



**Office of Inspector General
Central Audit Division
Audit Report**

**Resource Conservation and
Recovery Act**

**Appropriate Violator Classifications and Timely Initial
Enforcement Actions Would Strengthen Montana's
RCRA Enforcement Program**

Report No. 000762-2001-P-00004

March 28, 2001



EPA Inspector General Division
Conducting the Audit:

Central Audit Division
Denver, Colorado

EPA Region Covered:

Region 8

EPA Program Offices Involved:

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March 28, 2001

MEMORANDUM

SUBJECT: Appropriate Violator Classifications and Timely Initial Enforcement Actions
Would Strengthen Montana's RCRA Enforcement Program
Report No. 000762-2001-P-00004

FROM: Kimberly Victor
Acting Audit Manager
Denver Office

TO: Jack McGraw
Acting Regional Administrator
Region 8

Attached is our report entitled, *Appropriate Violator Classifications and Timely Initial Enforcement Actions Would Strengthen Montana's RCRA Enforcement Program*. The report includes recommendations to improve Montana's Resource Conservation and Recovery Act compliance monitoring and enforcement program, as well as Region 8's data in its oversight inspection and enforcement information system. We discussed our findings with your staff and Montana's staff, issued a draft report, and held an exit conference with your staff on March 14, 2001, and with Montana's staff on February 22, 2001. We summarized your comments in the final report and included your complete response in Appendix I.

We appreciate the cooperation your staff showed us and the assistance they provided throughout the audit. The staff exhibited a genuine interest in working with us to identify ways to improve Montana's RCRA enforcement program and helped add value to this audit.

Action Required

In accordance with the Environmental Protection Agency's (EPA) Order 2750, you, as the action official, are required to provide this office with a written response within 90 days of the final report date. For corrective actions planned, but not completed by the response date, reference to specific milestone dates will assist us in deciding whether to close this report.

We have no objection to the release of this report to any member of the public. This report contains findings that the Office of Inspector General (OIG) has identified and corrective

actions OIG recommends. This audit report represents the opinion of OIG and the findings in this report do not necessarily represent the final EPA position. Final determinations on matters in this audit report will be made by EPA managers in accordance with established EPA audit resolution procedures.

If you have any questions, please call me at (303) 312-6629. Please refer to report number 000762-2001-P-00004 on any correspondence.

Attachment

EXECUTIVE SUMMARY

INTRODUCTION

The objective of the Resource Conservation and Recovery Act (RCRA) is to ensure that hazardous waste is handled in a protective manner. Congress intended for states to assume primary responsibility for implementing hazardous waste regulations with oversight from the federal government. As part of the compliance monitoring and enforcement component of a hazardous waste program, the Environmental Protection Agency (EPA) and/or state staff conduct inspections, take enforcement actions, and assess penalties. To attain and maintain a high rate of compliance, EPA and state RCRA programs should address the most serious violators with timely, visible, and effective enforcement actions. For this audit, we reviewed inspection and enforcement actions for 47 out of 113 facilities with violations identified during fiscal 1997 through 1999 to determine whether Montana's Department of Environmental Quality (MDEQ) and EPA Region 8 took timely and appropriate enforcement actions. Region 8 authorized MDEQ for the RCRA base program. Therefore, MDEQ had lead responsibility to issue permits, monitor compliance, and enforce most of the significant RCRA requirements in Montana. Region 8 had oversight responsibility for those portions of RCRA that MDEQ received authorization.

OBJECTIVES

Our overall objective was to determine whether EPA Region 8's and Montana's RCRA compliance monitoring and enforcement program complied with the RCRA enforcement response policy and the Region 8-MDEQ enforcement agreement. We sought to answer the following specific questions:

- Did violator classifications and enforcement actions comply with EPA's hazardous waste enforcement response policy?
- Did enforcement actions return violators to compliance?

and was that return to compliance timely and documented?

- Did penalty calculations comply with the RCRA civil penalty policy and the State's penalty policy?
- Was accurate data recorded in the Resource Conservation and Recovery Act Information System (RCRIS)?

RESULTS IN BRIEF

MDEQ did not always appropriately classify violators or initiate timely enforcement actions in accordance with its enforcement agreement with Region 8. MDEQ did not appropriately classify violators in 9 of 47 cases. Also, MDEQ initiated untimely enforcement actions in 15 of 16 formal enforcement cases. Additionally, in 13 of 15 cases where MDEQ sought penalties against non-compliant facilities, MDEQ's penalty calculations did not comply with state or federal policy. Finally, while MDEQ staff generally recorded accurate data in RCRIS, the Department did not consistently record penalty information into RCRIS, and Region 8 staff did not adequately update RCRIS.

MDEQ's inappropriate violator classifications, untimely initial enforcement actions, and inconsistently documented penalty decisions occurred because MDEQ did not always utilize EPA guidance or adequately balance compliance assistance with enforcement. MDEQ could have benefitted from more effective case monitoring, a more collaborative internal team approach, and adequately documenting its RCRA activities in the facility files. As a result, Montana facilities did not always return to compliance as quickly as possible, and these delays could have increased the potential for harm to human health and the environment.

We recommended that the Regional Administrator require

RECOMMENDATIONS

MDEQ to comply with its new consolidated cooperative enforcement agreement. The Regional Administrator also should require that MDEQ escalate chronic or recalcitrant facilities for formal enforcement action rather than continue compliance assistance. Additionally, the Regional Administrator should require MDEQ to fully calculate and document its penalties against serious violators, as well as adequately document the Department's violator classifications and a facility's return to compliance. The Regional Administrator should work with MDEQ to modify its enforcement compliance information system for prioritizing the Department's enforcement requests and monitoring case progress, and support MDEQ efforts in implementing divisional cross-training and information-sharing plans.

AGENCY AND STATE COMMENTS AND OIG EVALUATION

Region 8 officials agreed with the findings and recommendations. Regional staff provided comments to clarify portions of the report, and we have incorporated these comments and modified the report as appropriate. We have summarized the Region's comments at the end of chapter 2 and have included its complete response in Appendix I.

MDEQ officials generally did not agree with our findings and conclusions. We considered MDEQ's comments and modified the report as appropriate. We have summarized MDEQ's comments at the end of chapter 2.

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CHAPTER 1

INTRODUCTION

PURPOSE

Protecting the public and the environment from risks posed by violations of hazardous waste requirements is basic to the Environmental Protection Agency's (EPA) mission. One of EPA's goals in its 1997 Strategic Plan is to ensure full compliance with laws intended to protect human health and the environment. The Resource Conservation and Recovery Act (RCRA) was designed to protect the public and the environment from risks associated with improper management of hazardous wastes. To attain and maintain a high rate of compliance, EPA and state RCRA programs should address the most serious violators with timely, visible, and effective enforcement actions. Our overall objective was to determine whether EPA Region 8's and Montana's RCRA compliance monitoring and enforcement program complied with the RCRA enforcement response policy and the Region 8-Montana enforcement agreement. We sought to answer the following specific questions:

- Did violator classifications and enforcement actions comply with EPA's hazardous waste enforcement response policy?
- Did enforcement actions return violators to compliance and was that return to compliance timely and documented?
- Did penalty calculations comply with the RCRA civil penalty policy and the State's penalty policy?
- Was accurate data recorded in the Resource Conservation and Recovery Act Information System (RCRIS)?

BACKGROUND

EPA's Credible Deterrent Goal

Within its 1997 Strategic Plan, EPA established a goal to ensure full compliance with laws intended to protect human health and the environment. This goal includes the following EPA objectives:

- Identify and reduce significant non-compliance in high priority program areas, while maintaining a strong enforcement presence in all regulatory program areas, and
- Promote the regulated community's voluntary compliance with environmental requirements through compliance incentives and assistance programs.

Compliance Monitoring and Enforcement Program Goals for Region 8 and Its States

as stated in the joint standard operating procedure

- To detect and deter violations through inspections and enforcement actions.
- To promote compliance with hazardous waste requirements to protect public health and the environment from future violations.

Improper management of hazardous waste poses a serious threat to human health and the environment. Congress enacted RCRA in 1976 which established, under Subtitle C, a framework to manage hazardous wastes from generation to disposal. The objective of RCRA's Subtitle C program is to ensure that hazardous waste is handled in a protective manner. Most facilities that treat, store, and dispose of hazardous waste must have permits.

Congress intended for the states to assume primary responsibility for implementing hazardous waste regulations with oversight from the federal government. To become authorized to implement and enforce hazardous waste regulations, a state must develop and submit for approval a hazardous waste program that is equivalent to and consistent with the federal program and provides adequate enforcement. However, EPA retains full enforcement authority and oversight responsibilities.

In Region 8, much of the hazardous waste program under RCRA is administered by authorized states, while the Region retains significant responsibilities for assuring effective programs. Region 8 and its six states jointly developed a standard operating procedure for overseeing state hazardous waste compliance monitoring and enforcement programs. The standard operating procedure document includes policy statements, identifies program criteria subject to oversight, defines performance levels for those criteria, and designates corresponding oversight levels and procedures.

In fiscal 1999, Region 8 introduced its *Uniform Enforcement Oversight System*, designed to evaluate state enforcement and compliance performance. The objective of this new system is to strengthen state programs and reward strong programs with reduced oversight. The system is composed of both quantitative scoring and narrative feedback. In fiscal 1999, Region 8 began using the results of the oversight system to conduct joint annual planning with states and to manage the Region's limited oversight resources.

The goal of the RCRA compliance monitoring and enforcement program is to attain and maintain a high rate of compliance by the regulated community. To accomplish this goal, EPA and/or state staff conduct inspections, take enforcement actions, and assess penalties. An appropriate enforcement action will help to achieve a timely return to compliance and serve as a deterrent by eliminating any economic advantage received by a violator through non-compliance. Montana Department of Environmental Quality (MDEQ) officials indicated that they did not adopt EPA's goals, and rather had separate goals for its hazardous waste inspection and enforcement programs.

Enforcement Action

EPA's *Enforcement Response Policy* discusses timely and appropriate RCRA enforcement actions. EPA issued the first enforcement response policy in December 1984, modified the policy in December 1987, and revised it again in 1996. The enforcement response policy establishes the criteria for determining appropriate types of enforcement responses and violator classifications to ensure consistent RCRA enforcement nationwide. The 1996 enforcement response policy replaced all prior criteria.

The 1996 enforcement response policy classifies violators into two categories: significant noncompliers and other secondary violators. The 1996 enforcement response policy defines significant noncompliers as,

...those facilities which have caused actual exposure or a substantial likelihood of exposure to hazardous waste or hazardous waste constituents; are chronic or recalcitrant violators; or deviate from RCRA statutory or regulatory requirements.

In contrast, the 1987 enforcement response policy designated three classifications of violators: high priority violator, medium priority violator, and low priority violator. The definition of a high priority violator was essentially the same as the definition of a significant noncomplier in the 1996 enforcement response policy. In this report, we will

generally use the term high priority violator, rather than the 1996 enforcement response policy term significant noncomplier because MDEQ used the definitions in the 1987 enforcement response policy.

In addition to categorizing a facility, the 1987 enforcement response policy also classifies individual facility violations into one of two classes – Class I or II. Class I violations are the more serious of the two and consist of deviations from regulations, permit conditions, or other binding agreements that could result in the failure to assure proper treatment, storage, disposal, or emergency cleanup of hazardous waste or prevent and detect hazardous waste releases. Class II violations are those that do not meet Class I criteria. The enforcement response policy defines a chronic or recalcitrant facility as one regularly found to have many Class I or II violations (even if minor in themselves) or one that fails to quickly correct previous violations.

An enforcement response may be either a formal or informal action:

- (1) Formal enforcement may take the form of an administrative order, civil lawsuit, or criminal lawsuit. A monetary penalty may be imposed. According to EPA's policy, formal enforcement is appropriate for high priority violators.
- (2) An informal enforcement response is the minimally appropriate enforcement action for a violator that does not meet the significant noncomplier or high priority violator definition.

An informal enforcement action generally involves notification and does not include economic sanctions. However, a facility that does not return to compliance following an informal enforcement response should be reclassified as a high priority violator and receive a formal enforcement response and penalty.

Region 8 maintains a field office in Helena, Montana, which implements and oversees the Region's programs and strategic priorities throughout Montana. Region 8's Helena office includes three staff who, in addition to other duties, oversee MDEQ's RCRA compliance monitoring and enforcement program.

Region 8 authorized MDEQ for the RCRA base program. Therefore, MDEQ had lead responsibility to issue permits (except for corrective action), monitor compliance, and enforce most of the significant RCRA requirements in Montana. Region 8 had oversight responsibility for those portions of RCRA that Montana received authorization. MDEQ was not yet authorized for RCRA corrective action or the land disposal restriction provisions, and was not authorized to implement RCRA in Indian country. Until December 26, 2000, when the Region authorized MDEQ for the corrective action component of RCRA, Region 8's Helena office had the lead for implementing corrective action. Region 8's Helena office also implemented all provisions of RCRA in Indian country.

MDEQ Organization

| MDEQ Hazardous Waste Program Goals |
|--|
| To assure regulatory compliance by conducting regular comprehensive compliance evaluation inspections at those installations that offer the greatest threat to public health and the environment. |
| To provide technical and compliance assistance to hazardous waste handlers in order to maintain and enhance regulatory compliance. |
| To initiate enforcement actions which are commensurate with the degree of non-compliance and which considers a violator's past compliance history. |

In Montana, RCRA inspections and enforcement actions are conducted by MDEQ staff. Staff in the air and waste management bureau within the permitting and compliance division conduct RCRA inspections and informal enforcement, while staff in the enforcement division conduct formal enforcement actions. MDEQ was created in 1995 through a reorganization of three different environmental and natural resource agencies. Prior to the reorganization, compliance staff were directly responsible for working with legal staff to develop enforcement cases, determine penalties, and achieve final case resolution. Following the reorganization, compliance staff request formal enforcement actions through MDEQ's enforcement division. Enforcement division staff are responsible for determining penalty amounts and proceeding with formal enforcement actions.

MDEQ's *Enforcement Response Manual*, dated October 25, 1999, identifies the common protocols, procedures, and forms used by MDEQ in fulfilling its compliance assistance and enforcement responsibilities. The manual states that MDEQ's specific enforcement responses and time frames should follow those negotiated in the State's enforcement agreement with Region 8. MDEQ's enforcement response manual states that the enforcement division must receive a completed and approved enforcement request from program staff prior to initiating a formal enforcement action.

Enforcement Agreement

The RCRA enforcement agreement between Region 8 and Montana, dated December 1993, cites the timely and appropriate enforcement criteria contained in the 1987 enforcement response policy as the guidance that MDEQ should use for its RCRA compliance monitoring and enforcement program. MDEQ and Region 8 did not renegotiate a new agreement to incorporate timely and appropriate enforcement criteria contained in the revised 1996 enforcement response policy. MDEQ and Region 8 continued to use the 1993 enforcement agreement until the two agencies signed a new agreement in 2000.

In September 2000, both agencies signed a consolidated cooperative enforcement agreement that incorporated five different programs, including RCRA, into one multi-media enforcement agreement. This 4-year agreement included new time frames and criteria different from those in the 1987 and 1996 enforcement response policies, and in MDEQ's 1993 enforcement agreement. This pilot agreement standardized terminology and created a uniform timeline for all five media programs.

SCOPE AND METHODOLOGY

We performed our audit in accordance with *Government Auditing Standards* (1994 Revision) issued by the Comptroller General of the United States. We conducted our fieldwork from February through November 2000.

We performed our fieldwork at MDEQ and Region 8. We reviewed case files for 47 out of 113 facilities in Montana that had violations identified in RCRIS during fiscal 1997 through 1999 to determine whether MDEQ and Region 8 officials took timely and appropriate enforcement actions. We discussed the facility files and other program activities with MDEQ and Region 8 staff and evaluated the internal controls over the inspection and enforcement processes. Because Region 8 authorized MDEQ for the RCRA base program, MDEQ led the inspections and enforcement actions at the 47 facilities and Region 8 acted in an oversight role. We did not include any facilities in Indian country as part of our scope.

Although we used the 1993 enforcement agreement as the primary criteria document, we also evaluated MDEQ's performance against the 1996 enforcement response policy, MDEQ's 1995 penalty policy, MDEQ's 1999 enforcement response manual, and the 2000 consolidated cooperative enforcement agreement. We recognize that Region 8 did not require MDEQ to comply with the 1996 policy. However, we wanted to analyze how timely MDEQ would have been had it used the more lenient time frames in the 1996 policy. In addition, we wanted to evaluate how timely MDEQ would have been if it tried to comply with the new time frames in its 2000 enforcement agreement.

We did not evaluate controls over RCRIS, although we used information from this national data system in our audit. See Exhibit 1 for details on our scope and methodology.

**PRIOR AUDIT
COVERAGE**

The Office of Inspector General (OIG) issued two prior reports related to Region 8 RCRA enforcement:

- The most recent report, dated September 31, 1991, examined the Region's administration of state RCRA enforcement activities. The audit found that Colorado, Utah, and Montana generally had not implemented strong enforcement programs or enforced penalties

because Region 8 had not developed an oversight program and the states were hesitant to take strong enforcement actions against violators for fear of losing business. In our current audit, we did not find that Montana hesitated to take strong enforcement actions due to a fear of losing business. However, as discussed in this report, we found other reasons why Montana did not appropriately classify violators or initiate timely enforcement actions.

- The earlier report, dated September 13, 1988, examined Region 8's controls over compliance monitoring of RCRA enforcement consent agreement provisions. While this report specifically addressed the tracking and control of RCRA enforceable consent agreements, it reported that some RCRA program violators were either not responding both timely and adequately, or there was no clearly documented evidence of their compliance with consent agreements.

Both the 1991 and 1988 reports recommended tighter controls within Region 8's RCRA program and more thorough oversight of state RCRA compliance monitoring and enforcement programs. As a result of the audits, Region 8, with its states, developed a standard operating procedure for hazardous waste compliance monitoring and enforcement programs to maximize consistency and program effectiveness across the Region.

In addition, OIG issued numerous reports between 1998 and 1999 on RCRA significant noncomplier identification in other regional and state offices. Audits conducted in Regions 1, 3, 5, 7, and 10 examined the effectiveness of significant noncomplier identification in those regions and in the states of Rhode Island, Virginia, Illinois, Nebraska, and Washington, respectively. The audits typically found that: (1) state enforcement programs were inconsistent with EPA policies, (2) facilities were not always correctly classified, (3) states did not impose strong penalties, (4) state RCRA files did not contain adequate documentation on return to compliance, (5) states did not always perform followup

**Appropriate Violator Classifications and Timely Initial Enforcement
Actions Would Strengthen Montana's RCRA Enforcement Program**

inspections where appropriate, (6) states took inappropriate enforcement actions, and (7) states did not enter accurate and complete RCRIS data.

See Exhibit 2 for a complete listing of prior audits.

CHAPTER 2

MDEQ NEEDED TO MORE APPROPRIATELY CLASSIFY VIOLATORS AND INITIATE TIMELY ENFORCEMENT ACTIONS

MDEQ did not always appropriately classify violators or initiate timely enforcement actions in accordance with its enforcement agreement with Region 8. MDEQ's untimely initial enforcement actions did not help return facilities to compliance in a timely manner. Additionally, MDEQ did not always consider economic benefit or multi-day components in its penalty calculations. These conditions occurred because MDEQ did not always utilize EPA guidance or adequately balance compliance assistance with enforcement. Also, MDEQ could have benefitted from more effective case monitoring and a more collaborative internal team approach. We also found that MDEQ staff did not adequately document their RCRA activities in the facility files. While MDEQ staff generally recorded accurate data in RCRIS, the Department did not consistently record penalty information into RCRIS, and Region 8 staff did not adequately update RCRIS. As a result, Montana facilities did not always return to compliance as quickly as possible, and these delays could have increased the potential for harm to human health and the environment.

ENFORCEMENT AGREEMENT REQUIREMENTS

The 1993 RCRA enforcement agreement between Montana and Region 8 authorized MDEQ to take timely and appropriate enforcement action against all persons in violation of the Montana Hazardous Waste Act. The 1993 enforcement agreement incorporated the enforcement criteria in EPA's 1987 enforcement response policy. Region 8 and MDEQ did not update the 1993 agreement to include the revised enforcement criteria in EPA's 1996 policy. MDEQ considered the 1993 enforcement agreement time frames as MDEQ's goals for good performance and as guidelines for reviewing progress in individual cases. The 1993 agreement specified that

timeliness would be case-specific and that MDEQ would document any deviation from established time frames.

The 1987 and 1996 enforcement response policies require that violation discovery and the decision to take formal enforcement action against a facility must be made within 45 and 90 days, respectively, of the facility's "evaluation date," or date it was initially inspected. Beyond this similarity, significant differences exist between the 1987 and 1996 enforcement response policies.

Key points in the 1987 enforcement response policy:

- 45 days from inspection to violation discovery and determination of significance
- 90 days from violation discovery to either initiate formal administrative action or refer to judicial authority

Key points in the 1996 enforcement response policy:

- 90 days from evaluation date to determine whether violations are significant enough to warrant a formal enforcement response
- If informal enforcement action does not return a facility to compliance within 90 days from the evaluation date, formal enforcement action must be initiated
- 180 to 300 days maximum, once a violation is discovered, to issue a final order to return the facility to

In addition, MDEQ's enforcement response manual includes time frames that overlay those contained in the 1987 enforcement response policy. For example, MDEQ's manual states that enforcement requests should be submitted for approval within 90 days of first discovery of the violations. MDEQ staff must complete an enforcement request in order to initiate a formal enforcement action. Though dated in 1999, MDEQ officials stated that they used the enforcement request process outlined in the Department's manual during the period of our review.

MDEQ's 1995 *Penalty Policy for the Hazardous Waste Program* mandates the recapture of any significant economic benefit the violator may have gained from non-

compliance and that penalties appropriately capture the gravity of the violation committed. When calculating the penalty, the policy requires MDEQ to complete two separate calculations:

- The first calculation determines an appropriate amount to assess in the administrative order or other action.
- The second calculation explains and documents MDEQ's process to develop a final agreed-upon penalty.

EPA's RCRA civil penalty policy states that the purpose of the policy is to ensure that RCRA civil penalties are assessed in a fair and consistent manner, penalties are appropriate for the gravity of the violation, economic incentives for non-compliance are eliminated, penalties are sufficient to deter persons from committing violations, and compliance is quickly achieved and maintained. The RCRA civil penalty policy further notes that,

...in order to support the penalty proposed in the complaint, enforcement personnel must include in the case file an explanation of how the penalty amount was calculated.

Both policies establish requirements to ensure that penalties are consistent with the goals of: deterrence, fair and equitable treatment of the regulated community, and swift resolution of environmental problems.

**VIOLATOR
CLASSIFICATIONS AND
ENFORCEMENT
DECISIONS DID NOT
ALWAYS FOLLOW
POLICY**

MDEQ did not always appropriately classify violators or make timely decisions whether to take formal enforcement actions. Violation discovery helps MDEQ staff determine violator classifications and conclude whether to take formal enforcement action against a facility.

Appropriate Violator Classifications and Timely Initial Enforcement Actions Would Strengthen Montana's RCRA Enforcement Program

Despite EPA's 1987 enforcement response policy requirements, MDEQ did not appropriately classify facilities in 9 of the 47 files reviewed. Many of the facilities appeared to be chronic or recalcitrant violators. Examples of two cases follow in Table 2-1:

Table 2-1 – Violators Inappropriately Classified

| Facility Name | Problem |
|---------------|---|
| MT14 | <p><i>Never Classified:</i> This large oil refinery was never classified as a high priority violator despite repeated Class I and II violations during nine inspections between 1992 and 1999. The facility's violations included improper management of its storage areas, improper management of accumulation areas, unlabeled used oil containers, uncovered containers, and a cracked regulated unit cap.</p> |
| MT27 | <p><i>Not Classified Timely:</i> Before being classified as a high priority violator on 08/24/99, this train maintenance facility had repeated Class I and II violations during four inspections between 1992 and 1999. The facility's violations included mislabeled drums and soil contaminated by used oil. The enforcement request, reclassifying the facility to high priority violator status, listed 20 repeat violations between 1990 and 1999 and noted that the facility had been recalcitrant since 1990. MDEQ staff stated that the enforcement request for MT27 should have been more clearly written to indicate that the facility finally passed the high priority violator threshold in 1999.</p> |

See Exhibit 3 for a complete list of all 9 inappropriate violator classifications.

MDEQ did not always make timely violation discoveries or decisions to take formal enforcement actions in accordance with EPA's 1987 policy. Of the 47 files reviewed, MDEQ took formal enforcement actions for 16 facilities. In most of the 16 cases, MDEQ made timely violation discoveries. However, in 5 of the 16 enforcement actions, MDEQ's timeliness of violation discovery exceeded the 45-day requirement specified in EPA's 1987 enforcement response

policy. For example, 170 days elapsed between MT39's inspection and MDEQ's date of violation discovery. Similarly, 88 days elapsed between MDEQ's inspection at the MT19 facility and the date MDEQ discovered the violations at the site. See Exhibit 4-A for details on all 16 formal enforcement actions under EPA's 1987 enforcement response policy.

MDEQ's decisions to take formal enforcement action also did not always meet time frames included in MDEQ's 1999 enforcement response manual. MDEQ's enforcement response manual states that in order to initiate an enforcement action, an enforcement request must be submitted within 90 days of first discovery of the violations. In 5 of the 16 formal enforcement actions, MDEQ's decision to complete enforcement requests exceeded the 90-day requirement. For example, 240 days elapsed between MDEQ's violation discovery at the MT42 facility and the date of the enforcement request. Exhibit 4-B illustrates the timeliness of MDEQ's decisions to take formal enforcement actions based on the Department's 1999 enforcement response manual process.

Additionally, MDEQ's decisions to take formal enforcement action also exceeded time frames in EPA's 1996 enforcement response policy. We recognize that Region 8 did not require MDEQ to comply with the 1996 policy. However, we wanted to analyze how timely MDEQ would have been had it used the more lenient time frames in the 1996 policy. The 1996 enforcement response policy requires that the decision to take formal enforcement action must be made within 90 days of the initial inspection or evaluation. In 7 of the 16 formal enforcement actions, MDEQ's decision to take formal enforcement exceeded the 90-day requirement. For example, 165 days elapsed between MDEQ's inspection at the MT19 facility and the date of MDEQ's enforcement request. Exhibit 4-C illustrates the timeliness of MDEQ's decisions to take formal enforcement actions based on EPA's 1996 enforcement response policy.

INITIAL FORMAL ENFORCEMENT ACTIONS WERE NOT TIMELY

MDEQ initiated untimely formal enforcement actions in 15 of 16 cases. MDEQ's initial enforcement response ranged from 40 days under to 347 days beyond the time frames required in both the 1987 and 1996 enforcement response policies. On average, it took MDEQ staff 229 days from violation discovery to initiation of formal enforcement action at each of the 16 facilities. Even under the new 2000 consolidated cooperative enforcement agreement that provides more lenient time frames, MDEQ's actions to return facilities to compliance would have been untimely in 9 of 15 instances. As a result of untimely initial enforcement actions, MDEQ did not compel facilities to return to compliance in a rapid or expeditious manner.

Following are two examples in which MDEQ's formal enforcement actions did not comply with 1987 enforcement response policy time frames:

TABLE 2-2 – Untimely Formal Enforcement Actions

| Facility Name | MDEQ Activities | 1987 Enforcement Response Policy <i>90 day requirement</i> |
|----------------------|---|---|
| MT19 | - 07/30/99 violation discovery - 03/21/00 demand letter | 234 days |
| MT39 | - 02/12/99 violation discovery - 10/08/99 administrative order | 239 days |

The 1993 enforcement agreement allowed the Department to exceed standard timelines under some circumstances. The circumstances that could possibly impact or alter EPA established time frames include the type of violation, complex negotiation, investigation, testing, production and analysis of evidence, and unique questions of law requiring additional time for case analysis. MDEQ stated that each of the cases that exceeded the time frames resulted from unique circumstances and thus the standard 1993 enforcement agreement timelines did not apply. For example, MDEQ stated that for facility MT19, Region 8's

delayed issuance of a variance compromised MDEQ's initiation of formal enforcement and resolution of the violation. However, Region 8's issuance of a variance should not have impeded MDEQ's efforts in taking timely enforcement action at facility MT19. Region 8 oversight inspectors worked very closely with MDEQ staff to ensure that MDEQ officials had the same information as Region 8 regarding the status of MT19's variance, and that MDEQ's actions were not affected by Region 8's issuance of a variance.

MDEQ did not always document the reasons for deviations from the timelines in the case files. While the 1993 enforcement agreement allowed MDEQ to exceed time frames under some circumstances, the agreement also states that "reasons for deviations from timelines will be documented by the lead agency." In addition, the 1987 enforcement response policy states where time frames will be exceeded due to case-specific circumstances, the states and regions must monitor case development. Additionally, where timely enforcement action will not be feasible, the states and regions must be prepared to justify the delay and develop an alternative schedule for case resolution to which they closely adhere. MDEQ did not develop alternative schedules for those cases that exceeded the time frames in the policy.

Region 8's end-of-year compliance monitoring and enforcement reviews also identified problems with MDEQ's timeliness. For example, in the Region's fiscal 1998 review, the reviewer recommended that MDEQ take steps to improve its ability to issue initial formal actions on a more timely basis. The reviewer also stated that the actions filed during fiscal 1998 always exceeded the time allowed by the 1993 enforcement agreement by periods ranging from 15 days to 112 days and similar conditions occurred for cases reviewed in fiscal 1996 and 1997.

See Exhibit 5 for a complete list of the 16 formal enforcement cases. Exhibit 5 compares MDEQ's actions against the 1987 enforcement response policy as well as the

1996 enforcement response policy and 2000 consolidated cooperative enforcement agreement.

PENALTY CALCULATIONS DID NOT COMPLY WITH POLICY

MDEQ Penalty Policy Requirements

- Violations involving the management of hazardous waste should reflect the probability that the violation could have resulted in a release of hazardous waste.
- The Department should explain and document the process by which it arrived at the penalty figure.
- Penalties should recapture any economic benefit the violator accrues as a result of non-compliance.

In 13 of 15 cases where MDEQ sought penalties against non-compliant facilities, the penalty calculations did not comply with state or federal policy. Both Montana's and EPA's RCRA penalty policies require well documented penalty calculations that capture the gravity of the violation committed by a high priority violator and eliminate the economic incentives of non-compliance. Both policies state that economic benefit should be calculated even if it is later found to be negligible. For example, the following cases illustrate where MDEQ did not calculate a penalty as required by the penalty policies:

TABLE 2-3 – Penalty Calculations Inadequate

| Facility Name | MDEQ Penalty Activities |
|---------------|--|
| MT20 | MDEQ classified this lumber facility as a high priority violator for unlawfully disposing of wood treating solution without a permit. MDEQ did not assess a penalty citing that the owner had an inability to pay, although the file showed that the facility owner could pay a maximum penalty of \$12,980. |
| MT39 | MDEQ classified this lumber facility as a high priority violator for numerous violations, including operating an unpermitted disposal facility. MDEQ did not assess a penalty. MDEQ officials stated that they issued a cleanup order for this facility, not a penalty order. |
| MT41 | MDEQ classified this furniture refinishing facility as a high priority violator for a direct release of wood stripping solvents to the groundwater under the facility. MDEQ did not assess a penalty because it determined that the owner had an inability to pay. However, Montana's penalty policy states that ability to pay should be used to adjust a penalty only after making a full penalty calculation. |

MDEQ officials stated that they generally considered economic benefit in all penalty assessments but they did not always place written documentation of the economic benefit calculation in the case file. In 12 of the 13 penalty cases, MDEQ did not have documentation supporting that it either considered or calculated economic benefit or multi-day components.

See Exhibit 6 for a complete list of the 13 cases where MDEQ's penalty calculations did not comply with state or federal policy.

**REGION 8 RCRIS
DATA ENTRY NEEDED
IMPROVEMENT**

Region 8 staff did not adequately update RCRIS to reflect their facility inspection and enforcement activities. For example, Region 8 oversight inspectors did not input case settlement data into RCRIS for the MT02 facility, or oversight inspection information for the MT19 facility. Region 8 guidance emphasized that RCRIS was the mechanism for measuring case progress. Region 8 generates RCRIS reports based on data entered by the Region and its six states, and EPA national offices examine RCRIS data for oversight purposes. Region 8 staff acknowledged their RCRIS problems and indicated they needed additional RCRIS training.

MDEQ staff generally recorded accurate data in RCRIS, and the State's files contained supporting documentation for RCRIS activities. However, MDEQ staff did not consistently record penalty information in RCRIS. MDEQ staff responsible for RCRIS data entry acknowledged their inconsistencies, and stated that they have taken steps to improve their data entry of penalty information. MDEQ staff also recognized the importance of timely and accurate RCRIS data entry for EPA's national reporting. Finally, MDEQ officials stated that the new RCRIS enterprise-wide database should make data entry more frequent and accurate.

**IMPROVEMENTS
NEEDED TO
STRENGTHEN MDEQ'S
RCRA ENFORCEMENT
PROGRAM**

MDEQ's inappropriate violator classifications, untimely initial enforcement actions, and inconsistently documented penalty decisions occurred because MDEQ did not always utilize EPA guidance or adequately balance compliance assistance with enforcement requirements. MDEQ also could have benefitted by effectively monitoring case progress and implementing a more collaborative internal team approach in case management. In addition, MDEQ staff did not adequately document their RCRA activities in the facility inspection and enforcement files. As a result, Montana facilities did not always return to compliance as quickly as possible, and these delays could have increased the potential for harm to human health and the environment.

**MDEQ Needed to Use EPA
Guidance**

MDEQ and Region 8 did not update their 1993 RCRA enforcement agreement to incorporate EPA's 1996 enforcement response policy. During fiscal 1997 through 1999, MDEQ operated, and Region 8 evaluated MDEQ, under the 1993 RCRA enforcement agreement. The 1993 enforcement agreement references timely and appropriate criteria as defined in the 1987 enforcement response policy. Although MDEQ agreed to use the criteria in the 1987 policy, MDEQ enforcement division staff claimed EPA's policy established unrealistic time frames and stated they did not comply with them. MDEQ staff further indicated that each case must be evaluated individually since the time frames in EPA's policy could not be applied to many facilities in Montana. In addition, MDEQ enforcement staff stated that tracking and meeting out-of-date, program-specific time frames was not a priority during negotiations of the 2000 consolidated cooperative enforcement agreement. MDEQ staff explained that both MDEQ and Region 8 recognized that MDEQ's compliance with these policies was not likely.

Region 8 enforcement officials said other Region 8 states incorporated the 1996 enforcement response policy criteria without drafting new agreements between the states and Region 8. However, Region 8 did not require MDEQ to incorporate the 1996 enforcement response policy criteria

into the State's RCRA compliance monitoring and enforcement program. Region 8 stated that Montana's 1997 legislature enacted the Voluntary Environmental Audit Law, which raised serious questions within Region 8 regarding Montana's continued ability to enforce its own environmental laws. Region 8 was not willing to formally update the enforcement agreement until Region 8 and Montana resolved the issue of enforceability. In December 1999, Region 8 and Montana resolved the issue of enforceability and signed a memorandum of understanding. Region 8 also added that since the 1996 policy was more lenient than the 1987 policy in its enforcement timeline, the Region questioned whether it would have been beneficial to adopt the 1996 policy.

MDEQ's director stated that MDEQ focused its efforts on developing a new consolidated cooperative enforcement agreement as part of a pilot effort approved by EPA. MDEQ staff stated that the time frames in the new agreement contained more realistic targets than those in the enforcement response policies. However, as depicted in Exhibit 5, had MDEQ applied the new agreement's time frames for the 16 facilities with formal enforcement actions, MDEQ still would have been untimely in 10 of the 16 instances.

**Better Balance Needed
Between Compliance
Assistance and
Enforcement**

MDEQ needed to better balance when it applied compliance assistance versus enforcement. MDEQ focused on compliance assistance when it determined violator classifications and calculated penalties. MDEQ's enforcement response manual states:

The initial response to many violations will be to provide compliance assistance. If a person ignores the Department's compliance assistance efforts and remains out of compliance or a violation is significant, an enforcement action may be appropriate.

Violator Classifications

In 9 of 47 instances, MDEQ gave facilities numerous

opportunities to address repeated similar violations rather than classify the facilities as high priority violators. The 1987 enforcement response policy lists four factors to consider when classifying a facility as a high priority violator: (1) a handler who has caused actual exposure, or substantial likelihood of exposure to hazardous waste or hazardous constituents; (2) chronic or recalcitrant handlers (this includes handlers who are regularly found to have many Class I or Class II violations); (3) a handler who deviates from the terms of a permit, order, or decree by not meeting requirements in a timely manner and/or by failing to perform work as required by terms of permits, orders, or decrees; or (4) a handler who substantially deviates from RCRA statutory or regulatory requirements.

MT05, a large facility, had repeated Class II violations, including used oil spills, during its 1996 and 1998 inspections. However, MDEQ did not classify the facility as a high priority violator following the 1998 inspection. MDEQ staff said MT05's small releases pertained to container management and that their response corresponded to the gravity of the spills. However, we agree with Region 8 oversight inspectors who said that any more than one attempt at compliance assistance for the same violation was no longer compliance assistance but rather consulting work. We also agree with Region 8 oversight inspectors who added that larger facilities such as MT05 should be familiar with environmental requirements and the State should not be continually providing compliance assistance.

Similarly, MDEQ provided smaller facilities, such as MT36, repeated opportunities to address their violations. The MT36 facility had repeated similar violations during several inspections between 1995 and 1999. An MDEQ inspector said facility staff turnover at MT36 led the inspector to continue with informal enforcement action rather than classify the facility as a high priority violator. One MDEQ inspector added that he did not see the value in escalating small "mom and pop" facilities for formal enforcement, and preferred informal warning letters. A former enforcement division case manager also stated that MDEQ would "go

easy” on smaller facilities because those facilities lacked appropriate education on environmental regulations. However, the enforcement response policy mandates formal enforcement for repeat violators regardless of the facility’s size. In our opinion, a facility’s size should not influence MDEQ’s decision to pursue formal enforcement action where violations warrant a more stringent enforcement response.

MDEQ’s director did not agree with EPA’s enforcement approach to achieve facility compliance. He stated that MDEQ’s approach was to use enforcement as one of the many tools to obtain facility compliance. While MDEQ’s director also stated that the Department’s primary goal was to encourage businesses to comply with environmental laws, MDEQ attempted to achieve that goal through compliance assistance as well as formal enforcement. He further stated that MDEQ’s overall attitude about how to work with a facility was to be non-confrontational while ensuring compliance. The director emphasized that if a facility was intentionally violating the law, then MDEQ would take an enforcement action. He added that inspectors should ask themselves whether a facility was trying to operate within the law or not. MDEQ and Region 8 inspectors agreed that intent was difficult to document and if cases were based solely on intent, few formal enforcement actions would be taken.

Exhibit 3 lists all 9 inappropriate violator classifications.

Penalty Calculations

MDEQ continued its compliance assistance focus through the penalty calculations phase. For example, MDEQ did not assess penalties against the MT20 and MT39 facilities, although MDEQ took formal enforcement actions against each facility. Both Montana’s and EPA’s RCRA civil penalty policies require well documented penalty calculations that capture the gravity of the violation committed and eliminate the economic incentives of non-compliance. Both policies establish requirements to ensure that penalties are consistent with the goals of deterrence, fair and equitable treatment of the regulated community,

and swift resolution of environmental problems. EPA's 1987 enforcement response policy states that enforcement actions against high priority violators should penalize the violator and recover economic savings the violator may have accrued. MDEQ staff said they did not assess penalties against MT20 and MT39 because staff considered the formal enforcement actions as cleanup orders rather than penalty orders. However, MDEQ cited the two facilities for high priority violations which warranted a gravity component according to both the enforcement agreement and the enforcement response policy. Both the MT20 and MT39 cases had at least the appearance of economic benefit, thus warranting at least the calculation of an economic benefit component.

One former enforcement division case manager said that, in general, if MDEQ could get a facility to comply, it would forego a penalty calculation. MDEQ's director said that the enforcement division uses its discretion in every case and will only pursue penalties for significant violations. Enforcement division staff added that they would not assess penalties against facilities if MDEQ knew that they could not collect from the facility. However, Region 8 oversight inspectors said MDEQ officials should not be writing off penalties because a facility has an inability to pay. We agree with Region 8 oversight inspectors who said MDEQ should cite violations, fully calculate initial penalties (including economic benefit, where appropriate), and document and justify any reductions in penalty calculations or decisions to drop a case.

Improved Monitoring of Case Progress Needed

MDEQ did not always effectively monitor case progress. Monitoring case progress includes tracking cases against required state and EPA time frames, such as those contained in EPA's 1987 enforcement response policy, and prioritizing cases based on adherence to time frames and other considerations. Monitoring case progress is an important management tool to determine where resources need to be focused, to prevent unnecessary delays in enforcement actions, and ultimately to prevent harm to the environment and human health. In addition, monitoring case progress is

**Table 2-4
MT26 Activities**

| Date | MDEQ Actions |
|----------|---|
| 09/03/96 | complaint received |
| 10/15/96 | enforcement division inspection |
| 05/23/97 | second complaint received |
| 08/18/97 | second enforcement division inspection |
| 09/24/97 | enforcement division sent violation letter |
| 05/28/98 | third enforcement division inspection |
| 06/05/98 | enforcement division sent second violation letter |
| 07/09/98 | permitting and compliance division inspection |
| 07/31/98 | enforcement request signed |

important to ensure that MDEQ initiates action on cases within Montana's 2-year statute of limitations, which restricts the Department's ability to take enforcement actions after that time. MDEQ uses an enforcement compliance information system to monitor and report enforcement activities. However, at the time of our review, the system did not track cases against time frames contained in EPA's 1987 enforcement response policy.

The MT26 case was one example where effective monitoring may have prevented substantial delays in case progress. The case originated from two separate complaints MDEQ's enforcement division received in 1996 and 1997. Enforcement division personnel conducted inspections following each complaint, noting heavy saturation of oil spillage and asphalt flow on the ground each time. After a third followup inspection 633 days after MDEQ received the original complaint, the enforcement division advised the facility that it was still out of compliance. In June 1998, the enforcement division referred the case to State inspectors for additional field investigation. After observing no evidence that the facility had cleaned up the used oil or asphalt, the MDEQ inspector immediately filed an enforcement request sending the case back to the enforcement division. As a result, the soil remained contaminated with used oil for almost 2 years before MDEQ took a formal enforcement action. Monitoring would have allowed MDEQ to assess where the MT26 case was in relation to enforcement response policy time frames and the State's statute of limitations. See Table 2-4 for activities that took place at the MT26 facility.

Monitoring case progress may have prevented unnecessary delays in addressing MT12's violations as well. After inspecting and citing the facility for operating an unpermitted treatment, storage, and disposal facility and unlawful disposal of hazardous waste, the inspector initiated an enforcement request. Although MDEQ staff collected evidence and prepared the case, the enforcement division eventually dropped the case due to lack of evidence and questioned whether environmental damage actually

occurred. However, it took MDEQ over 300 days to make this determination.

While we did not independently review the evidence MDEQ staff relied upon to dismiss the case, we did review the case file and discussed the case with the inspector and case manager. Based upon MDEQ's subsequent inspections of the site, enforcement division staff said that cans contained the waste, no leaking occurred, and the facility owner cleaned up the site. However, the picture below depicts the violations at the MT12 site and illustrates that leaking did occur and cans did not contain the waste. Monitoring would have helped MDEQ assess where technical knowledge and/or enforcement knowledge was needed. At the very least, monitoring would have allowed MDEQ staff to evaluate the case and identify how similar situations could be prevented from happening again.



The MT12 facility.

MDEQ staff did not take advantage of established time frames as criteria to monitor case progress. MDEQ officials stated that consistent time frames would not affect the outcome of specific cases. MDEQ staff also stated that they did not look at time frames to help prioritize cases or allocate resources. Rather, the enforcement division took cases as they came in, and worked as fast as they could to keep cases moving forward. The enforcement division administrator stated that his division did not “triage”

enforcement requests, or perform quick initial assessments, except in emergency situations that posed imminent threats to the environment.

Although enforcement division staff said they do profile each case to determine which cases can go through the judicial process, better collaboration among MDEQ divisions could help the Department effectively use its resources. Additionally, by instituting a process where cases are prioritized and monitored against time frames, the enforcement division may be able to better identify more difficult cases, allocate resources more effectively, and ensure that cases progress as quickly as possible.

**More Collaborative
Internal Team Approach
Needed**

MDEQ needed to apply a more collaborative internal team approach in its enforcement of hazardous waste laws. MDEQ's 1995 reorganization created a system that relied on strong communication to be effective since the reorganization separated compliance activities from enforcement activities. MDEQ files contained several examples where increased information-sharing and communication by divisional staff could have improved case development. Also, cross-training could have helped MDEQ divisions better understand the information other staff needed to effectively manage cases.

*Information-Sharing Could
Improve Communication*

Increased divisional information-sharing could have prevented miscommunication in some cases. For example, information on a used oil spill at the MT26 facility spent nearly 2 years in MDEQ's enforcement division complaints management section before being passed to inspectors in the permitting and compliance division. The inspectors subsequently conducted a further inspection and quickly compiled the information necessary to submit a formal enforcement request. However, the site remained contaminated during the 2 years it took the enforcement division complaints management section to share the information.

Similarly, insufficient information prevented an enforcement division case manager from adequately explaining why the

penalty dropped from \$8,500 to \$1,000 in the MT42 case. The case manager thought the attorney assigned to the case would have documented his rationale for the penalty reduction. However, the MT42 enforcement case file did not contain the rationale. The attorney stated he fully explained the penalty reduction in an enforcement sensitive file he maintained separate from the case file and that litigation risks justified the penalty reduction for the MT42 case. The attorney, however, had not shared that information with the case manager. Because the information would have been beneficial to the case manager, we believe the attorney should have made a short descriptive note in the case file regarding the penalty reduction. In addition, a reference in the case file that the enforcement sensitive file contained additional information would help to ensure that MDEQ fully supported its penalty decisions.

MDEQ staff said that divisional managers shared information on cases. For example, managers meet once a week to discuss case status and they also prepare monthly reports that summarize MDEQ activities. Managers also get together quarterly to develop the Department's compliance monitoring strategy. However, despite these efforts, some MDEQ staff stated they were not involved in RCRA case decisions. MDEQ's air and waste management bureau chief said that effective teamwork could result in timely enforcement and adequately documented penalties that provide economic disincentives and deter non-compliance by the regulated industry.

One MDEQ staff member admitted that the divisions had a strained relationship with one another following MDEQ's 1995 reorganization, and that each division had a different idea of what constituted appropriate enforcement. MDEQ staff stated that enforcement case managers lost intimate facility knowledge as a result of being separated from compliance staff following the reorganization. However, enforcement division section chiefs stated their staff did not lose facility knowledge as a result of the reorganization. They said their staff had a team approach toward

enforcement cases and, as a “service division,” enforcement personnel needed to remain in contact with the inspectors to verify facts and other facility data. Nevertheless, enforcement division staff said they generally felt “out of the loop” in communications between MDEQ’s permitting and compliance division and legal unit. Region 8 oversight inspectors also said that MDEQ’s inspectors complained about feeling “cut off” from their work once they referred a case to the enforcement division.

High turnover in MDEQ’s enforcement division increased the need to have staff share information. Region 8 staff stated that high turnover in MDEQ’s enforcement division caused a loss of continuity in some cases because inadequate documentation prevented new staff from understanding issues raised earlier in the case. For example, in a letter to Region 8, the MDEQ enforcement division case management section chief wrote that staff turnover of three employees caused a delay in the approval of MT32’s supplemental environmental project. Similarly, a vacancy in MDEQ’s enforcement division liaison position made information exchange more difficult since the liaison served as a facilitator between the enforcement division and other divisions.

Cross-Training Could Improve Case Development

Increased cross-training among MDEQ divisions could have helped staff better manage their cases. For example, enforcement division staff argued that the State inspectors were unaware of what was required to make a strong enforcement case against the MT12 facility. Similarly, a State inspector said in one report that an enforcement division complaints manager did not note asphalt seepage during his investigation at the MT26 facility.

MDEQ officials stated that permitting and compliance division staff could benefit from increased case development knowledge, while enforcement division staff could benefit from more familiarity with RCRA regulatory requirements. A Region 8 oversight inspector added that MDEQ’s inspectors could benefit from a broader case development perspective when reviewing facilities, and that inspectors

should be trained on such areas as “selling a case to management” and writing effective warning letters. The Region 8 inspector also said MDEQ’s enforcement division staff could benefit from increased technical expertise in determining the appropriate enforcement response for RCRA violations.

Improved Documentation Needed

MDEQ did not adequately document its RCRA compliance monitoring and enforcement program activities in the facility inspection and enforcement files. MDEQ needed to better document its rationale for penalty calculations and enforcement action classifications, as well as a facility’s full return to compliance.

MDEQ’s enforcement response manual states that:

To support the penalty proposed in an order or complaint, a written explanation of how the penalty was calculated must be placed in the case file. The documentation must include a brief narrative explaining the rationale for the penalty amount, along with any relevant information or documents that support the penalty calculation.

Similarly, EPA’s 1993 *Oversight of State and Local Penalty Assessments: Revisions to the Policy Framework for State/EPA Enforcement Agreements* states that it is important that accurate and complete documentation of economic benefit calculations be maintained to support defensibility in court, enhance negotiating posture, and lead to greater consistency.

Insufficient Documentation of MDEQ’s Penalty Calculations and Reductions

MDEQ did not adequately document its rationale for penalty calculations in 13 of 15 formal enforcement actions. For example, the MT27 file insufficiently explained why MDEQ decided not to include economic benefit or multi-day components in the Department’s \$20,497 penalty calculation. Although MDEQ staff said they calculated economic benefit for the MT27 facility and found the benefit insignificant, the enforcement file did not contain

documents to support that conclusion. MDEQ's enforcement division administrator said his staff could determine that economic benefit would be inappropriate for certain cases without going through economic benefit calculations. Nonetheless, calculations would have supported MDEQ's decision not to include economic benefit. The following picture illustrates used oil contamination at the MT27 facility. The size of the oil contamination suggests that the spill lasted for more than one day. MDEQ's penalty calculation should have included a multi-day component as well as a calculation for the economic benefit the facility received for not properly disposing of the oil.



The MT27 facility. The dark area in the concrete represents used oil contamination.

Additionally, MDEQ's files did not adequately support the rationale for why MDEQ did not seek penalties against the MT20 and MT39 facilities. In both instances, MDEQ classified the facilities as high priority violators, yet did not assess penalties. EPA's 1987 enforcement response policy states that enforcement actions against high priority violators should penalize the violator and recover any economic savings the violator may have accrued. MDEQ staff stated that they did not calculate penalties in those

cases because the enforcement actions were cleanup rather than penalty orders. However, each case file included an assessment of the facility owner's ability to pay. Region 8's 1999 oversight review found that MDEQ assumed an inability to pay at the MT20 facility prior to having reviewed all of the facility owner's financial documentation.

Finally, MDEQ's files did not support the Department's penalty calculation and eventual collection for the MT24 facility. MDEQ classified the facility as a high priority violator for operating a hazardous waste facility without a permit. In a letter to the facility, MDEQ stated that it had evidence to support a \$400,000 penalty, but that it would be willing to settle for \$21,340. MDEQ later reduced its penalty calculation to \$16,228, and eventually settled with the facility for \$8,200 according to a June 9, 2000 press release. MDEQ did not clearly document its rationale for each penalty reduction.

MDEQ's enforcement division administrator stated that, in general, his staff determine whether they are going to pursue a penalty and, if not, they do not calculate a penalty or document their decision not to pursue a penalty. MDEQ staff added that MDEQ's enforcement division staff made decisions based upon their best professional judgement and years of experience. MDEQ staff also stated that the Department would rather have facilities with limited financial resources spend their money on cleaning up violations than on paying penalties. However, MDEQ's penalty policy requires the Department to fully calculate a penalty and then negotiate the terms of the penalty with the violator. Exhibit 6 lists all cases where MDEQ did not comply with either state or federal penalty policy.

Prior Region 8 oversight reviews in fiscal 1997 through 1999 also found that MDEQ did not adequately document its penalty calculations in a number of cases. According to EPA's 1993 *Oversight of State and Local Penalty Assessments: Revisions to the Policy Framework for State/EPA Enforcement Agreements*, in situations where

states adopt and implement a sound penalty policy, such as keeping complete documentation of penalty calculations, the state would receive less EPA oversight with a focus on periodic audits, generally limiting discussions of penalties in ongoing cases to major matters or unusual circumstances.

Insufficient Documentation of Enforcement Action Classifications and Return to Compliance

MDEQ's inspection files did not always document support for the Department's decisions to classify facilities as low priority violators instead of high priority violators. Although the enforcement response policy does not specifically require documentation to support low priority violator classifications, the inspection reports occasionally included information, such as repeat violations, that appeared to warrant higher violator classifications. For example, MDEQ classified the MT04 facility as a low priority violator even though the facility had the same Class II violations during two inspections over a year-and-a-half time period. The inspector said he classified the facility as a low priority violator because the facility lacked sophistication and filled its environmental manager position with a newly-promoted painter. A Region 8 RCRA oversight inspector concurred with MDEQ's violator classification, but justified his determination based on the fact that the MT04 facility quickly complied with its prior violations.

A simple annotation in the case file referencing the factors impacting MDEQ's violator classification for MT04 would have contributed to better case file documentation. Improved documentation would better support MDEQ's decisions on violator classifications for facilities that could be high priority violators, such as those with repeat violations.

Similarly, MDEQ insufficiently documented why certain facilities were given extra time to comply with time frames specified in warning letters. For example, while the warning letter issued to the MT17 facility required compliance within 20 days of letter receipt, MT17 did not comply for 40 days. The inspector said he knew the facility owner

worked long hours and, even though the MDEQ inspector called to remind the facility owner of the deadline, he still gave MT17 extra time to comply.

MDEQ staff also did not always adequately document in facility inspection and enforcement files whether some facilities achieved full physical compliance. For example, MDEQ staff did not document return to compliance in either the MT20 or MT24 cases. MDEQ staff said that both cases required the involvement of other programs and that the MT20 site would not be fully cleaned up for another 2 years. However, MDEQ did not adequately document the reasons for the delay. In addition, MDEQ did not adequately document return to compliance for facilities MT12, MT22, and MT41.

CONCLUSION

While MDEQ's violator classifications and enforcement actions generally contributed to protecting human health and the environment from risks associated with improper management of hazardous wastes, improvements could be made to help reduce potential environmental harm, ensure the integrity of MDEQ's RCRA enforcement program, and provide an effective deterrent to non-compliance.

MDEQ did not always appropriately classify violators, take timely initial enforcement actions, or adequately document its rationale for penalty calculations and consider economic benefit or multi-day components where appropriate. MDEQ needed to consistently utilize EPA guidance, adequately balance compliance assistance with enforcement, and fully document its RCRA activities and decisions. MDEQ could have benefitted from more effectively monitoring case progress and implementing a more collaborative internal team approach. In addition, Region 8 should adequately update RCRIS to reflect its facility inspection and enforcement activities.

RCRA is one of the main safeguards for protecting human health and the environment from the risks posed by

hazardous waste. Consistent, timely, appropriate, and well documented actions are necessary to maintain the integrity of RCRA programs and ensure that those actions reduce potential public and environmental harm. In addition, consistent, timely, appropriate, and well documented actions maintain MDEQ's credibility as an effective deterrent with the courts, public, and regulated community.

RECOMMENDATIONS

We recommend that the Regional Administrator:

- 2-1. Require MDEQ to comply with its new consolidated cooperative enforcement agreement, particularly when classifying violators and taking timely and appropriate enforcement actions.
- 2-2. Require MDEQ to escalate chronic or recalcitrant violators for formal enforcement rather than continue compliance assistance.
- 2-3. Require MDEQ to fully calculate and document penalties, including economic benefit and multi-day components where appropriate, when issuing formal enforcement actions against high priority violators.
- 2-4. Provide additional RCRIS training to staff in Region 8's Montana Operations Office.
- 2-5. Work with MDEQ to modify its enforcement compliance information system to monitor case progress and prioritize enforcement requests using time frames in the State's new consolidated cooperative enforcement agreement.
- 2-6. Support MDEQ efforts and provide assistance, where appropriate, in developing an information-sharing process so both inspectors and enforcement staff are aware of facility activities.
- 2-7. Support MDEQ efforts and provide assistance,

where appropriate, in developing a divisional cross-training plan for staff that provides technical training and information on case development.

- 2-8. Require MDEQ to fully document its actions related to penalty calculations and reductions, violator classifications, and instances where MDEQ provides extended time frames for a facility to return to compliance.
- 2-9. Require MDEQ to maintain full documentation of a facility's return to physical compliance.
- 2-10. As part of Region 8's *Uniform Enforcement Oversight System*, it should assess whether MDEQ has complied with the report's recommendations and adjust the level of regional oversight and technical assistance accordingly. Region 8 also should include pertinent recommendations as part of MDEQ's grant conditions, performance partnership agreement, and/or other agreements to ensure the recommendations are implemented. Finally, the Region should develop a tiered approach for states that do not properly classify violators or take timely enforcement actions. Region 8's approach should define when the Region will overfile, directly implement the program, withhold grant dollars, and finally take back the program.

**AGENCY AND STATE
COMMENTS AND OIG
EVALUATION**

Both Region 8 and MDEQ officials provided comments to clarify the report. We have incorporated their comments and modified the report as appropriate. We have included Region 8's complete response in Appendix I. Region 8 officials agreed with the findings, conclusions, and recommendations. Region 8 staff stated that its prior regional reviews led to conclusions similar to those contained in this audit report. However, Region 8 staff disagreed with some of our facility-specific conclusions regarding violator classifications and agreed with the

classifications MDEQ made for facilities MT05, MT18, and MT27.

MDEQ officials generally disagreed with the findings and conclusions. MDEQ staff stated that they strongly disagreed with our conclusion that the Department inappropriately classified violators. MDEQ staff stated that the permitting and compliance division did follow the 1993 enforcement agreement, with very few exceptions, when identifying and classifying violators. Also, they stated that they undertook timely actions to address violations in accordance with the enforcement agreement. MDEQ staff explained that in those instances where the Department exceeded timelines, unique case-specific factors allowed deviation from established response timelines. MDEQ staff also stated they disagreed with our conclusion that the Department offered inappropriate compliance assistance in lieu of enforcement. MDEQ officials stated that the audit did not acknowledge that MDEQ had discretion, or professional judgment, in determining what actions it took.

We recognize that classifying violators and determining the appropriate enforcement action requires an evaluation of case-specific factors and professional judgment. However, we also believe that professional judgment and evaluation should be based upon the guidelines of the enforcement response policy and the enforcement agreement that MDEQ and Region 8 agreed to use. In addition, MDEQ should be able to clearly demonstrate that its professional judgment was appropriate, and where actions deviated from the policy or agreement, that MDEQ adequately document its rationale. This report discusses those instances where we believe MDEQ did not comply with the enforcement agreement.

MDEQ officials also disagreed that non-compliance with EPA's enforcement response policy resulted in an increased threat to human health and the environment. MDEQ officials stated that compliance with EPA's policies was not the sole indicator of program performance or of protection of human health and the environment. In addition, MDEQ

staff stated that while their actions may not have always satisfied EPA's guidance, the audit did not demonstrate that exceeding time frames increased the potential for harm to human health and the environment. Region 8 staff also responded that when evaluating how well human health and the environment are protected, it was difficult to specifically measure the effectiveness of any single component such as compliance with the enforcement agreement. MDEQ staff added that the audit did not substantiate any risks, and the report's conclusions portray an inaccurate characterization of the success of MDEQ's hazardous waste compliance and enforcement programs.

We agree that compliance with EPA's policies is not the only way to assure the protection of human health and the environment. However, the 1993 enforcement agreement between MDEQ and EPA Region 8 states that one of the goals of RCRA was to protect human health and the environment and both MDEQ and Region 8 recognized

...that for this goal to be fully met, a high level of compliance with applicable standards must be maintained within the regulated hazardous waste community. To do this requires the establishment of a credible enforcement presence by the State of Montana and EPA.

In the 1993 agreement, MDEQ agreed to take timely and appropriate enforcement action and considered the time frames used by EPA in its definition of "timely and appropriate" to be goals for good program performance. Further, MDEQ agreed that the time frames were guidelines that MDEQ and Region 8 should use to review progress in individual cases. As such, MDEQ agreed to use EPA's definitions and policies to help meet RCRA's goal of protecting human health and the environment from risks associated with improper management of hazardous waste.

This report discusses those cases that did not meet the 1993 enforcement agreement requirements. We believe that

compliance with enforcement agreement standards are important to ensure a credible enforcement presence that provides a deterrent and helps to protect human health and the environment. We also believe that our audit results clearly showed that by not meeting the time frames in the enforcement response policy, MDEQ did not help facilities return to compliance as quickly as possible. Facilities that remained out of compliance posed a potential threat to human health and environment. In addition, MDEQ's untimely initial enforcement actions minimized the Department's deterrent effect. MDEQ should take action as quickly as possible to ensure that facilities correct violations in a expeditious manner.

SCOPE AND METHODOLOGY

For our review, we elected to focus on Montana after eliminating the other two states in Region 8 that had significant numbers of large quantity generators. The Region identified areas needing improvement with the other two states' RCRA enforcement programs. Region 8 was already conducting significant oversight and direct implementation in one state to address its problems, and OIG planned to include the other state in a national enforcement audit.

We obtained comprehensive RCRIS compliance monitoring and enforcement reports for fiscal 1997 through 1999 for all of Montana's RCRA facilities. To determine whether violator classifications and enforcement actions complied with EPA's enforcement response policy, we reviewed inspections and enforcement actions for 47 out of 113 facilities in Montana that had violations identified in RCRIS during fiscal 1997 through 1999. We selected 47 facilities to review as follows:

- We reviewed all 17 (out of 17) large quantity generators with violations identified during inspections conducted in fiscal 1997 through 1999.
- We also reviewed all 23 (out of 23) small quantity generators with violations identified during inspections conducted in fiscal 1997 through 1999.
- We chose a judgmental sample of 7 out of the 73 conditionally-exempt small quantity generators since Montana has a large universe of these types of facilities. The seven conditionally-exempt small quantity generators we chose to review had violations identified during inspections conducted in fiscal 1997 through 1999.

We interviewed officials in MDEQ's permitting and compliance division's air and waste management bureau and the enforcement division, as well as Region 8 staff, regarding MDEQ's actions at the 47 facilities we reviewed. Specifically, we met with the following MDEQ and Region 8 staff:

MDEQ Staff:

- Two former MDEQ enforcement division case managers,
- MDEQ enforcement division administrator,
- MDEQ enforcement division case management section chief,
- MDEQ enforcement division complaints management section chief,

- MDEQ permitting and compliance division administrator,
- MDEQ permitting and compliance division air and waste management bureau chief,
- MDEQ permitting and compliance division air and waste management bureau hazardous waste section supervisor,
- Two MDEQ permitting and compliance division air and waste management bureau hazardous waste section inspectors,
- One attorney in MDEQ's legal unit,
- MDEQ administrative officer, and
- MDEQ director.

Region 8 Staff:

- Region 8 Montana operations office waste and toxics team leader,
- Two Region 8 Montana operations office waste and toxics team inspectors,
- Two Region 8 RCRA oversight inspectors,
- Region 8 RCRIS database manager,
- Deputy Assistant Regional Administrator, Region 8 Enforcement, Compliance, and Environmental Justice,
- Environmental Protection Specialist, Region 8 Enforcement, Compliance, and Environmental Justice,
- Director, Region 8 Technical Enforcement Program, and
- Senior Enforcement Specialist within Region 8's Technical Enforcement Program.

To determine the requirements MDEQ agreed to use for violator classifications and enforcement actions, we used the timely and appropriate enforcement action criteria in the 1987 enforcement response policy since MDEQ's and Region 8's 1993 RCRA enforcement agreement cited the

1987 policy as criteria and this agreement governed the period of our review from fiscal 1997 through 1999. In addition, we evaluated MDEQ's performance against the 1996 enforcement response policy to determine what impact, if any, resulted from MDEQ not using the current guidance. We also evaluated MDEQ's performance against the Department's 1995 penalty policy, MDEQ's 1999 enforcement response manual, and 2000 consolidated cooperative enforcement agreement.

To determine whether enforcement actions returned violators to compliance and whether that compliance was timely and documented, we reviewed the 47 facility files for evidence of return to compliance by the facility or for evidence of followup inspections. We evaluated MDEQ's actions against its 1993 RCRA enforcement agreement with Region 8 regarding timely and appropriate enforcement actions. We also visited two facilities to observe how MDEQ conducts inspections.

To evaluate whether penalty calculations complied with Montana's and EPA's RCRA civil penalty policies, we reviewed all 16 facility files where MDEQ took formal enforcement actions. We did not review facility files for the informal enforcement actions to determine whether a penalty should have been assessed. In addition, we did not attempt to recalculate the penalty. We evaluated the penalty calculation to determine whether it generally complied with Montana's and EPA's penalty policies, including consideration of economic benefit and multi-day components. We also reviewed the files to determine whether they contained sufficient documentation for the basis of the penalty calculation, any adjustments, and the final collection.

To determine whether accurate data were recorded in RCRIS, we compared the results of our review of the 47 facility files to RCRIS reports to determine whether RCRIS accurately reflected information on inspections, enforcement actions, and penalties. We also reviewed whether the facility files contained supporting documentation for activities in RCRIS. Although we used data from RCRIS during the audit, we did not evaluate controls over the system. Our review of RCRIS included the input and update of data by both MDEQ and Region 8.

PRIOR AUDIT REPORTS

RCRA ENFORCEMENT: RCRA Significant Noncomplier Identification and Enforcement by Rhode Island Department of Environmental Management, Report No. E1GSD8-01-0006-9100078, dated January 21, 1999

RCRA ENFORCEMENT: Region 2's Enforcement of the Resource Conservation and Recovery Act (RCRA), Report No. 1999-1-00224, dated July 21, 1999

Identification and Enforcement of RCRA Significant Noncompliers by EPA Region III and the Virginia Department of Environmental Quality, Report No. 1999-P-00215, dated September 20, 1999

RCRA ENFORCEMENT: Resource Conservation and Recovery Act Significant Noncomplier Enforcement, Report No. E1DSD8-05-0036-9100110, dated March 23, 1999

RCRA: Region 7 and Nebraska Resource Conservation and Recovery Act Enforcement, Report No. 1999-183-P00211, dated July 6, 1999

RCRA ENFORCEMENT: Significant Noncomplier Enforcement by EPA and Washington State, Report No. E1GSF7-11-0019-8100093, dated March 31, 1998

Region 8's Administration of State Resource Conservation and Recovery Act Enforcement Activities, Report No. E1DSC1-08-0049-1100428, dated September 31, 1991

*Consolidated Report on Review of EPA's Controls Over Administrative Penalties Under the RCRA Enforcement Program, Report No. E1G6*8-09-0188-9100479, dated September 18, 1989*

Review of EPA, Region 8's Controls Over Compliance Monitoring of RCRA Enforcement Program Consent Agreement Provisions, Report No. E1G27-08-0054-81855, dated September 13, 1988

VIOLATOR CLASSIFICATIONS

The 1987 enforcement response policy lists 4 factors to consider when classifying a facility as a high priority violator. The following 4 criteria pertain to high priority violators:

- 1) A handler who has caused actual exposure, or substantial likelihood of exposure to hazardous waste or hazardous constituents;
- 2) Chronic or recalcitrant handlers (this includes handlers who are regularly found to have many Class I or Class II violations);
- 3) A handler who deviates from the terms of a permit, order, or decree by not meeting requirements in a timely manner and/or by failing to perform work as required by terms of permits, orders, or decrees; or
- 4) A handler who substantially deviates from RCRA statutory or regulatory requirements.

We considered all four criteria in our analysis. However, in our judgment many of the facilities appeared to be chronic or recalcitrant handlers. When considering whether a facility was a chronic or recalcitrant handler, we evaluated whether the handler had a history of repeated Class I and/or Class II violations that would indicate a general unwillingness or inability to comply with requirements. In addition, we also evaluated whether the facility was regularly found to have violations that were not quickly resolved or regularly found with the same type of violation. The blue text below indicates where we differed with MDEQ's violator classifications.

| | Facility Name | Inspection Date | MDEQ Violator Classification | OIG Violator Classifications |
|----|----------------------|------------------------|--|--|
| 1. | MT05 | 06/03/96 11/25/97 | Class II low priority violator Class II low priority violator | Class II low priority violator Class I high priority violator |
| 2. | MT13 | 12/09/97 08/27/98 | Class I high priority violator Class II low priority violator | Class I high priority violator Class I high priority violator |

Appropriate Violator Classifications and Timely Initial Enforcement Actions Would Strengthen Montana's RCRA Enforcement Program

| | | | | |
|----|----------------------|--|--|---|
| 3. | MT14 | 11/06/92 04/21/93 11/17/94 04/18/95 04/28/95 10/23/96 11/04/97 09/17/98 11/17/99 12/01/99 | Class II low priority violator Class II low priority violator | Class II low priority violator Class I high priority violator Class I high priority violator Class I high priority violator Class I high priority violator MT14 should have been classified as a high priority violator on 11/04/97 because MDEQ found the exact same violations during that inspection as it did on 11/17/94, 3 years earlier, as well as having a history of other violations. |
| | Facility Name | Inspection Date | MDEQ Violator Classification | OIG Violator Classifications |
| 4. | MT18 | 03/18/98 | Class II low priority violator for 7 violations stemming from not notifying as a small quantity generator. | Class I high priority violator MT18 should have been classified as a high priority violator since the facility was previously inspected on 02/02/95 and was aware of the regulatory requirements. MDEQ officials indicated that they would have classified the facility as a high priority violator had there been the same operator at the facility during both the 02/02/95 and 03/18/98 inspections. Subsequent documents provided by MDEQ showed that the same operator was in place at MT18 during both inspections. |
| 5. | MT22 | 06/30/92 05/07/93 07/09/98 12/03/99 | Class I high priority violator Class I high priority violator Class II low priority violator Class I high priority violator | Class I high priority violator Class I high priority violator Class I high priority violator Class I high priority violator |

**Appropriate Violator Classifications and Timely Initial Enforcement
Actions Would Strengthen Montana's RCRA Enforcement Program**

| | | | | |
|----|------|--|--|---|
| 6. | MT27 | 09/10/92 09/07/93 02/23/99 08/24/99 | Class II low priority violator Class II low priority violator Class II low priority violator Class I high priority violator | <p>Class II low priority violator Class II low priority violator Class I high priority violator Class I high priority violator</p> <p>MDEQ staff signed an enforcement request on 10/25/99 which listed 20 repeat violations between 1990 and 1999 and noted that the facility had been recalcitrant since 1990. MDEQ staff stated that the enforcement request for MT27 should have been more clearly written to indicate that the facility finally passed the high priority violator threshold in 1999. MDEQ officials added that similar "threshold" inquiries occur in every case, and that MDEQ staff use their best professional judgement based on years of experience to make such determinations.</p> |
|----|------|--|--|---|

**Appropriate Violator Classifications and Timely Initial Enforcement
Actions Would Strengthen Montana's RCRA Enforcement Program**

| | Facility Name | Inspection Date | MDEQ Violator Classification | OIG Violator Classifications |
|----|----------------------|--|--|---|
| 7. | MT32 | 03/30/92 03/10/93 03/30/94 03/27/95 02/15/96 03/12/96 10/14/97 09/09/98 01/05/99 | Class II medium priority violator Class II low priority violator Class II low priority violator Class II medium priority violator Class II low priority violator Class II low priority violator Class II low priority violator Class I high priority violator Class I high priority violator | Class II medium priority violator Class I high priority violator Class I high priority violator |
| 8. | MT33 | 02/28/92 02/10/93 01/11/94 03/10/97 03/03/98 | Class II medium priority violator Class II low priority violator Class II low priority violator Class II low priority violator Class I high priority violator | Class II medium priority violator Class I high priority violator Class I high priority violator Class I high priority violator Class I high priority violator |
| 9. | MT36 | 01/12/95 03/31/97 05/05/98 03/24/99 | Class II medium priority violator Class II low priority violator Class II low priority violator Class II low priority violator | Class II medium priority violator Class I high priority violator Class I high priority violator Class I high priority violator |

EXHIBIT 4-A

**TIMELINESS OF VIOLATION DISCOVERY UNDER EPA'S
1987 ENFORCEMENT RESPONSE POLICY**

| | Facility Name | Date of Inspection (Evaluation Date) | Date of Violation Discovery | Days from Evaluation Date to Date of Violation Discovery <i>45 days from inspection date</i> |
|-----|----------------------|---|------------------------------------|--|
| 1. | MT02 | 11/04/98 | 11/04/98 12/29/98 | 0 55 (untimely)* |
| 2. | MT06 | 03/19/98 | 04/20/98 | 33 |
| 3. | MT12 | 08/07/97 | 08/07/97 | 0 |
| 4. | MT13 | 12/09/97 | 02/13/98 | 66 (untimely) |
| 5. | MT19 | 05/03/99 | 07/30/99 | 88 (untimely) |
| 6. | MT20 | 11/09/98 | 11/09/98 | 0 |
| 7. | MT24 | 09/03/98 | 10/21/98 | 49 (untimely)* |
| 8. | MT26 | 07/09/98 | 07/09/98 | 0 |
| 9. | MT27 | 08/24/99 | 08/24/99 | 0 |
| 10. | MT32 | 01/05/99 | 01/05/99 | 0 |
| 11. | MT32 | 09/09/98 | 09/09/98 | 0 |
| 12. | MT33 | 03/03/98 | 03/03/98 | 0 |
| 13. | MT39 | 08/25/98 | 08/25/98 02/12/99 | 0 170 (untimely) |
| 14. | MT41 | 03/23/99 | 04/23/99 | 32 |
| 15. | MT42 | 11/21/97 | 12/03/97 | 13 |
| 16. | MT43 | 03/20/98 | 03/20/98 | 0 |

*Region 8 staff agreed that MDEQ's delays were justifiable.

EXHIBIT 4-B

**TIMELINESS OF DECISIONS TO TAKE FORMAL
ENFORCEMENT ACTIONS UNDER MONTANA'S
1999 ENFORCEMENT RESPONSE MANUAL**

| | Facility Name | Date of Inspection or Evaluation Date | Date of Violation Determination | Date of Enforcement Request | Days from Date of Violation Determination to Enforcement Request <i>90 days from violation determination</i> |
|-----|----------------------|--|--|------------------------------------|--|
| 1. | MT02 | 11/04/98 | 11/04/98 12/29/98 | 02/08/99 | 94 (untimely) 40 |
| 2. | MT06 | 03/19/98 | 04/20/98 | 06/02/98 | 52 |
| 3. | MT12 | 08/07/97 | 08/07/97 | 09/29/97 | 52 |
| 4. | MT13 | 12/09/97 | 02/13/98 | 05/18/98 | 95 (untimely)* |
| 5. | MT19 | 05/03/99 | 07/30/99 | 10/18/99 | 78 |
| 6. | MT20 | 11/09/98 | 11/09/98 | 01/07/99 | 58 |
| 7. | MT24 | 09/03/98 | 10/21/98 | 12/03/98 | 43 |
| 8. | MT26 | 07/09/98 | 07/09/98 | 07/31/98 | 22 |
| 9. | MT27 | 08/24/99 | 08/24/99 | 10/25/99 | 61 |
| 10. | MT32 | 01/05/99 | 01/05/99 | 02/08/99 | 33 |
| 11. | MT32 | 09/09/98 | 09/09/98 | 02/08/99 | 149 (untimely) |
| 12. | MT33 | 03/03/98 | 03/03/98 | 05/01/98 | 58 |
| 13. | MT39 | 08/25/98 | 08/25/98 02/12/99 | 03/12/99 | 197 (untimely) 30 |
| 14. | MT41 | 03/23/99 | 04/23/99 | 05/06/99 | 13 |
| 15. | MT42 | 11/21/97 | 12/03/97 | 07/31/98 | 240 (untimely) |
| 16. | MT43 | 03/20/98 | 03/20/98 | 05/01/98 | 41 |

*MDEQ officials said that questions concerning litigation risks delayed approval of MT13's enforcement request.

EXHIBIT 4-C

**TIMELINESS OF DECISIONS TO TAKE FORMAL ENFORCEMENT
ACTIONS UNDER EPA'S 1996 ENFORCEMENT RESPONSE POLICY**

| | Facility Name | Date of Inspection or Evaluation Date | Date of Enforcement Request | Days from Evaluation Date to Enforcement Request <i>90 day requirement</i> |
|-----|----------------------|--|------------------------------------|--|
| 1. | MT02 | 11/04/98 | 02/08/99 | 97 (untimely) |
| 2. | MT06 | 03/19/98 | 06/02/98 | 76 |
| 3. | MT12 | 08/07/97 | 09/29/97 | 54 |
| 4. | MT13 | 12/09/97 | 05/18/98 | 161 (untimely) |
| 5. | MT19 | 05/03/99 | 10/18/99 | 165 (untimely) |
| 6. | MT20 | 11/09/98 | 01/07/99 | 60 |
| 7. | MT24 | 09/03/98 | 12/03/98 | 92 (untimely) |
| 8. | MT26 | 07/09/98 | 07/31/98 | 23 |
| 9. | MT27 | 08/24/99 | 10/25/99 | 63 |
| 10. | MT32 | 01/05/99 | 02/08/99 | 35 |
| 11. | MT32 | 09/09/98 | 02/08/99 | 153 (untimely) |
| 12. | MT33 | 03/03/98 | 05/01/98 | 60 |
| 13. | MT39 | 08/25/98 | 03/12/99 | 200 (untimely) |
| 14. | MT41 | 03/23/99 | 05/06/99 | 45 |
| 15. | MT42 | 11/21/97 | 07/31/98 | 253 (untimely) |
| 16. | MT43 | 03/20/98 | 05/01/98 | 43 |

**Appropriate Violator Classifications and Timely Initial Enforcement
Actions Would Strengthen Montana's RCRA Enforcement Program**

EXHIBIT 5

**COMPARISON OF FORMAL ENFORCEMENT ACTIONS
USING 1987, 1996, AND 2000 POLICIES**

| | Facility Name | MDEQ Actions | 1987 enforcement response policy <i>90 days from violation determination to issue an administrative action or refer to the Attorney General's Office</i> | 1996 enforcement response policy <i>90 days from violation determination to issue an initial order; 120 days to refer to the Attorney General's Office; or 210 days to enter a final or consent order</i> | September 2000 consolidated cooperative enforcement agreement <i>120 days from enforcement request to initial action</i> |
|----|----------------------|--|--|---|--|
| 1. | MT02 | 12/29/98 violation determination 02/08/99 enforcement request signed 03/10/00 demand letter | untimely 437 days from violation determination to initial action | untimely 437 days from violation determination to initial action | untimely 395 days from enforcement request to initial action |
| 2. | MT06 | 04/20/98 violation determination 06/02/98 enforcement request signed 09/01/98 administrative order with penalty | untimely 135 days from violation determination to initial action | untimely 135 days from violation determination to initial action | timely 91 days from enforcement request to initial action |
| 3. | MT12 | 08/07/97 violation determination 09/29/97 enforcement request signed 02/03/98 notice of violation | untimely 180 days from violation determination to initial action | untimely 180 days from violation determination to initial action | untimely 137 days from enforcement request to initial action |
| 4. | MT12 | 08/07/97 violation determination 09/29/97 enforcement request signed 07/30/98 case dropped due to lack of evidence | untimely 357 days from violation determination to initial action | untimely 357 days from violation determination to initial action | untimely 305 days from enforcement request to initial action |
| 5. | MT13 | 02/13/98 violation determination 05/18/98 enforcement request signed 12/18/98 administrative order with penalty | untimely 309 days from violation determination to initial action | untimely 309 days from violation determination to initial action | untimely 215 days from enforcement request to initial action |
| 6. | MT19 | 07/30/99 violation determination 10/18/99 enforcement request signed 03/21/00 demand letter | untimely 234 days from violation determination to consent order | untimely 234 days from violation determination to consent order | untimely 155 days from enforcement request to initial action |

**Appropriate Violator Classifications and Timely Initial Enforcement
Actions Would Strengthen Montana's RCRA Enforcement Program**

| | Facility Name | MDEQ Actions | 1987 enforcement response policy <i>90 days from violation determination to issue an administrative action or refer to the Attorney General's Office</i> | 1996 enforcement response policy <i>90 days from violation determination to issue an initial order; 120 days to refer to the Attorney General's Office; or 210 days to enter a final or consent order</i> | September 2000 consolidated cooperative enforcement agreement <i>120 days from enforcement request to initial action</i> |
|-----|----------------------|---|--|---|--|
| 7. | MT20 | 11/09/98 violation determination 01/07/99 enforcement request signed 05/06/99 notice of violation and administrative order for corrective action | untimely 180 days from violation determination to initial action | untimely 180 days from violation determination to initial action | timely 119 days from enforcement request to initial action |
| 8. | MT24 | 10/21/98 violation determination 12/03/98 enforcement request signed 07/23/99 demand letter | untimely 276 days from violation determination to initial action | untimely 276 days from violation determination to initial action | untimely 232 days from enforcement request to initial action |
| 9. | MT26 | 07/09/98 violation determination 07/31/98 enforcement request signed 12/18/98 administrative order with penalty | untimely 163 days from violation determination to initial action | untimely 163 days from violation determination to initial action | untimely 140 days from enforcement request to initial action |
| 10. | MT27 | 08/24/99 violation determination 10/25/99 enforcement request signed 02/11/00 notice of violation and administrative order for corrective action | untimely 172 days from violation determination to initial action | untimely 172 days from violation determination to initial action | timely 109 days from enforcement request to initial action |
| 11. | MT32 | 01/05/99 violation determination 02/08/99 enforcement request signed 07/23/99 letter to resolve violations prior to initiation of civil litigation (with attached penalty calculations) | untimely 200 days from violation determination to initial action | untimely 200 days from violation determination to initial action | untimely 165 days from enforcement request to initial action |

**Appropriate Violator Classifications and Timely Initial Enforcement
Actions Would Strengthen Montana's RCRA Enforcement Program**

| | Facility Name | MDEQ Actions | 1987 enforcement response policy <i>90 days from violation determination to issue an administrative action or refer to the Attorney General's Office</i> | 1996 enforcement response policy <i>90 days from violation determination to issue an initial order; 120 days to refer to the Attorney General's Office; or 210 days to enter a final or consent order</i> | September 2000 consolidated cooperative enforcement agreement <i>120 days from enforcement request to initial action</i> |
|-----|----------------------|---|--|---|--|
| 12. | MT32 | 09/09/98 violation determination 02/08/99 enforcement request signed 07/23/99 letter to resolve violations prior to initiation of civil litigation (with attached penalty calculations) | untimely 318 days from violation determination to initial action | untimely 318 days from violation determination to initial action | untimely 165 days from enforcement request to initial action |
| 13. | MT33 | 03/03/98 violation determination 05/01/98 enforcement request signed 06/16/98 notice of violation and administrative order for corrective action with penalty | untimely 106 days from violation determination to initial action | untimely 106 days from violation determination to initial action | timely 46 days from enforcement request to initial action |
| 14. | MT39 | 02/12/99 violation determination 03/12/99 enforcement request signed 10/08/99 administrative order | untimely 239 days from violation determination to initial action | untimely 239 days from violation determination to initial action | untimely 210 days from enforcement request to initial action |
| 15. | MT41 | 04/23/99 violation determination 05/06/99 enforcement request signed 06/11/99 administrative order | timely 50 days from violation determination to initial action | timely 50 days from violation determination to initial action | timely 36 days from enforcement request to initial action |
| 16. | MT42 | 12/03/97 violation determination 07/31/98 enforcement request signed 09/29/98 notice of violation and administrative order for corrective action with penalty | untimely 301 days from violation determination to initial action | untimely 301 days from violation determination to initial order | timely 61 days from enforcement request to initial order |

**HIGH PRIORITY VIOLATOR PENALTY CALCULATIONS
THAT DID NOT MEET POLICY REQUIREMENTS**

Penalty Policy Requirements:

- A. Some violations (e.g. operating a facility without a permit) may jeopardize the continued integrity of the State's RCRA program and merit substantial penalties where the violation undermines the State's regulatory purpose.
- B. Where a violation involves the actual management of waste, a penalty should reflect the probability that the violation could have resulted in, or has resulted in, a release of hazardous waste or constituents.
- C. The Department should not consider ability to pay prior to its initial penalty calculation, and rather should assess a penalty and then make downward adjustments based on ability to pay.
- D. The Department should explain and document the process by which it arrived at the final penalty figure, as well as carefully document the basis for recalculations of penalty computations.
- E. Penalties for multi-day violations should be included where any of the violations continued more than one day.
- F. Penalties should recapture any significant economic benefit of noncompliance that accrues to a violator, and it is incumbent on all enforcement personnel to calculate economic benefit, even if it is later found to be negligible (under \$2,500).
- G. When inability to pay is a factor, other options rather than collecting the full penalty include installment plans, delayed payment schedule with interest, or straight penalty reductions as a last recourse.

| | Facility Name | MDEQ Penalty Activities | A | B | C | D | E | F | G |
|----|----------------------|---|----------|----------|----------|----------|----------|----------|----------|
| 1. | MT02 | MDEQ cited the the facility for five violations, including discharging hazardous waste to the ground. MDEQ officials assessed a penalty of \$188,000 and stated that litigation risks justified the penalty reductions. | | X | | X | | X | |
| 2. | MT06 | MDEQ cited the facility for violating restrictions on the land disposal of hazardous waste. MDEQ assessed and collected a penalty of \$1,200. | | X | | X | | X | |
| 3. | MT12 | MDEQ cited the facility for unlawful hazardous waste disposal and operating a treatment, storage, and disposal facility without a permit. MDEQ did not assess a penalty, and the file indicated that MDEQ dropped the case due to lack of sufficient evidence. We did not independently review the evidence MDEQ staff relied upon to dismiss the case. MDEQ informally settled with MT12 for \$600. MDEQ did not view the \$600 amount as a penalty. | X | X | | X | X | X | |
| 4. | MT20 | MDEQ cited the facility for unlawfully disposing of hazardous waste without a permit. MDEQ did not assess a penalty, although the file showed that the facility owner could pay a penalty of \$12,980. | X | X | X | X | X | X | X |

**Appropriate Violator Classifications and Timely Initial Enforcement
Actions Would Strengthen Montana's RCRA Enforcement Program**

| | Facility Name | MDEQ Penalty Activities | A | B | C | D | E | F | G |
|---------------|----------------------|---|----------|----------|----------|-----------|-----------|-----------|----------|
| 5. | MT22 | MDEQ cited the facility for operating in a manner that released hazardous waste to the soil. MDEQ assessed a \$13,513 penalty. MDEQ did not assess a multi-day component because it could not determine the violation start date. One Region 8 official said that MDEQ could have used the "violation discovery" date as the start date for multi-day purposes. | | | | X | X | | |
| 6. | MT24 | MDEQ cited the facility for operating a hazardous waste facility without a permit. In a letter to the facility, MDEQ stated that it had evidence to support a \$400,000 penalty, but that it would be willing to settle for \$21,340. MDEQ later reduced its penalty calculation to \$16,228, and eventually settled with the facility for \$8,200 according to a 06/09/00 press release. MDEQ officials stated that litigation risks justified the penalty reductions. | | | | X | | | |
| 7. | MT26 | MDEQ assessed the facility a penalty for violations including used oil soil contamination. | | | | X | X | X | |
| 8. | MT27 | MDEQ cited the facility for numerous violations, including soil contamination, improper drum markings, and lack of training records. MDEQ assessed a penalty of \$20,497. | | | | | X | | |
| 9. | MT32 | MDEQ cited the facility for more than 11 violations. MDEQ assessed a penalty of \$34,849. | | | | X | X | X | |
| 10. | MT33 | MDEQ cited the facility for numerous violations, including unmarked hazardous waste containers and insecure drum covers. MDEQ proposed a penalty of \$6,700. MDEQ officials stated that an extensive analysis was not necessary to determine that the economic benefit derived from MT33's violations would have been minimal. MDEQ officials further noted that the Department considered economic benefit, yet they could not provide documentation concerning the calculation of economic benefit. | | | | X | X | X | |
| 11. | MT39 | MDEQ cited the facility for numerous violations, including operating a disposal facility without a permit. MDEQ did not assess a penalty because they said a penalty was negligible. | X | X | X | X | X | X | X |
| 12. | MT41 | MDEQ cited the facility for a release of wood stripping solvents to the groundwater under the facility. MDEQ never assessed a penalty. | X | X | X | | X | X | |
| 13. | MT42 | MDEQ cited the facility for not properly registering as a small quantity generator. MDEQ calculated an initial penalty of \$8,500. It was not clear from the file how MDEQ reached an eventual settlement of \$1,000 after it earlier rejected the facility's \$500 settlement offer. | | | | X | X | X | |
| TOTALS | | | 4 | 6 | 3 | 11 | 10 | 10 | 2 |

AGENCY RESPONSE



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 8
999 18TH STREET - SUITE 300
DENVER, CO 80202-2466

(February 23, 2001) Date Stamped

Ref: 8MO

MEMORANDUM

SUBJECT: Draft Audit Report: Appropriate Violator Classifications and Timely Enforcement Actions Would Improve Montana's RCRA Enforcement Program. Report Number 2000-P-000762-XXXX

FROM: Jack W. McGraw, Acting Regional Administrator
Region 8

TO: Kimberly Victor, Acting Audit Manager
Office of Inspector General

Attached is EPA Region 8's response to the above-referenced draft audit report. In Attachment 1, this response addresses errors, suggests alternative or modified recommendations, and suggests changes for clarity. In Attachment 2, the response notes where Region 8 has already taken steps to address the draft recommendations, and discusses how the Region plans to address those recommendations that have not already been addressed. Reviews conducted by Region 8 using the Unified Enforcement Oversight System (UEOS), and prior reviews conducted using the Appropriate State Oversight Project (ASOP), have led Region 8 to conclusions similar to those contained in your report.

Because I believe some of your recommendations may be impacted by the comments in Attachment 1, we have provided in Attachment 2 a general description of how Region 8 will respond to your recommendations. After your final report is written, we may be able to be more specific in our response to your recommendations.

Please note that page numbers in the attached response refer to page numbers

in the hard copy of the report you provided on December 20, 2000, and may not coincide with the page numbers of the electronic copy of the report.

Finally, I wish to tell you that the Region 8 staff with which you, Erin Barnes, Tom Herrod, and Larry Dare have interacted during this audit have provided very positive comments regarding the professional and communicative manner in which you all have conducted this audit. I wish to extend my appreciation to each of you for your cooperation and consideration.

If you have any questions regarding this response, please contact Eric Finke (406) 441-1130 ext 239, Marvin Frye (303) 312-6902, or Mike Gaydosh (303) 312-6773.

Attachments 1 and 2

cc: John Wardell
Marvin Frye
Mike Gaydosh
Beverly Goodsell
Eric Finke

EPA Region 8's Response to Draft Audit Report:
Appropriate Violator Classifications and Timely Enforcement Actions
Would Improve Montana's RCRA Enforcement Program.
Report Number 2000-P-000762-XXXX

Attachment 1

General Comments

1. Throughout the report where the deviation from evaluation criteria is stated, it would be useful to include the range and average of these deviations. For example, on page 12 the report states "in 7 of the 16 enforcement actions, MDEQ's decision to pursue formal enforcement against a facility exceeded the 90-day requirement specified in EPA guidance," and then provides two examples illustrating this point. It would be useful and more informative for the reader if the report also described the range and average of the days that MDEQ exceeded the ERP's 90-day criteria.

Executive Summary

2. Page i, Introduction. It would be helpful to add a brief description of the level of program authorization for MDEQ to help clarify what roles MDEQ and Region 8 have in the hazardous waste program in Montana. During the audit period, Montana was authorized for the RCRA "base" program, and RCRA rules promulgated up through March 1989. Montana therefore had lead responsibility to issue permits (except for corrective action), monitor compliance, and enforce most of the significant RCRA requirements in Montana. Montana was not yet authorized for RCRA corrective action or the LDR provisions, and is not authorized to implement RCRA in Indian Country. Until December 26, 2000, when Montana was authorized for corrective action, the EPA Montana Office had the lead for implementing corrective action, and did so with the close participation of DEQ. The EPA Montana Office also implements all provisions of RCRA in Indian Country.

Chapter 1: Introduction

3. Page 1, Purpose, 1st paragraph. Compliance monitoring and enforcement are two of many components of the RCRA program. When evaluating how well human health and environment are protected, it is difficult to specifically measure the effectiveness of any single component when compared to the

whole. Therefore, I suggest changing “The overall objective of our audit was to determine whether EPA Region 8's and Montana’s RCRA compliance monitoring and enforcement program *protected human health and the environment*” to “The overall objective of our audit was to determine whether EPA Region 8's and Montana's RCRA compliance monitoring and enforcement program *followed the RCRA ERP and the EPA/DEQ cooperative enforcement agreement.*”

Chapter 2: MDEQ Needed to More Appropriately Classify Violators and initiate Timely Enforcement Actions

4. Page 12, Table 2-1, MT27. Table 2-1 states that MT27 had repeated Class I and II violations during 4 inspections between 1992 and 1999, and concludes that MT27 therefore should have been, but was not, classified as an high priority violator in a timely manner.

MDEQ's file indicates that the first 2 of the 4 inspections referred to in Table 2-1 (conducted in September 1992 and September 1993) were followed by 3 inspections (August 1995, January 1996, February 1997) during which no violations were found. The next 2 inspections referred to in Table 2-1 (February 1999 and August 1999) then found both new and repeated violations. The MDEQ file also shows that the violations found during each of the first 2 inspections were less significant and fewer in number than those found during the last 2 inspections.

As noted in comment 12, the 1987 ERP does not require that a violator be classified as a high priority violator merely because it had prior violations. In the MT27 case, approximately 3½ years passed during which 3 inspections found no violations. Because the violations of the first 2 inspections were both minor and few in number, and because MT27 was found to be in compliance for a significant period of time after those 2 inspections, MT27 did not meet the 1987 ERP criteria for classification as a “chronic” violator until the August 1999 inspection. Therefore, I concur with MDEQ's classifications for MT27, and suggest that MT27 be removed from Table 2-1.

5. Page 12, Violator Classifications and Enforcement Decisions Did Not Follow Policy, last paragraph. This paragraph is confusing because it occurs in the section of the report which evaluates violator classification, yet appears to evaluate timeliness of enforcement decisions or actions. And for the following reasons, it is unclear what is actually being evaluated.

In making its evaluation, this paragraph compares the 1987 ERP's 90-day period for HPVs between violation *discovery* and filing of an *enforcement action* (an

“action-based” time period) to MDEQ’s time between *evaluation (inspection)* date and filing of an *enforcement request* (a “decision-based” time period). First, this comparison utilizes incompatible start dates (discovery versus evaluation). Second, since the “decision to act” will always come before the “act”, this comparison will not be relevant to evaluation of MDEQ’s performance against any established 1987 ERP criteria. There are no 1987 ERP criteria against which to evaluate timeliness of the *decision* to take formal enforcement action, only timeliness of the *enforcement action itself*. MDEQ’s enforcement process contains a decision-making point (the enforcement request), but there is no comparable milestone in the 1987 ERP. I suggest that this evaluation be removed from the report, or that the text of the report be modified to state that there are no 1987 ERP criteria against which to measure MDEQ’s decision-making performance.

6. Page 14, Table 2-3, MT12. The text of this entry in Table 2-3 states that MDEQ dropped this case due to insufficient evidence, but at the same time takes issue with MDEQ’s failure to assess a penalty. This implies that the auditors disagree with MDEQ’s decision to drop this case due to insufficient evidence, but the report does not say whether the auditors themselves made an independent assessment of the evidence.

I believe it is the responsibility of the enforcing agency to re-evaluate as necessary the sufficiency of evidence for any violation, and an inherent part of any re-evaluation of evidence is a potential re-classification of the violator. If one accepts MDEQ’s determination that insufficient evidence existed for a formal enforcement action, a penalty assessment of any kind would be moot. If one believes that sufficient evidence did exist for a formal enforcement action, the lack of a penalty assessment seems to be secondary to the issue of improper handling of the case overall. For these reasons, I suggest removing MT12 from the report both in Table 2-3 and in Exhibit 6 (as an example of an inadequate penalty assessment) unless an independent evaluation of the evidence was made which concluded that sufficient evidence did exist for a formal enforcement action.

7. Page 15, Region 8 RCRIS Data Entry Needed Improvement, 1st paragraph. Since most relevant CM&E data exist for MT02 and MT19 in RCRIS, I suggest changing the 2nd sentence to read “For example, Region 8 oversight inspectors did not input *recent* case settlement data into RCRIS for the MT02 facility, or *recent* oversight inspection information for the MT19 facility.”
8. Page 16, MDEQ Needed to Use EPA Guidance, 1st paragraph. The paragraph accurately describes that Region 8 and MDEQ did not update the 1993

enforcement agreement to incorporate the 1996 ERP, and the paragraph seems to imply that Region 8 should have done so. Overall, the 1996 ERP is more lenient than the 1987 ERP in its enforcement timeline. Since your investigation found that MDEQ would have been untimely under either the 1987 ERP or the 1996 ERP, I question the implication that the adopting the 1996 ERP would have been beneficial.

Also, Montana's 1997 legislature enacted the Voluntary Environmental Audit Law, which raised serious questions within EPA regarding Montana's continued ability to enforce its own environmental laws. Although Region 8 commented on Montana's proposed Consolidated Cooperative Enforcement as early as April 1999, until the question of enforceability was resolved by Region 8's and Montana's signing of an MOU in December 1999, Region 8 maintained that it was unwilling to authorize Montana for additional RCRA program requirements or formally update the enforcement agreement.

9. Page 20, Improved Monitoring of Case Progress Needed, 3rd paragraph. This paragraph cites MT12 as an example of poor case monitoring. As stated in Table 2-3, after the enforcement request had been received, MDEQ enforcement staff determined that inadequate evidence existed for a formal enforcement action. Therefore, MT12 does not seem to fit the paragraph as an example poor case monitoring, and I suggest that MT12 be replaced with another example. (See also comments 6 and 19 for relevant information.)
10. Page 24, Improved Documentation Needed, 1st paragraph. The second sentence states "MDEQ needed to better document its rationale for penalty assessments and enforcement action classifications, as well as a facility's full return to compliance." The ensuing text includes statistics which describe how frequently penalty assessments were inadequately documented. It would be useful to include similar statistics in this and the ensuing paragraphs to illustrate how frequently the other two allegations occurred. For example, Region 8's CM&E reviews for the years 1997 through 1999 found, with only a few exceptions, that MDEQ (permit and compliance staff) generally did document return to compliance in both RCRIS and in the handler files.
11. Page 26, *Insufficient Documentation of Enforcement Action Classifications and Return to Compliance*, 1st paragraph. The paragraph states "MDEQ's files did not always document support for the Department's decisions to classify facilities as low priority violators instead of high priority violators."

Neither the 1987 nor the 1996 ERP require documentation to support low priority

violators classifications. Perhaps the auditor's statement was intended to suggest something else. If so, I suggest that it be clarified.

12. Page 28 Recommendation 2-5. Taken together, page 21 of the draft report (which states "Additionally, by instituting a triage process where cases are prioritized, the enforcement division may be able to better identify more difficult cases and allocate resources more effectively.") and Recommendation 2-5 seem to suggest that MDEQ could use a "triage" process to establish case priorities. This in turn seems to imply that the auditors believe it would be acceptable for lower priority cases to exceed the timeliness criteria of the enforcement agreement as long as the higher priority cases were pursued within timelines. Please clarify if this is so, and clarify how the auditors would reconcile this with the ERP which allows for the more difficult cases (which are also often higher priority) to sometimes exceed timelines.

In addition, please note whether your audit included a review of MDEQ's Enforcement Compliance Information System (ECIS), and whether ECIS is (or could be) helpful in meeting the need for case monitoring.

Exhibit 3: Violator Classifications

13. Facility MT05. According to Region 8's review of this MDEQ handler file, only one violation was discovered during the 06/03/96 inspection – failure to clean up a used oil spill. MT05 submitted the required cleanup plan, and according to the inspector MT05 cleaned up the spill.

During the 11/25/97 inspection, the same violation was found again (different spill), along with other Class II violations, such as satellite accumulation quantity exceeded, used NiCad batteries not labeled "universal waste", and 3 drums of used oil not labeled "used oil". None of these violations would pose a significant threat to health or environment, or potentially cause an inappropriate response to a release, nor are they significant deviations from RCRA requirements.

In both inspection reports, the inspector referred to "some" of the oil being released in his discussion of the spills, an indication that the releases were not major. On 1/19/01, the inspector verbally verified that the oil spills were in fact minor. Unless the used oil spill was a "major" release, even the Region 8 Used Oil Field Citation Program would assess a \$100 field citation rather than seek a formal enforcement action. In my opinion, MT05 did not meet the 1987 ERP criteria for a chronic or recalcitrant violator. Therefore, I concur with MDEQ's decisions to issue Warning Letters in both of these situations, and suggest that MT05 be removed from Exhibit 3.

14. Facility MT18. The table entry for MT18 states "Since the facility was previously inspected on 02/02/95 and was aware of MDEQ's presence, MDEQ should have classified the facility as a high priority violator in the subsequent inspection." I disagree. Merely being aware of a regulatory agency's presence is not a criteria of the 1987 ERP for a chronic or recalcitrant violator, and does not make a violator an HPV. If that were true, EPA could make a case that any violator would be an HPV as long as the violator knew that EPA existed as an agency, and there would then be no reason for an ERP.

According to Region 8's review of this MDEQ handler file, no violations were found during the 2/2/95 inspection, and all of the violations found during the 3/18/98 inspection would be Class II according to the 1987 ERP. MT18 had registered as a CESQG in December 1991. A 3/15/95 letter from MDEQ to MT18 verified that MT18 had not yet generated sufficient waste to be classified as SQG, the next higher generator classification. MT18 registered itself as an SQG 3 days before receiving MDEQ's 3/27/98 Warning Letter requiring MT18 to do so, and had complied with the other terms of the 3/27/98 Warning Letter by 6/1/98. For these reasons, I concur with MDEQ's decision to classify the 3/18/98 violations as LPV, and suggest that MT18 be removed from Exhibit 3.

15. Facility MT22. According to the revised Exhibit 3 which you provided us on 1/10/01, the violation classification at MT22 with which you disagreed was the one associated with MDEQ's 7/9/98 inspection. There were three other violator classifications at MT22 with which you agreed. According to Region 8's review of this MDEQ handler file, that violation was for failure to clean up a used oil release from a front-end loader. MDEQ classified that violation as a Class II low priority violation, even though MT22 had many Class I high priority violations discovered during 2 prior inspections in 1992 and 1993.

According to the MDEQ file for MT22, MDEQ filed a civil complaint in 1992 for violations surrounding the operation of a hazardous waste management facility without a permit, seeking a court order assessing \$10,000 per day per violation. (See related remarks in comment 52.) Sixteen additional violations found in 1993 were added via a 10/7/93 amended complaint. The 7/9/98 oil spill violation was handled by MDEQ informally via a Warning Letter. Additional spills (of pentachlorophenol and used oil) discovered during a 10/6/99 inspection were not added to the complaint itself, but since the complaint was in settlement negotiations at that time, MDEQ added the remediation of these additional spills as conditions of settlement.

Strictly speaking, MT22 met the 1987 ERP criteria for a chronic violator at the time of the front-end loader used oil spill. However, MT22 had many other

significant, extensive, and long-standing violations, including soils extensively contaminated by spills and dumping of hazardous wastes far more toxic and persistent than used oil. The used oil spill from the front-end loader had little relative impact on the threat to environment and public health posed by MT22, and classifying the spill as Class I would have had little relative impact on the remediation of the extensive violations and contamination at this facility.

16. Facility MT27. Please refer to comment 4 for the rationale for why MT27 should be removed from Exhibit 3 (as an example of improper violation classification.)

Exhibit 4-A: Timeliness of Decisions to Take Formal Enforcement Action

17. Title. The "Date of Determination" from the 1987 ERP refers to the date that a significant violation is determined to exist, rather than to the timeliness of the decision to take or to not take enforcement action. In addition, the 1987 ERP uses the term "Discovery" rather than "Determination." As discussed in comment 5, the 1987 ERP does not contain criteria against which to measure timeliness of the *decision* to take enforcement action, only the timeliness of violation discovery and of the enforcement action. Therefore, I suggest changing the title of Exhibit 4-A to something like "Timeliness of Violation Discovery."
18. Facility MT02. In response to Region 8's SFY 99 End-of-Year Compliance Monitoring and Enforcement Review, MDEQ asserted that this was a complex case, and that preparation of the inspection report (and therefore achieving date of discovery and preparing the Warning Letter) required additional time as allowed by the 1987 ERP. Region 8 agreed with MDEQ's assertion, and noted the discovery date to be timely in this case.

Exhibit 5: Formal Enforcement Actions

19. Page 36, Facility MT12. The table lists 8/5/98 as the date that MDEQ dropped the case due to insufficient evidence, and uses that date as the date of "initial actions" for purposes of computing performance against the ERPs and the CCEA. August 5, 1998 was instead the date of an internal MDEQ case file summary.

For purposes of determining MDEQ enforcement performance against the ERPs and the CCEA, one must recognize that there are actually 2 parts to this case. Only one part, the alleged disposal of paint cans in a pasture, was dropped entirely as an enforcement case. The other part involved improper handling of other paint waste at another location, and MDEQ resolved these violations informally.

The 8/5/98 case file summary lists a 7/30/98 as the date that the enforcement division closed the first part of the case. Although it is only 6 days earlier, I believe 7/30/98 provides a better date for the date of "initial action" for the first part of this case. Using 7/30/98, the elapsed days in the latter 2 columns of MT12's row in Exhibit 5 change from 364 and 311 days to 358 and 305 days for the first part of the MT12 case.

A more proper date for evaluation of MDEQ's initial action timeliness for the second part of the case would be the date that MDEQ hand-delivered NOVs to the three "defendants". That date was 3/2/98. Using 3/2/98, one calculates 208 and 155 days for the latter 2 columns of this row for the second part of the case.

Exhibit 6: Penalty Assessments Did Not Meet Policy Requirements

20. Page 38, Facility MT12. For the reasons described in comments 6 and 9 above, I suggest that MT12 be removed from Exhibit 6 as an example of an inadequate penalty assessment.
21. Page 38, Facility MT22. The text for MT22 states "MDEQ assessed a \$13,513 penalty in accordance with state and federal guidance, and its penalty worksheets included calculations for gravity and economic benefit. MDEQ did not assess a multi-day component because it could not determine the violation start date."

Perhaps this statement about MT22 should be clarified. During Region 8's review of the PCD file for MT 22, a penalty worksheet dated 1/20/93 was found which calculated a total penalty amount of \$49,782, of which \$12,782 was economic benefit, and \$29,000 was for multi-day violations. A later enforcement request dated 8/2/93 included 12 separate penalty calculation worksheets, each of which addressed gravity, economic benefit, and multi-day violations. The amended complaint based on this enforcement request sought an additional \$404,900 in penalties.

EPA Region 8's Response to Draft Audit Report:
Appropriate Violator Classifications and Timely Enforcement Actions
Would Improve Montana's RCRA Enforcement Program.
Report Number 2000-P-000762-XXXX

Attachment 2

- Recommendation 2-1. Require MDEQ to comply with its new consolidated cooperative enforcement agreement, particularly when classifying violators and taking timely and appropriate enforcement actions.
- Region 8 Response: Region 8 agrees with the auditors' recommendation, and will look for ways in which to encourage MDEQ to abide by the CCEA. See also Region 8's response to Recommendation 2-10.
- Recommendation 2-2. Require MDEQ to escalate chronic or recalcitrant violators for formal enforcement rather than continue compliance assistance.
- Region 8 Response: Region 8 agrees with the auditors' recommendation, and will look for ways in which to encourage MDEQ to do so. See also Region 8's response to Recommendation 2-10.
- Recommendation 2-3. Require MDEQ to fully calculate penalties, including economic benefit and multi-day components where appropriate, when issuing formal enforcement actions against high priority violators.
- Region 8 Response: Region 8 agrees with the auditors' recommendation, and will look for ways in which to encourage MDEQ to do so. See also Region 8's response to Recommendation 2-10.
- Recommendation 2-4. Provide additional RCRIS training to staff in Region 8's Montana Operations Office.
- Region 8 Response: Region 8 (and all of EPA) recently converted from RCRIS to RCRAInfo, a web-based data system for RCRA. Region 8 is in the process of training all Region 8 RCRA staff on this

new system, and will include the Montana Operations Office staff in the training schedule. Regarding the missing RCRIS data noted by the auditors, the Montana Office staff have already prepared and submitted the data forms necessary to add that data to RCRIS.

Recommendation 2-5. Work with MDEQ to develop an effective process for monitoring case progress and prioritizing enforcement requests using time frames in the State's new enforcement agreement.

Region 8 Response: The Montana Office and MDEQ have established a meeting date to discuss how to better track case progress, and to modify ECIS reports to provide the data necessary to do so.

Recommendation 2-6. Support MDEQ efforts and provide assistance, where appropriate, in developing an information-sharing process so both inspectors and enforcement staff are aware of facility activities.

Region 8 Response: Region 8 agrees that close consultation between compliance monitoring staff and case development staff is necessary in order to achieve a sound and effective enforcement action. Region 8 will explore with MDEQ practices which might enhance this activity.

Recommendation 2-7. Support MDEQ efforts and provide assistance, where appropriate, in developing a divisional cross-training plan for staff that provides technical training and information on case development.

Region 8 Response: Region 8 and EPA-NETI have access to numerous RCRA- and enforcement-related training courses, and have made them available to all states, including Montana. At least one of those training courses has been presented in Montana, and another soon will be. To our knowledge, Montana has attended such training as their resources have allowed.

Recommendation 2-8. Require MDEQ to sufficiently document its actions related to penalty calculations and reductions, violator classifications, and instances where MDEQ provides extended time frames for a facility to return to compliance.

Region 8 Response: Region 8 agrees with the auditors' recommendation, and will look for ways in which to encourage MDEQ to do so. See also Region 8's response to Recommendation 2-10.

Recommendation 2-9. Require MDEQ to maintain sufficient documentation of a facility's full return to physical compliance.

Region 8 Response: Region 8 agrees with the auditors' recommendation, and will look for ways in which to encourage MDEQ to do so. See also Region 8's response to Recommendation 2-10.

Recommendation 2-10. After discussions and clarifications of the recommendations in the draft report, Region 8 and the IG Auditors agree with the inclusion of this additional recommendation. As part of its Uniform Enforcement Oversight System, the Region should assess whether MDEQ has complied with the report's recommendations and adjust the level of regional oversight and technical assistance accordingly. The Region should also include pertinent recommendations as part of MDEQ's grant conditions, performance partnership agreement, and/or other agreements to ensure they are implemented. Finally, the Region should develop a tiered approach for states that do not properly classify violators or take timely enforcement action. Its approach should define when the Region will overfile, directly implement, withhold grant dollars, and finally take back the program.

Region 8 Response: Region 8 has already implemented a Uniform Enforcement Oversight System (UEOS) which will allow us to access whether MDEQ has complied with the report recommendations, adjust oversight and assistance, and include pertinent recommendations in the PPA. Under the UEOS, state enforcement programs which fall below the minimum standards are subject to targeted oversight. This targeted oversight is tailored to aid and encourage the state to correct enforcement program deficiencies. Targeted oversight can include enhanced file review, technical assistance, work sharing, direct implementation, over filing, and inclusion of corrective actions as a part of the PPA process. The Office of Enforcement, Compliance, and Environmental Justice (ECEJ) agrees to the development of

a written policy which details the implementation of the UEOS targeted oversight escalation process. The Region agrees that EPA oversight and involvement can be tiered to escalate monitoring of the state and to take actions beyond the UEOS approach to include, but not limited to, withholding grant dollars, and program withdrawal. The Region will develop a policy specifying how it will implement this tiered escalation approach. ECEJ has begun a dialogue with other Regional programs to discuss this policy and the broader program implications of this recommendation.

ABBREVIATIONS

| | |
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| EPA | Environmental Protection Agency |
| MDEQ | Montana Department of Environmental Quality |
| OIG | Office of Inspector General |
| RCRA | Resource Conservation and Recovery Act |
| RCRIS | Resource Conservation and Recovery Act Information System |

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