



State of Louisiana
DEPARTMENT OF ENVIRONMENTAL QUALITY
OFFICE OF THE SECRETARY

May 17, 2012

Arthur A. Elkins, Jr., Inspector General
Environmental Protection Agency
Ariel Rios Building
Mail Code: 2410T
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Re: Report No. 12-P-0113: EPA Must Improve Oversight of State Enforcement

Dear Mr. Elkins:

On December 9, 2011, the Environmental Protection Agency's (EPA's) Office of Inspector General (OIG) released a report entitled "EPA Must Improve Oversight of State Enforcement" (OIG Report). In its preliminary response to the report dated December 15, 2011, the Louisiana Department of Environmental Quality (LDEQ) highlighted a number of errors and omissions which misrepresented LDEQ's ability to administer and enforce the environmental laws of this state. Now that LDEQ has had an opportunity to fully review the report and consider OIG's findings, I want to address a number of matters in greater detail.

The OIG Report evaluates the following parameters for each major regulatory program implemented by the states:

- percent of facilities inspected;
- percent of inspections identifying significant noncompliance ("SNC") or a high-priority violation ("HPV"); and
- percent of state actions that included a penalty.¹

The programs assessed include Title V (Clean Air Act, or CAA), the National Pollutant Discharge Elimination System (Clean Water Act, or CWA), and Subtitle C (Resource Conservation and Recovery Act, or RCRA).

Finally, OIG averaged the three percentages for each program to rank each state's relative performance and draw conclusions about the state's enforcement activity levels. Despite EPA's finding that the metrics relied upon by OIG were "sometimes inaccurate and/or misleading" and "not adequate for drawing conclusions about program performance," OIG used this contrived figure to erroneously conclude that "Louisiana has the lowest enforcement activity levels in Region 6 and ranked in the lower half for the CWA and lowest quartile for CAA and RCRA for FYs 2003 – 2009."

¹ These calculations were based on information obtained from EPA's enforcement and compliance database, the Online Tracking Information System ("OTIS"). Only government agencies have access to the OTIS data system. The public may access EPA's Enforcement and Compliance History Online (ECHO) website, which provides similar data.

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This correspondence is intended to provide accurate information regarding LDEQ's inspection and enforcement activities and to show how the methodology employed by OIG renders the conclusions of the report fallible. To do so, I will address each metric individually. To begin, however, I want to address the likelihood of errors in the OTIS data itself.

OTIS Data

Early in 2011, EPA made Fiscal Year 2010 State Review Framework (SRF) data available on its website.² This data was extracted from OTIS. On March 11, 2011, LDEQ informed EPA that Louisiana's data was inconsistent with the department's records and did not appropriately reflect state activities or commitments to EPA. LDEQ documented the discrepancies with each SRF metric and provided accurate data to EPA obtained from EPA's Integrated Compliance Information System (ICIS). Unfortunately, it appears the same OTIS data retrievals were used to generate the OIG Report.

Metric 1: Percent of Facilities Inspected

The "percent of facilities inspected" metric was calculated by dividing the number of inspections by the number of facilities/permits.

OIG's Analysis Ignores Whether or Not States are Meeting Agreed to Goals with EPA

The OIG Report correctly notes that EPA establishes goals for facility inspections, that these goals differ from statute to statute, and that some states negotiate lower goals with EPA in exchange for conducting additional activities in other areas. Yet, instead of evaluating performance based on whether or not a state is meeting its prescribed goals, OIG chose to base its calculation on the "universe" of facilities/permits set forth in OTIS.

OTIS Data is Not Consistent Such That Appropriate Comparisons Can Be Made

Because each state's permitting requirements differ, particularly with respect to minor sources, OIG's approach is reasonable for comparing a state with many permits to a state that has fewer permits *only* if the same types of permits are considered. OIG recognizes as much, acknowledging "states reporting more than just major facilities could possibly appear to be doing worse in this category than they actually are." OIG even suggests that this possibility should be considered a "caveat of the CWA data that users should consider when interpreting the performance of a given state under that program." Yet this caveat did not prevent OIG from reaching the unfounded conclusion that Louisiana "ranked in the lower half for the CWA."

In fact, Louisiana's data in OTIS reflects *thousands* of CWA facilities classified as minor sources. If only major sources are considered, Louisiana's "percent of facilities inspected" would be 87%. In short, if some states are reporting only major sources and others are reporting both major and minor sources (or some subset of minor sources), there is no meaningful or equitable way to compare states using this metric.

² The SRF is a tool used by EPA to assess each state's enforcement of the Clean Water Act, Clean Air Act, and hazardous waste laws. In conducting the SRF, EPA collaborates with each state on reports. These reports allow EPA to track recommendations for states to improve their enforcement programs. See http://www.epa-otis.gov/echo/state_framework.html for more information.

OIG Mistakenly Used the "Historical Universe" to Determine Percent of Facilities Inspected

Even if OIG included all of the permits in OTIS for the sake of consistency, only effective permits should have been considered. However, in order to determine the percent of facilities inspected, OIG mistakenly divided the number of inspections by the "historical universe" (i.e., all permits ever issued) instead of by the average number of permits effective during the period evaluated. Louisiana's CWA historical universe totals 16,656 facilities, whereas the actual average number of permits in effect between 2003 and 2009 was only 8916. Likewise, the same flawed methodology was employed to determine the percent of facilities inspected under RCRA. The total historical universe of waste handlers was used instead of only *active* waste handlers.

OIG Considers a Single Indicator to Assess Inspection Activities

The OIG Report fails to emphasize that the data in OTIS does not reflect all of the inspections conducted by a state each year. During the timeframe evaluated by the report, LDEQ completed more 10,588 CWA, CAA, and RCRA inspections not accounted for in the "percent of facilities inspected" metric. Also not included were 18,629 disaster-related inspections conducted in response to Hurricanes Katrina, Rita, Gustav, and Ike.

While it is absolutely essential for me to point out the shortcomings of the OIG Report, it is just as important, if not more so, to provide OIG and the public with reliable and accurate data. Attachment A contains a complete listing of LDEQ's inspection goals and inspections conducted for each program during fiscal years 2003 – 2009. As you can see, LDEQ's performance during this period is substantially better than that reflected in the OIG Report.

Now, let me turn to OIG's second metric – percent of inspections identifying SNCs or HPVs.

Metric 2: Percent of Inspections Identifying SNCs or HPVs

The "percent of inspections identifying SNCs or HPVs" metric was calculated by dividing the number of facilities with a new state-identified SNC or HPV by the number of facilities inspected.

OIG Inappropriately Links SNCs to Inspections

Under the CWA, SNCs apply only to major sources. Further, the number of SNCs in OTIS reflects only SNCs *self-reported* by major sources, not those discovered during an inspection. Therefore, there is no relationship between SNCs and CWA inspections.

A High Percentage of Inspections Identifying SNCs / HPVs May Indicate Poor Performance

The OIG Report notes that "EPA more frequently views state identification of an SNC/HPV as a success because it indicates a rigorous targeting and inspection protocol. OIG adopted EPA's view by considering a higher value of this metric as an indicator of better state enforcement performance."

While a high percentage of inspections identifying an SNC or HPV may indicate a “rigorous targeting and inspection protocol,” it also points to the fact that a large number of facilities are in violation of federal and state laws and regulations. In such a case, it is just as reasonable to conclude that the permitting authority’s enforcement program is *underperforming*, since it is not serving as a deterrent to noncompliance.

Moreover, OIG failed to consider that proactive outreach by a state may reduce the number of SNC and HPV events. During the seven year period in question, LDEQ offered 98 compliance assistance classes, training nearly 2000 individuals on various environmental matters.

Metric 3: Percent of State Actions that Included a Penalty

The “percent of state actions that included a penalty” metric was calculated by dividing the number of state actions that included penalties by the total number of state formal actions to offer a relative measure of how frequently the state addresses a violation using a penalty.

OIG Fails to Account for Differences in State Law

Louisiana state law requires that a respondent be issued a “Notice of Potential Penalty” prior to being issued a “Penalty Notice.” Both documents are considered formal actions in OTIS. As a result, the highest percentage that Louisiana could potentially attain is 50%. Moreover, amended actions and settlement agreements also count as formal actions. Therefore, at least two and perhaps several more formal actions may be associated with a single violation that ultimately results in a penalty.

Average Performance Calculation

OIG’s Data is Internally Inconsistent

First, OIG’s data, at least with regard to the CWA, is internally inconsistent. OIG acknowledges that states are not required by the NPDES program to report penalty information. Thus, it is not possible to determine whether a zero in OTIS represents a true value or no response. There were 18 states with a zero value. OIG adjusted for this in its analysis by utilizing the penalty metric only for the 28 states that had a greater than zero value for penalties. Thus, for these 18 states, the average performance calculation accounts for only two metrics, whereas the same calculation for the other 28 states accounts for three.³ This issue, in and of itself, renders the CWA comparisons invalid.

Averaging Unrelated Metrics Results in a Meaningless Number

Notwithstanding the internal inconsistencies, the fundamental fault with the average performance calculation is that averaging unrelated metrics results in a meaningless number. For example, consider two states with 100 Title V facilities. If, on average, only 1 source in the first state was inspected each year, but an HPV was discovered at that source and a penalty was assessed by the permitting authority, the average for the state would be 67%. However, if the second state inspects, on average, 60 facilities each year, identifies HPVs at 25 facilities, and includes penalties in half of the formal enforcement actions issued, the average for that state would be 51%. Is the first state performing at a higher level than the second? Clearly not.

³ Note that ID, MA, NH, and NM do not have delegated NPDES programs.

State	Inspections	SNC	Penalty	Average
A	1%	100%	100%	67%
B	60%	42%	50%	51%

Alternate Measurement of State and EPA Region Enforcement Performance

Despite its limitations, data from OTIS could be used to evaluate enforcement performance provided that the appropriate measures are taken to account for incomplete data, differences in statutes, and differences in the states' enforcement processes. Care must be taken to avoid basing comparisons and drawing conclusions from meaningless averages. In fact, contrary to OIG's assessment, data from OTIS can be used to show that Louisiana performs quite favorably when compared to other states.

Louisiana's Enforcement Performance (FY 2003 – 2009 Averages⁴)			
Program	Louisiana	National Average	Louisiana Rank
Clean Water Act			
NPDES Permits	16,656	4,004	2
Inspections/Year	2201	668	5
Formal Enforcement Actions/Year	273	38	2
Amount / Penalty	\$37,983	\$7,853	1
Total Penalties/Year	\$1,287,778	\$244,778	2
Average Rank:⁵			2
Clean Air Act			
Air Majors	542	284	6
Inspections/Year	279	194	14
Formal Enforcement Actions/Year	264	63	3
Amount/Penalty	\$42,007	\$23,685	11
Total Penalties/Year	\$1,433,489	\$1,089,808	8
Average Rank:			8

⁴ Data was obtained from EPA's OTIS Management Report tool.

⁵ As noted elsewhere, LDEQ does not believe averaging unrelated metrics provides meaningful data. This figure is included herein only to draw comparisons to the OIG Report.

Louisiana's Enforcement Performance (FY 2003 – 2009 Averages)			
Program	Louisiana	National Average	Louisiana Rank
Resource Conservation and Recovery Act			
RCRA Active Handlers	14,101	7887	9
Inspections/Year	302	379	24
Formal Enforcement Actions/Year	36	29	12
Amount/Penalty	\$87,400	\$27,320	6
Total Penalties/Year	\$443,313	\$388,964	10
Average Rank:			12

Though the overly simplistic approach and faulty data employed by OIG reduce LDEQ's efforts to meaningless percentages, the effectiveness of the department's permitting, surveillance, and enforcement programs is incontrovertible. For instance, the positive environmental outcomes resulting from these activities include:

- Regarding air quality, the 8-hour ozone design value for the Baton Rouge area has decreased from 95 parts per billion (ppb) in 2005 to 78 ppb in 2010. Baton Rouge, which was formerly designated as *severe* under the 1-hour ozone National Ambient Air Quality Standard (NAAQS), is now in attainment with both the 1-hour ozone NAAQS and the 1997 8-hour ozone NAAQS. In 2009, EPA's Regional Deputy Administrator declared, "Today, Baton Rouge's air is the cleanest it has been in over a generation."
- LDEQ's "2010 Louisiana Water Quality Inventory: Integrated Report" shows that for the fifth consecutive reporting cycle, Louisiana's water quality has improved. For example, the primary contact recreation (i.e., swimming) metric continued to show improvement, with 83.8 percent of the water body subsegments designated for this use fully supporting it – the highest value achieved since this parameter was first evaluated. Likewise, secondary contact recreation (i.e., boating) improved to 97.2 percent, again the highest value ever achieved.

In sum, the OIG Report relies on erroneous calculations, an incomplete database, and flawed logic to grossly misrepresent the effectiveness of LDEQ's Inspection and Enforcement Divisions. EPA's evaluation of the OIG Report is particularly telling:

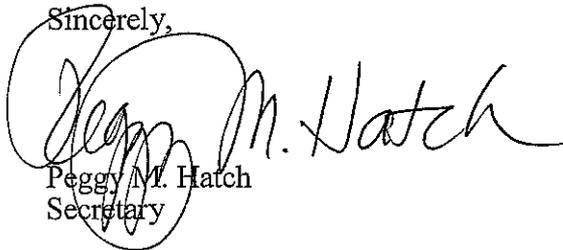
[T]he metrics relied on by the Inspector General in this draft Report are overly simplistic, and in some cases inaccurate, thereby resulting in erroneous conclusions regarding individual state enforcement performance. The use of limited data presents an incomplete picture of state enforcement programs, and fails to provide an accurate evaluation of the quality or other contextual aspects of complex state enforcement performance. * * * [T]he Report, as currently presented, will give the public a false impression of state

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performance by publishing both inaccurately positive and inaccurately negative state evaluations.⁶

EPA's assessment has unfortunately proven to be correct. Should you have any questions concerning this correspondence, please contact me at (225) 219-3950.

Sincerely,

A handwritten signature in black ink that reads "Peggy M. Hatch". The signature is written in a cursive style and is enclosed within a circular stamp or seal.

Peggy M. Hatch
Secretary

PMH

Attachment

⁶ "EPA Must Improve Oversight of State Enforcement," Report No. 12-P-0113, December 9, 2011, p. 43.
The report is available at <http://www.epa.gov/oig/reports/2012/20111209-12-P-0113.pdf>.

Attachment A

Inspection Goals / Inspections Conducted

CAA Title V	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009
Title V Universe ⁷	542	542	542	542	542	542	542
Inspection Goal %	50%	50%	50%	33%	33%	33%	33%
% Inspected	43%	41%	60%	39%	37%	23%	37%
Inspection Goal No.	271	271	271	179	179	179	179
Inspected	234	224	325	213	201	127	202
Additional Air Inspections	1377	1469	598	321	409	419	529

RCRA	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009
TSD Universe	23	23	23	23	23	23	23
Inspection Goal %	100%	100%	100%	100%	100%	100%	100%
% Inspected	274%	248%	170%	109%	126%	126%	157%
Inspection Goal No.	23	23	23	23	23	23	23
Inspected	63	57	39	25	29	29	36

RCRA	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009
LQG Universe	367	367	367	367	367	367	367
Inspection Goal %	20%	20%	20%	20%	20%	20%	20%
% Inspected	22%	26%	31%	15%	23%	31%	37%
Inspection Goal No.	73	73	73	73	73	73	73
Inspected	81	95	114	55	83	115	135

RCRA	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009
SQG Universe	2421	2421	2421	2421	2421	2421	2421
Inspection Goal %	1%	1%	1%	1%	1%	1%	1%
% Inspected	4%	3%	3%	1%	2%	3%	3%
Inspection Goal No.	24	24	24	24	24	24	24
Inspected	88	65	64	26	46	66	82
Additional RCRA Inspections	199	251	276	204	271	275	402

CWA NPDES	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009
Major Universe	217	217	217	217	217	217	217
Inspection Goal %	100%	100%	100%	100%	100%	50%	50%
% Inspected	119%	117%	110%	78%	110%	65%	66%
Inspection Goal No.	217	217	217	217	217	109	109
Inspected	259	254	238	169	239	141	143
Additional NPDES Inspections	2608	2539	2027	1282	2605	1732	1685

Additional Disaster-Related Inspections

Disaster Inspections	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009
Katrina-related			1291	4710	402	4	8
Rita-related			365	2533	212	7	
Gustav-related						4599	2397
Ike-related						1126	975
Total:			1656	7243	614	5736	3380

⁷ Universe data for all programs was obtained from EPA's OTIS State Review Framework, queried in December 2011.