cleanups completed that we found, using FY 1996 data, can be applied to confirmed releases and cleanups initiated. The use of FY 1996 data should typify MDE LUST program accomplishments because Maryland had a LUST program for more than ten years.

Regarding our sample being 0.5 percent of the entire universe of confirmed releases, we would point out that we reviewed 12 percent (53 of 458) of the cleanups completed in FY 1996. Moreover, FY 1996 data is representative of the MDE LUST Program.

We could not verify MDE's contention that there is always contamination during tank pulls because it was not documented. Nevertheless, we concur with MDE's completed and planned corrective actions regarding documenting tank pulls more thoroughly.

We have revised our recommendations regarding the recoupment of \$1.4 million from MDE. We considered the Region's planned program reviews of all LUST programs in Region 3 states as an acceptable alternative to our recommendation. Accordingly, we revised our recommendation to require Region 3 to make appropriate adjustments to correct any inequities in funding levels after the proposed program reviews are completed. It should be noted that if the program reviews indicate a state accurately reported program accomplishments, that state may have unfairly received less funding in past years. This should be considered when future funding allocations are made. Also, it should be noted that the STARS statistics used for funding allocations are cumulative; therefore, although data reporting may now be accurate, the cumulative data remains inaccurate.

DOCUMENTATION LACKING FOR LESS THAN FULL COST RECOVERY SETTLEMENTS

MDE did not document the reason for accepting settlement amounts that were less than full cost recovery. Cost recovery records show MDE did not recover all costs on the three recovery cases completed in FY 1996. MDE did not recover \$616,990 (47 percent) of the \$1,304,490 of costs associated with the three sites. Because the required documentation was not prepared and maintained, we could not determine whether MDE effectively used LUST Trust Fund resources. When States do not recover cleanup costs from responsible parties, the State is: 1) relieving the RP of their financial obligation; 2) removing the financial incentive to cleanup contamination; and 3) shifting the burden of cleanup costs to the Federal government.

The Solid Waste Disposal Act states that whenever costs have been incurred by the Administrator, or by a state undertaking corrective action or enforcement action with respect to the release of petroleum from a tank, the RP will be liable to the Administrator or the state for such costs. OSWER Directive 9610.10A requires states to develop a cost recovery program, and allows them to use recovered funds to pay for future cleanups. This directive also requires states to establish a cost accounting system to support cost recovery claims in a judicial action, and provide evidence that costs claimed are reasonable and necessary. The directive also specifies that the basis for any compromise or termination should be adequately supported. The policy allows states to reach compromised settlements when it is more cost effective to negotiate a settlement rather than pursuing litigation.

The following table shows the amounts not recovered for each of the three sites completed in fiscal year 1996.

<u>Case</u>	<u>Total Costs</u>	<u>Settlement</u>	<u>Not Recovered</u>	
			<u>Amount</u>	<u>Percent</u>
A	\$454,000	\$ 50,000	\$404,000	89
B	488,900	315,000	173,900	36
C	<u>361,590</u>	<u>322,500</u>	<u>39,090</u>	11
	<u>\$1,304,490</u>	<u>\$687,500</u>	<u>\$616,990</u>	<u>47</u>

While MDE did not recover \$616,990 (47 percent) of the \$1,304,490 of costs associated with the three sites, it believed the best possible settlements were reached considering the circumstances of each case.

MDE personnel stated the judge for case “A” was very “anti-environmental” and he “strongly pressured” MDE to accept the RP’s offered settlement of \$50,000. MDE personnel stated the judge lead them to believe if the case proceeded to trial, MDE would not receive more than \$50,000. However, MDE’s files did not document this information.

There was a judgement, in case “B” for \$321,977. The judgement did not include litigation and

interest costs. Subsequently, MDE entered a settlement for \$315,000. MDE personnel stated they settled for that amount so the RP: 1) would not appeal the judgement; and 2) would cooperate fully with the monitoring wells, and dismantling the recovery units.

For case "C," MDE entered a settlement for \$302,500 and obtained a promissory note for an additional \$20,000. There was no documentation evidencing the reason MDE did not recover the remaining \$39,090, or 11 percent of the total costs.

MDE personnel agreed that they should have documented their rationale for accepting the settlement amounts.

RECOMMENDATION

We recommend that the Regional Administrator require MDE to document the basis for all future settlements that are for amounts less than full cost recovery.

MDE RESPONSE

Concerning Case "A," the OIG did not review the complete record. MDE personnel informed the OIG that the Assistant Attorney General's file on Case "A" was archived offsite. MDE offered to retrieve the file, but the OIG did not request it. MDE subsequently retrieved the file. It substantiated the inability of the RP to pay the full cost recovery amount, and the Maryland Court's disposition towards the low settlement accepted by the Department.

MDE has completed drafting new cost recovery procedures, which are currently being reviewed by Region 3. These procedures will require proper documentation in all future cost recovery settlements where the MDE achieves less than full cost recovery.

REGION 3 RESPONSE

EPA received a copy of MDE's draft cost recovery procedures on July 17, 1997. These procedures indicate that all decisions shall be documented in writing and include the rationale for the decisions made. EPA's comments on the draft cost recovery procedures will request that MDE emphasize in its procedures that decisions to accept less than full cost recovery shall be documented.

OIG EVALUATION

Regarding Case "A," we were aware of the archived file, but MDE personnel stated that the information regarding the rationale for accepting less than full cost recovery would not be in that file. In any event, MDE needs to document its rationale for accepting less than full cost recovery, and we concur with MDE's and Region 3's proposed actions.

OTHER MATTERS

Information Was Reported Untimely

The STARS reports erroneously included LUST program data that occurred in previous reporting periods. In our sample of 53 cleanups reported as completed in FY 1996, we found 10 sites that were completed in previous FYs. For these sites, the actual cleanup work was performed before FY 1996, but the sites were formally closed and reported in FY 1996. For example, one case could have been closed in June 1990, but was not closed until August 1996. Another case could have been closed in February 1993, but was not closed until August 1996.

To provide EPA managers reliable information, MDE must ensure that they report LUST Program activity information timely, and for the proper reporting period. MDE personnel agreed untimely case closures were a problem. They cited limited resources, and stated in the past they have given compensatory time to inspectors to close cases administratively. MDE personnel estimated that 732 or 21 percent of LUST cases open, as of April 1997, could be closed. These cases represent sites where the actual cleanup work was completed and the case only needs to be administratively closed out.

Questioned Costs

Our review of the total costs on MDE's FSR disclosed that most costs were eligible. However, we noted several nonrecurring mistakes that resulted in \$7,883 of questioned costs. The questionable costs are described as follows:

- ◆ Costs of \$5,933 were ineligible because MDE erroneously inflated amounts on the FSR when compiling figures from their accounting records.
- ◆ Contractual expenditures of \$1,950 were ineligible because they were for State projects and were not allocable to the LUST CA. OMB Circular A-87 requires that in order for the cost to be allocable, it must benefit the CA.

The effect of the questioned costs results in MDE having an additional \$7,883 available in their cost recovery fund to perform LUST activities. MDE personnel agreed that the FSR was incorrect and stated they would determine the applicable corrective action.

RECOMMENDATIONS

We recommend that the Regional Administrator should instruct MDE to:

1. Administratively close all cases in a timely manner for which the cleanups have been completed.

2. Adjust their cost recovery balance to reflect the \$7,883 available to perform additional LUST activities.

MDE RESPONSE

MDE recognizes that there may be some administrative backlog of closed cases. This backlog is to some extent the result of the amount of work assigned to each inspector. The 21 percent figure was an estimated “worst-case” scenario and should not be construed as an actual representation of the current gap. MDE determined that a 90-day gap could exist at any one time and has given this guidance to their staff to reduce and eliminate any delays outside the 90-day period. This 90-day period is needed to complete supervisory concurrence on the case and for issuance of “No Further Action” or “Notice of Compliance” letters to the site owners. The Department is also considering various procedures from other states to further streamline its procedures.

MDE is pleased that all costs were found eligible with the exception of \$7,883 (0.5 percent of the total project costs). The “nonrecurring” mistakes were the result of a spreadsheet error and miscoding an expense. The Department will reinforce its existing accounting procedures.

REGION 3 RESPONSE

MDE has implemented new procedures to streamline site closure procedures. EPA agrees with MDE that there will always be some delay between when a case is technically closed and when loose ends are tied up to be able to actually close out a file administratively. During program reviews, EPA will ensure that MDE is committed to minimizing this gap. Also, MDE has addressed the questioned costs by transferring \$7,883 to the LUST cost recovery account from Maryland’s Oil Fund.

OIG EVALUATION

The 21 percent figure used was conservative. In calculating the 21 percent, we assumed all cases opened after June 1994 did not need to be closed and thus were not a problem. Nevertheless, we concur with the proposed actions.

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Parris N. Glendening
Governor

Jane T. Nishida
Secretary

August 25, 1997

The Honorable W. Michael McCabe
Regional Administrator (3RAOO)
U.S. Environmental Protection Agency
Region III
841 Chestnut Building
Philadelphia PA 19107-4431

Dear Administrator McCabe:

This letter is to provide further information in follow-up to our earlier comments of July 24, 1997 in response to the June 25, 1997 draft OIG Report of Audit on Maryland's LUST program (Report Number E3LLL7-03-0009).

After further reviewing the list of the 480 reported cleanups the program completed during FY 96, the Department has determined that 99 (21%) were from the "marketer" sector and 381 (79%) were from "non-marketers." Therefore, the audit's sample of 11 marketers (21%) and 42 non-marketers (79%) appears to be a representative sample for the "cleanups completed" category. However, the points we noted relative to Maryland's statutory and regulatory definitions of spills (Issue #1, page 2 of MDE's Comments) remain valid. Therefore, the Department still maintains that only 26%, instead of the 45% figure in the draft OIG Report, is a more accurate representation of non-marketer case files with reporting issues.

The marketer/non-marketer issue would remain valid for the other two accomplishment categories (i.e., confirmed release and cleanups initiated). We have reviewed the printout of the ongoing LUST responsible party cleanups and have determined that 67% are marketers and 33% are non-marketers. Thus, any overstatement of accomplishments for confirmed releases and cleanups initiated would fall below 26%, as opposed to the 45% "across the board" assumed in the draft OIG Report.

Therefore, the Department believes that it would be more appropriate for the OIG Report to report a percentage range as possible overstatements as opposed to a single figure. Based on our review, we believe that approximately 20% to 26% of reported accomplishments may have been inadvertently overstated for FY 96.

If you have any questions, please feel free to call me at (410) 631-3304.

Sincerely

/s

Richard W. Collins, Director
Waste Management Administration

RWC:rjm

cc: Carl A. Jannetti
Ms. Maria P. Vickers

^s As signed by Richard Collins on August 25, 1997.



MARYLAND DEPARTMENT OF THE ENVIRONMENT
2500 Broening Highway ● Baltimore Maryland 21224
(410) 631-3000 ● 1-800-633-6101 ● <http://www.mde.state.md.us>

Parris N. Glendening
Governor

Jane T. Nishida
Secretary

July 31, 1997

The Honorable W. Michael McCabe
Regional Administrator (3RA00)
U.S. Environmental Protection Agency
Region III
841 Chestnut Building
Philadelphia PA 19107-4431

RE: Correction to MDE's Comments on
Draft Report of Audit on LUST Program
Report Number E3LLL7-03-0009

Dear Administrator McCabe:

Enclosed please find corrected page 1 of MDE's comments on the above-referenced report. This page should replace the same page in the comments enclosed in my July 24, 1997 letter to you. The correction changes the dollar amount, on line 3 of the paragraph, from \$7,833 to \$7,883. This correction is made as a result of an error in the draft OIG report, pages 5 and 12.

Specific questions related to this correction may be directed to Mr. Horacio Tablada, Administrator of the Oil Control Program, at 410-631-3386, or to me at 410-631-3304.

Sincerely,

/s

Richard W. Collins, Director
Waste Management Administration

RWC:ht

Enclosure

cc: Mr. Carl A. Jannetti
Divisional Inspector General for Audit

^s As signed by Richard W. Collins on July 31, 1997

Comments by the Waste Management Administration
of the Maryland Department of the Environment (MDE)
on Draft Report of Audit on MDE's
Leaking Underground Storage Tank (LUST) Program
Report Number E3LLL7-03-0009

Financial Audit

The Department is pleased that the OIG found the Department's financial procedures to be adequate for the purpose of the audit. Maryland's costs of \$1,548,798 were found eligible with the minor exception of \$7,883 (0.5% of the total project cost). The "nonrecurring" mistakes were the result of a spreadsheet error and of miscoding an expense. The Department will reinforce its existing internal accounting procedures which are designed to prevent the inadvertent misplacement of ineligible charges to federal grants.

Recommendation: The draft OIG Report recommends (Recommendation #2, page 13) to adjust the cost recovery account to reflect the \$7,883 available to perform additional LUST activities. The Department has addressed this matter by transferring this amount to the LUST cost recovery account from the Maryland Oil Disaster Containment, Clean-Up and Contingency Fund.

Reporting of Program Accomplishments

The Department previously recognized, and has implemented, needed improvements in the way confirmed releases, cleanups initiated, and cleanups closed are counted (i.e., utilizing the actual case file instead of the inspectors' Daily Activity Form). These changes were reviewed by the OIG and were implemented for federal FY 1997. (The audit period was federal FY 1996.) We believe that the newly implemented case-tracking procedure will track closures more accurately. The Department recognizes the need to maintain and report data that is reflective of actual circumstances.

Concerning the appropriation of funding, EPA Headquarters grants the LUST appropriation to its Regions based in part on states' accomplishments. However, it is up to individual Region's discretion to determine grant amounts to the states on a yearly basis. While EPA Region III considers program accomplishments, it is not the only or final determining factor. The Department does not believe that the amount of funds received by Maryland would have significantly changed.

The OIG draft report goes on to state that 45% of the reported confirmed releases should not have been reported. The Department disagrees with this statement for the following reasons:



MARYLAND DEPARTMENT OF THE ENVIRONMENT
2500 broening Highway ● Baltimore Maryland 21224
(410) 631-3000 ● 1-800-633-6101 ● <http://www.mde.state.md.us>

Parris N. Glendening
Governor

Jane T. Nishida
Secretary

July 24, 1997

The Honorable W. Michael McCabe
Regional Administrator (3RAOO)
U.S. Environmental Protection Agency
Region III
841 Chestnut Building
Philadelphia PA 19107-4431

Dear Administrator McCabe:

Enclosed please find general comments on the June 25, 1997 Draft Report of Audit on the Maryland Department of the Environment's Leaking Underground Storage Tank (LUST) Program. Maryland is proud of its tank program that over the years has been acknowledged by your office as a model for inspections in the country. These comments are provided in the spirit of partnership with EPA Region III, as your office prepares a response to the Office of Inspector General draft report in accordance with Regional R3-12750.

Overall, we valued the audit as a learning opportunity for our staff and as such have already implemented various procedures which directly relate to some of the issues raised by the Office of Inspector General (OIG). Since the enclosed comments provide clarification on issues raised by the OIG, the Department respectfully requests that they be included as an appendix in the final Report of Audit.

Specific questions related to this letter may be directed to Mr. Horacio Tablada, Administrator of the Oil Control Program, at 410-631-3386, or to me at 410-631-3304. Thank you for allowing us to comment on this draft. We especially would like to thank the OIG staff for their time and guidance on several of the issues discussed.

Sincerely,

/s

Richard W. Collins, Director
Waste Management Administration

RWC:ht

Enclosure

cc: Carl A. Jannetti
Divisional Inspector General for Audit

^s As signed by Richard W. Collins on July 24, 1997.

Comments by the Waste Management Administration
of the Maryland Department of the Environment (MDE)
on Draft Report of Audit on MDE's
Leaking Underground Storage Tank (LUST) Program
Report Number E3LLL7-03-0009

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Recommendation: The draft OIG Report recommends (Recommendation #2, page 13) to adjust the cost recovery account to reflect the \$ 7,883 available to perform additional LUST activities. The Department has addressed this matter by transferring this amount to the LUST cost recovery account from the Maryland Oil Disaster Containment, Clean-Up and Contingency Fund.

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Concerning the appropriation of funding, EPA Headquarters grants the LUST appropriation to its Regions based in part on states' accomplishments. However, it is up to individual Region's discretion to determine grant amounts to the states on a yearly basis. While EPA Region III considers program accomplishments, it is not the only or final determining factor. The Department does not believe that the amount of funds received by Maryland would have significantly changed.

The OIG draft report goes on to state that 45% of the reported confirmed releases should not have been reported. The Department disagrees with this statement for the following reasons:

1. Any amount of oil spilled is a release: In the State of Maryland, by law and regulation, any amount of oil discharged is a reportable amount (Environment Article §§4-401(d) and 4-410(a), Annotated Code of Maryland, and Code of Maryland Regulations 26.10.02.01(A)). At the removal of non-upgraded systems, staff always find some degree of contamination. However minimal the spills may be, this Department factually list them as confirmed releases. We recognize that in some past cases inspectors may not have documented, in the Tank Removal Form, small amounts of oil spilled. To properly document the confirmed releases and remain consistent with this approach, the Department changed its Tank Removal/Abandonment Form and its Leak Summary & Tank Closure Form in the spring of 1997 to include an entry that records a release if it has been found. All field staff has also been instructed to record the method of detection (i.e., field instrumentation, visual, picture, smell, or laboratory analysis) in the forms. These forms will be reprinted in the Fall and will have the method of detection already pre-printed in the forms.

2. Cases reviewed were not representative of the program: The OIG draft report states on page 2 that the site files were "judgmentally" selected. It should be noted that most of the reviewed site files were from the "non-marketer" industry sector, which represents only 20% or less of Maryland's tank population. Of the 458 Maryland case files, the Department staff believes that the OIG chose to review 49 "non-marketer" and only 4 "marketer" files. A more representative sample would have been to select 11 files (20%) from the "non-marketer" sector and 42 files (80%) from the "marketer" sector. Another approach to consider would have been to select a true random sample. From such a random sample, conclusions could have been drawn on the total population at a satisfactory confidence level.

It is not surprising to find recording problems in the nonmarketer case files. The marketer sector have releases easily documented by tank-testing failure results, visual inspections, or field instrumentation results. By virtue of the larger volume of product handled, soil contamination is very obvious at marketer sites. Our experience has shown, however, that contamination is also found at tank removals of non-marketers. While contamination found at non-marketers is less obvious, it still remains a confirmed release under State's rules and must be reported as such.

Therefore, of the 24 sites listed on page 7 of the draft OIG report, 16 of these 24 cases could have not been found in the marketer sector. Those 16 include the 10 tank pulls, the 3 heating oil tanks, and at least 3 of the 6 miscellaneous sites. By removing these cases, only 15% (8 out of 53 total) of the marketer sector case files would have had reporting issues. Further, if you remove the 10 tank pull cases, only 26% (14 out of 53 total) of the non-marketer sector case files would have had reporting issues, instead of the 45% reported by the OIG. Therefore, the Department does not agree with the 45%

overstatement presented in the draft report. Only through auditing, or random sampling, of the full 458 case files could an accurate assessment of any possible overstatements be attained.

Recommendations: The draft OIG report recommends (Recommendation #3, page 9) that EPA adjust the amount awarded to MDE in future years to remedy the alleged past excesses in funding MDE has received. The Department strongly disagrees with this recommendation and believes it is not justified or warranted and would jeopardize the Department's ability to adequately address potential oil contamination in the State, affecting the environment and public health of those impacted by the contamination. The Department strongly believes that it did not erroneously receive \$1.4 million because EPA Region III does not allocate monies solely based on program accomplishments but utilizes other factors which qualified Maryland for the funds it has received. Additionally, this recommendation was not made for similar findings in other states and Regions in the August 6, 1996 OIG Consolidated Report on EPA's LUST Program.

The draft OIG Report also recommends (Recommendation #1, page 9) that EPA instruct MDE to review and correct all previous STARS information to reflect accurate cumulative totals. The Department does not find this recommendation appropriate because the alleged 45% overstatement may, in fact, only be less than 17% (26% of the 20% non-marketers and 15% of the 80% marketers) and the substantial amount of resources necessary to make this correction would not offset any relatively minor benefits.

The draft OIG Report recommends (Recommendation #2, page 9) that EPA ensure that MDE's new procedures will result in accurate STARS reporting. MDE is committed to maintain an accurate reporting method to EPA by ensuring that the data in the STARS is a true picture of the program in Maryland. Some of the new procedures will include: the use of the new tank closure form with the method of detection of the confirmed release, the counting of the actual closed case files; periodic review of inspectors' cases to determine project status; and annual random sampling of the program's data to assure data quality.

Documentation in Cost Recovery Settlements

Maryland has always been in the forefront in cost recovery cases and has exercised its discretion in pursuit of such cases in accordance with EPA OSWER Directive 9610.10A. This directive specifically provides States with flexibility and discretion in determining which costs to pursue and how much effort to devote in the pursuit of these costs. The Department is dependent on the use of cost recovery funds. As stated on page 2 of the draft report the Department has used its cost recovery account to supplement the State's LUST Cooperative Agreement. The State has been prompt and aggressive in

seeking cost recovery. In some cases, full and detailed documentation of the settlement process has not been recorded due to the privileged nature of information utilized and disclosed by parties in the course of litigating and settling cost recovery cases. The Administration and its counsel recognize that, in seeking cost recovery, the LUST program's objectives and the public interest are best served, and the Department's human resources best utilized, in considering the cost-effectiveness of prolonged cost recovery actions, i.e., supplementing the LUST Cooperative Agreement with a negotiated settlement in a timely manner, versus engaging limited resources in expensive and time consuming litigation for a remaining small percentage of arguably cost-recoverable expenditures.

Concerning Case "A", the OIG auditor did not review the complete record. The Department's staff informed the auditor that the Assistant Attorney General's file on Case "A" was archived offsite at the State's warehouse in Jessup, Maryland. The Department offered to retrieve the file from the archives, but the auditor did not request it. Although the auditor was not able to review the entire record, the Department has subsequently retrieved the file which substantiates the inability of the responsible party to pay the full cost recovery amount and the Maryland Court's disposition towards the low settlement accepted by the Department.

Recommendation: The draft OIG Report recommends that EPA require MDE to document the basis for all future settlements that are for amounts less than full cost recovery. The Department has completed drafting new cost recovery procedures, which are currently being reviewed by EPA Region III. These procedures will establish proper documentation in all future cost recovery settlements where the Department achieves less than full cost recovery.

Information Reported Untimely

The Department recognizes that there may be some administrative back log of closed cases (e.g., cases that are technically or programmatically closed but have not been closed administratively). This backlog is to some extent the result of the amount of work assigned to each inspector. The auditor commented during his visit that he was very impressed with the case load carried by the inspectors.

MDE personnel recall discussing a potential gap between cases "technically" closed but not "administratively". However, the 21% figure given was an estimated "worst-case" scenario and should not be construed as an actual representation of the current gap. The staff has determined that a 90-day gap could exist at any one time and has given this guidance to the field staff and managers to reduce and eliminate any delays outside the 90-day period. This 90-day period is needed to complete supervisory concurrence on the case and issuance of no further action or notice of compliance letters

to the site owner.

Recommendation: The draft OIG Report recommends (Recommendation #1, page 13) that MDE administratively close all cases in a timely manner for cleanups which have actually been completed. The Department had implemented monthly review meetings between supervisors and field inspectors to review potential closed cases. A 90-day gap between actual and administrative closure will be considered acceptable. The Department is also considering various procedures from other States to further streamline the closure procedures. Our efforts will be directed toward minimizing this gap.

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**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION III
841 Chestnut Building
Philadelphia, Pennsylvania 19107**

SUBJECT: Draft Report of Audit on Maryland Department of the Environment's (MDE) Leaking Underground Storage Tank (LUST) Program

FROM: W. Michael McCabe /^S
Regional Administrator (3RA00)

TO: Carl A. Jannetti
Divisional Inspector General for Audit (3AI00)

Thank you for the opportunity to review and comment on the report. The Region has reviewed the report findings and recommendations and has prepared a detailed response which is attached.

In summary, the Region has found that the draft audit report is essentially accurate, but have some serious concerns about the fact that items presented in the report are not representative of MDE's entire LUST program operations.

The Region's response is based on the Office of RCRA Programs' comments dated July 31 and August 27. In addition, MDE on July 24 and August 25, responded and their comments were reviewed by the program and referenced in their response.

We hope that you find our comments useful. If you should have any questions on this matter, please contact Robert Reed at 6-5270.

Attachments

^S As signed by William Wisniewski for W. Michael McCabe on September 11, 1997.

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION III
841 Chestnut Building
Philadelphia, Pennsylvania 19107**

SUBJECT: Supplemental Response to Draft Report on Maryland
Department of Environment (MDE) Leaking
Underground Storage Tank (LUST) Program -
Report Number E3LL7-03-009

FROM: Maria Parisi Vickers, Associate Director ^S
Hazardous Waste Management Division
Office of RCRA Programs (3HW03)

TO: Robert G. Reed, Jr., Chief
Grants & Audit Management Branch (3PM70)

This memorandum will supplement the Office of RCRA Programs' response of July 31, 1997, to the Office of Inspector General's (OIG) Draft Report of the Audit captioned above.

Following submission of our response, members of your staff, members of OIG staff and members of my staff and I have had discussions among ourselves and with staff of Maryland's Department of the Environment (MDE) to clarify some of the issues in the Draft Report. A conference call was held on August 13, 1997 among all parties mentioned except MDE staff. During that conference call three major issues were discussed:

1. OIG staff described the sampling methodology used in the audit;
2. All parties explored the means by which corrective action could be achieved in the area of data management; and
3. How future funding of MDE's LUST Program would be affected.

Turning to the first issue, the OIG's discussion of sampling methodology satisfies this Office that the audit's sample of marketers and non-marketers appears to be a representative sample for the "cleanups completed" category. That discussion has persuaded MDE as well who has submitted additional comments on the Draft Audit Report. (Attached here and incorporated by reference is a letter dated August 25, 1997, submitted to EPA Regional Administrator W. Michael McCabe by MDE's Waste Management Administration Director, Richard W. Collins.) However, Mr. Collins goes on to point out that:

^S As signed by Maria Parisi Vickers on August 27, 1997

The marketer/non-marketer issue would remain valid for the other two accomplishment categories (i.e., confirmed release and cleanups initiated). We have reviewed the printout of the ongoing LUST responsible party cleanups and have determined that 67% are marketers and 33% are non-marketers. Thus, any overstatement of accomplishments for confirmed releases and cleanups initiated would fall below 26%, as opposed to the 45% “across the board” assumed in the draft OIG Report.

Therefore, the Department believes that it would be more appropriate for the OIG Report to report a percentage range as possible overstatements as opposed to a single figure. Based on our review, we believe that approximately 20% to 26% of reported accomplishments may have been inadvertently overstated for FY’96.

The second issue, the nature of corrective action to be taken in the area of data management, embraces two out of the three recommendations in the Draft Report as they appear on page 9:

1. Instruct MDE to review and correct all previously reported STARS information to reflect accurate cumulative totals for cleanups completed, confirmed releases, and cleanups initiated.
2. Ensure that MDE’s new procedures will result in accurate STARS reporting of cleanups completed, confirmed releases, and cleanups initiated.

We will not reiterate the position already stated in our July 31, 1997 response except to point out that the nature of the corrective action recommended in the OIG’s national audit of the LUST Program was prospective; that audit did not require a retroactive, historical overhaul of STARS data. The obvious administrative difficulty of reviewing 10,000 case files, and the fact that such a recommendation would single out Maryland for corrective action different from, and more burdensome than, the corrective action recommended by the OIG’s National Audit prompt us to suggest that prospective corrective action is the appropriate course.

Finally, on the third issue discussed -- recoupment of funds -- we again emphasize our position that it is in the interest of the environment and the public we serve to have MDE continue to implement what is an excellent LUST program and not jeopardize that quality by decrease of funding in order to recoup funds which were spent on LUST grant-eligible activities. Again, corrective action in this area should be prospective and we point that this position, too, is consistent with the OIG’s National Audit.

Also attached here for your reference and review is Chapter 4 of the Consolidated Report on EPA's Leaking Underground Storage Tank Program, Audit Report No. EILLF5-10-0021-6100264 August 6, 1996. That Chapter examines the same data reporting requirements as the instant audit and found that among the six States audited, data points were generally overstated from 7 to 47 % (see pages 33-44).

Attachments (2)

cc: Martin Pinto (3AI00)
John Bocelli (3PM70)
Robert Picollo (3PM70)
Tom Voltaggio (3DA00)
Randy Pomponio (3HW03)
Abe Ferdas (3HW00)
Richard Collins, MDE
Horocio Tablada, MDE
Bill Lienesch, OUST



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION III
841 Chestnut Building
Philadelphia, Pennsylvania 19107-4431

MEMORANDUM

SUBJECT: Response to Draft Report of Audit on Maryland Department of the Environment's (MDE) Leaking Underground Storage Tank (LUST) Program Report Number E3LLL7-03-009 7/31/97

FROM: Maria Parisi Vickers, Associate Director ^S
Hazardous Waste Management Division
Office of RCRA Programs (3HW03)

TO: Robert G. Reed, Jr., Chief
Grants and Audit Management Branch (3PM70)

The purpose of this memorandum is to respond to the Office of Inspector General's (OIG) Draft Report of Audit on the Maryland Department of the Environment (MDE) LUST Program. Pursuant to your memorandum of July 2, 1997 and a ten-day extension to respond granted by John Bocelli of your staff to John Humphries of my staff, I am submitting this response on behalf of the Office of RCRA Programs, so you can prepare a response to the OIG on behalf of the Regional Administrator. The purpose of the audit was to "determine whether MDE had adequately accounted for LUST Trust Fund monies and complied with the Cooperative Agreement (CA) conditions." We have attached to our comments, MDE's response to the Draft Audit Report, which was submitted directly to the Regional Administrator on July 24, 1997. We suggest that the OIG honor MDE's request to include their comments, which serve to clarify the issues presented in the Draft Audit Report, as an Appendix to the OIG's final report. In addition, we request that the Office of RCRA Program's comments be included in the OIG's final report as an Appendix.

As requested, the Office of RCRA Programs addressed the factual accuracy of the data presented in the Draft Audit Report, and then provided comments on the conclusions and recommendations included in the Report. Although the Draft Audit Report is essentially accurate, in light of the methodology employed in the audit, the Office of RCRA Programs has serious concerns about the conclusions and recommendations presented in the Report. We are concerned about the fact that site files were "judgmentally" selected in the audit process. The Draft Report is not totally clear on the parameters of that selective judgment, but EPA and MDE believe that underground storage tanks owned by non-marketers of petroleum are overrepresented. Since MDE asserts that non-marketers represent 20% or less of the State's total UST universe, conclusions and recommendations presented in the report seem to have been inappropriately extrapolated, from an unrepresentative sample of program data, to represent MDE's entire LUST program operations.

Factual Accuracy:

On page 11, first paragraph, last sentence, "The file did not document this information." EPA believes this statement is not totally accurate (see page 4 of MDE's response) and suggests a change be

^S As signed by Maria Parisi Vickers on July 31, 1997.

made to reflect that although “the” file reviewed did not contain the relevant documentation, other Maryland records could have been produced to provide the necessary documentation.

On Pages 5 and 12, there are two inconsistent references to the total amount of ineligible expenditures under the FY 96 Cooperative Agreement, i.e., \$7,833 and \$7,883. The correct figure should be \$7,883.

NOTE: Maryland also inadvertently made the same typographical error on page 1 of their July 24, 1997 response to the OIG Draft Audit Report. MDE has been notified and assures EPA the correct amount (\$7,883) will be transferred to the LUST cost recovery account to rectify the ineligible cost expenditures.

Conclusions and Recommendations:

Reporting of Program Accomplishment

Instruct MDE to review and correct all previously reported STARS information to reflect accurate cumulative totals for cleanups completed, confirmed releases, and cleanups initiated.

As stated in MDE’s response on pages 1 and 3, the Department recognized the need for, and has already implemented, improvements in the way confirmed releases, cleanups initiated, and cleanups completed are confirmed, counted and reported. These changes were reviewed by the OIG case auditor, Mr. Mark Phillips, and have been implemented for federal FY 97. The State contends the inaccurate records are more the result of poor documentation than misrepresentation of the facts. The Regional Office has consulted with the Headquarters Office of Underground Storage Tanks (OUST), and OUST has confirmed that some tolerance is allowed in the variation of program data among the states (see attached June 27, 1996 Comments on “Consolidated Report on EPA’s LUST Program, Draft Report Number E3PLF5-10-0021” from Elliot Laws, Assistant Administrator for OSWER to Michael Simmons, Deputy Assistant IG for Internal & Performance Audits at pages 57 - 59).

Since MDE has implemented a procedure to better document their program data in the future, Region III has confirmed with EPA Headquarters that MDE’s new procedures will more accurately document confirmed releases, and the effort to revisit nearly 10,000 case files would be substantial, the Office of RCRA Programs does not believe there is good reason to go back and have Maryland review, confirm and document past data. The time and effort associated with such an administrative task would be better invested in addressing current releases from underground storage tanks.

Ensure that MDE’s new procedures will result in accurate STARS reporting of cleanups completed, confirmed releases, and cleanups initiated.

The Office of RCRA Programs is committed to review and evaluate MDE’s new procedures regarding the “verification” of a confirmed release to ensure proper documentation is included in case files. EPA is also committed to review Maryland’s STARS data on a continuing basis to ensure that Maryland consistently follows EPA’s definitions. In fact, as a result of the national OIG audit of the LUST program, the Office of RCRA Programs has committed to conduct program reviews of all Region III states to identify how prevalent the national issues are in Region III states. Protocols to perform these reviews are currently under development and are awaiting conclusion of the OIG audit in Maryland before they are finalized and employed in other Region III states.

Adjust the amount awarded to MDE in future years to remedy the past excesses in funding MDE has received.

The Region is concerned about the OIG’s claim that confirmed release numbers were

overestimated by 45% based on the sample of “judgmentally selected” cases reviewed, and the subsequent extrapolation of that figure to represent the entire population of LUST facilities. First, Maryland believes the ten (10) tank pull cases reviewed were a question of documentation not an error in reporting, because MDE’s experience has shown tank pulls routinely show some evidence of a release. As a result, only 14 cases, or 26%, of the files reviewed would potentially have inaccuracies against reported data. In addition, as the audit report states, the site files reviewed were “judgmentally selected” and Maryland has reported that all but 4 of the cases reviewed represented a non-marketer facility. There is a likelihood that the characteristics of marketer and non-marketer operations are distinct enough to suggest findings in one universe may not represent the other (see page 2 of MDE response). For example, the 3 heating oil tanks noted as misrepresented data in the cases reviewed would not typically occur in the marketer universe, because gasoline stations, unlike non-marketers, would rarely have heating oil tanks on the premises. Maryland estimates that non-marketers represent 20% or less of the State’s total UST universe, therefore extrapolating the estimated 45% error in reporting across the entire LUST universe is misrepresentative. The State estimates that the rate of misrepresented data in the marketer universe is no greater than 15% (see pages 2 and 3 of MDE’s response). Therefore, the potential combined error rate, considering a modified error rate for non-marketers, would more likely be 17%, substantially lower than 45%.

Not only was the sample of 53 FY 96 case files unrepresentative, the recommendation to recover up to \$1.4 million from Maryland is based on an assessment of only 53 case files in relation to a total universe of almost 10,000 confirmed releases reported over a number of years, even accounting for the OIG’s estimated 4.5% “double counting” error. This sample of 53 sites, represented only about 0.5% of the entire universe of confirmed release case files at the time. Although for reasons noted below, Region III does not believe any grant funds should be recovered from Maryland, the OIG should have assessed a larger number of randomly selected case files in order to better support a more representative and defensible grant recovery amount.

The Office of RCRA Programs disagrees with the conclusion that Maryland should not have received up to \$1.4 million of LUST grant funds for fiscal years FY94 through FY97, because of inaccuracies in program data Maryland reported to EPA. The Office also disagrees with the recommendation to adjust Maryland’s future grant awards to “remedy the past excesses” in funding. First, and most importantly, if Maryland did receive “excess” funds, they were not used for ineligible activities. The audit supports that, except for \$7,883 of ineligible costs mistakenly charged to the LUST Cooperative Agreement and promptly rectified by Maryland, all LUST grant funds were applied to eligible program costs.

Second, if Maryland did overstate the number of confirmed releases and influenced the calculation of the State’s share of the national grant award budget, it would not necessarily directly impact what Region III offers to Maryland as an annual grant award amount. State allocations are combined to give each Region a total allocation. Then, using the state-based allocation figures, the Regional Administrator has discretion per 40 CFR Part 35 (35.120, 35.125(b), 35.141(a) and 35.143(a)) to distribute grant funds across the Regional states as appropriate - state-based allocations are not entitlements for respective states.

Third, the application of Regional discretion in setting grant award amounts for states is a part of the distribution process for allocating grant funds. Headquarters recognizes that the data used in the national grant allocation formula is not perfect (see Elliot Law’s memorandum cited

above), and expects Regions to use a variety of factors to determine state-specific grant allocation amounts. In fact, the Region does use its discretion to distribute grant funds among Region III states based on a variety of factors that can modify allocation figures derived from the national distribution formula. For example, from time-to-time the Region considers providing additional funding for particular, non-recurring needs of the states, like the establishment of computer-based tracking systems, the purchase of field and laboratory equipment, etc., to enhance state capabilities. In other instances, if a particular state is unable to match grant funds, either a Headquarters allocation or supplemental grant funds resulting from previous year carryover, the Region will routinely offer any excess grant funds to those states that can match and spend available grant dollars effectively. Maryland has traditionally been a state that could accept a substantial percentage of available Regional grant funds, and, as such, has built a strong infrastructure for their underground storage tank program.

Maryland continues to significantly lead other Region III states in cost recovery amounts, facility inspections, *and* confirmed releases and cleanups completed even if these numbers are adjusted downward because of reporting inaccuracies. Based on the above, the Office of RCRA Programs does not support the recovery of any grant funds from Maryland, because of inaccuracies in reporting program data. Essentially, grant funds were applied to eligible MDE LUST program costs to achieve effective program implementation. We note that the national audit of the LUST program did not recommend recovery of grant funds from states due to inaccurate reporting of program data. We believe that there is no reason to apply a different rationale here and single out Maryland for recoupment.

Ultimately, the discretion to set equitable grant funding levels among Regional states rests with the EPA Regions. Even before the OIG's Draft Audit Report was released, the Regional distribution of LUST funds was a topic on the May 14 and 15, 1997, All States Meeting agenda. As EPA grant funding levels stabilize and state program costs continue to escalate, the need for the Region to be particularly discerning in the distribution of grant funds is heightened. The Office of RCRA Programs informed the states at the May meeting that during FY 98 it would be assessing how LUST grant funds are allocated across the states. The states were invited to participate in the process to provide input, and the states declined the invitation, leaving the responsibility solely with the Region. The Office has every intention to continue to exercise its discretion to allocate grant funds to the states in a responsible and equitable manner.

Documentation in Cost Recovery Settlements

We recommend that the Regional Administrator require MDE to document the basis for all future settlements that are for amounts less than full cost recovery.

EPA received a copy of MDE's draft cost recovery procedures on July 17, 1997. These procedures indicate that "all decisions regarding the specific site shall be documented. The documentation shall be in writing and state the rationale for the decisions made. The documents will be maintained in the files of the Oil Control Program (OCP)." EPA's comments on MDE's draft cost recovery procedures will request that MDE emphasize in its procedures that "every decision for all sites where the Department achieves less than full cost recovery shall be documented."

Information Reported Untimely

Administratively close all cases in a timely manner for which the cleanups have been completed.

MDE has implemented new procedures, as discussed on page 4 of their response, to streamline site closure procedures. EPA agrees with MDE that there will always be some gap between when a case is technically closed and when loose ends are tied up to be able to actually close out a file administratively. MDE's response discusses establishing new procedures to set expectations for timely closure of cases which should eliminate extensive lapses in reporting site closures.

In addition, EPA's own method of collecting state program data does not promote timely reporting. State STARS report data is due to EPA every six months by the 5th working day following March 31st and September 30th. This reporting time frame does not always allow site closures that are "technically" completed towards the end of one reporting period to be reported in the appropriate cycle, because administrative details cannot be completed soon enough. Consequently, the next time data can be updated is during the next reporting cycle, six months later.

During program reviews, EPA will ensure that MDE is committed, within the LUST Cooperative Agreement, to direct their efforts towards minimizing the gap between the time when a case is technically closed and when a case file is administratively closed.

Questioned Costs

Adjust their cost recovery balance to reflect the \$7,883 available to perform additional LUST activities.

The Department has addressed this matter by transferring \$7,883 to the LUST cost recovery account from Maryland's Oil Fund (see page 1 of MDE's response). Also see the clarifying "note" on the first page of this memorandum.

The Office of RCRA programs notes that greater than 99% of MDE's expenditures in FY 96 were LUST-eligible costs. Maryland has committed to reinforce their existing internal accounting procedures to further decrease the percentage of ineligible costs charged to LUST grant funds in the future.

EPA recognizes MDE's tank program as one of the best in the country. The State's inspection program has been held up as a model for other states nationwide. The constructive manner in which MDE has addressed the issues in the Draft Audit Report is an example of the State's commitment to work as a partner with EPA. We anticipate that MDE will cooperate with EPA in the future to continuously improve Maryland's underground storage tank program.

If you have any questions regarding EPA's comments on the OIG's Draft Audit Report of the MDE's LUST Program, please do not hesitate to contact me at 215-566-3149 or John Humphries, Chief, State Programs Branch at 215-566-3372.

Attachments (2)

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