August 31, 2009

Mr. Tom Ripp, Chief
Sector Analysis and Implementation Branch
Compliance Assistance and Sector Programs Division
Mail Code 2224A
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Dear Mr. Ripp:


The attached comments on the CMS were compiled from comments received from 10 individual States and two other ASTSWMO Hazardous Waste Subcommittee Task Forces. The comments, which have not been reviewed or adopted by the ASTSWMO Board of Directors, are provided in two parts: the more substantive issues identified within the CMS (Attachment 1), and technical corrections (Attachment 2).

The issues which generated the most comments from States were: the inclusion of a Financial Assurance Review as part of a Compliance Evaluation Inspection (CEI), the use of a Focused Compliance Inspection (FCI) in lieu of a CEI at facilities with good compliance histories, the concept of having day zero of a CEI be other than the first day of an on-site inspection, and the concept of encouraging regions to require States to begin to collect and report environmental outcome information.

We again would like to express our thanks for the opportunity to provide comment, and also underscore our willingness to continue working with the Agency in its effort to develop this strategy. If you have any questions about these comments, please contact me at 518-402-8629 or at tjkillee@gw.dec.state.ny.us.

Sincerely,

[Signature]

Thomas J. Killeen
Chair, ASTSWMO Enforcement & Compliance Task Force

cc: ASTSWMO HW Subcommittee & Task Forces
1. Section I, second paragraph, 4th bullet and Section V.D. paragraph 2, Measuring Environmental Outcomes: the CMS is shifting the focus of compliance monitoring from inspection and review outputs to those measuring environmental outcomes. Although the Enforcement & Compliance Assurance Task Force (Task Force) recognizes that measurement of environmental outcomes would be a valuable tool for the national hazardous waste program, the vast majority of State programs are not equipped to collect and report outcome information. At this time overly stressed State hazardous waste programs cannot accommodate additional data gathering, storage and reporting requirements. We request that references to this shift in focus as it relates to State programs be removed from the CMS. The Task Force is willing to work with EPA on developing outcome measurements, but does not support any mandatory requirement to be imposed on the States.

2. Sections II.C (figure 1 & C.1), IV.B. and IV.C., Inclusion of Specific Priorities: The CMS should be developed as a time neutral document, and should remove references to existing time specific priorities. The CMS includes references to the 2009 and 2010 federal facility Integrated Strategy and the FY 2008-2010 National Priorities. Inclusion of these specific priorities which will end shortly after the proposed adoption date of the CMS would require EPA to modify this document every few years to keep it from becoming outdated.

3. Section III.A.1., Additional RCRA C Universe: The Scope of the Subtitle C Program listed in paragraph 1 does not mention that Subtitle C also encompasses Universal Waste Handlers and Used Oil facilities, and does not recognize inspections that focus on these types of handlers or include these rules. At some point, it may also include Hazardous Secondary Material inspections.

4. Section III.A.2., Inspection Coverage: In Fig. 3, there are several inspection goals to be conducted by the EPA Regions for TSDFs. If these are joint EPA/State inspections, should the facilities involved be included in the State's TSDF universe and the inspections counted by the State or should the facilities be excluded from the State's universe? This condition is repeated several times in subsequent sections, in addition to the grant commitment, this would seem to make a difference in SRF calculations. III.C.1. explains how EPA inspections of LQGs can be counted toward the State's 20% coverage requirement.

5. Section III.B.1., State TSDF Inspections: The bullet addressing EPA inspections of federal TSDF facilities has an ending sentence stating authorized States may also conduct inspections. The bullet addressing EPA inspections of State/local government TSDFs does not have a comment indicating authorized States may conduct inspections.

6. Section III.B.2.c., Term – Commercial TSDF: Use of the term "commercial TSDF" for all non-government TSDF facilities is misleading and should be replaced with a different term. Various State programs have specific definitions for commercial facilities, often relating to facilities which receive hazardous waste from offsite for profit, which do not encompass all non-government TSDF facilities. We propose using the term non-government TSDFs, as this is the universe that the document is defining.

7. Section III.B.3. First paragraph, Financial Assurance Review within a CEI: Types of Inspections for TSDFs and Section V.B.1, last sentence, second paragraph: A CEI should include determining compliance with FA requirements. The Task Force does not support the
inclusion of the review of financial assurance requirements within a CEI. Although financial assurance requirements still need to be met and reviewed for compliance even after financial assurance is no longer a national priority, to require that review be conducted as part of every CEI is burdensome and inappropriate. A number of States separate these types of inspections for various reasons, primarily because area of expertise required of staff is vastly different (and necessarily so), but resource efficiency (more and more necessary as resources dwindle) and task focus are considerations as well. There are a number of issues with implementing this change:

- CEIs are on-site inspections conducted by field staff. In some States, Financial Record Reviews (FRR) are conducted by specialized staff in their central office. Inspectors do not have the training to do FRRs. Coordinating this implementation would be overly burdensome and unnecessary. The only documents related to financial assurance which should be reviewed at the time of inspection are those required to be maintained on-site.
- Current regulations only require that a detailed closure cost estimate, an inflation-adjusted closure cost estimate amount, a detailed post closure cost estimate (if applicable), and an inflation-adjusted post closure cost estimate amount are the only financial assurance documents required to be present during an on-site inspection. Inclusion of this requirement as part of a CEI would therefore need a regulatory change.
- The FRRs are timed to coincide with the renewal of the instruments or mechanisms. They do not occur on the same timeline as CEIs. On-site inspections at a TSDF may be conducted more than once per year, and may be required by State law. It is not unusual for States to conduct complete multiple CEIs at certain TSDFs. Financial assurance reviews may be conducted yearly, or less frequently, if the financial assurance instrument/mechanism does not expire.
- If more than one company location has financial assurance, a single FRR letter may address multiple facilities. Coordinating CEIs for these would be burdensome.
- The current process, including data reporting, allows for separate reviews and inspections, with the data being entered into RCRAInfo. The ASTSWMO Program Information Management Task Force suggests EPA create a new RCRAInfo report that retrieves CEI, FRR, and financial assurance module data to determine complete compliance.
- Inclusion of this additional requirement will result in the States, needing to train additional staff on the implementation of financial assurance. Most States do not have funding sources for these additional reviews. Therefore, EPA would need to provide additional program resources to ensure that this additional requirement could be met.
- With the majority of States authorized to implement the core RCRA program including financial assurance review, the inclusion of these reviews as part of a CEI would make this review as part of a CEI conducted by EPA inspection personnel extremely unproductive. Some States may actually have financial assurance requirements broader in scope than EPA’s, which would then make it impossible for EPA inspectors to conduct a complete CEI.

8. Section III.B.3. Second paragraph under Types of Inspections for TSDFs, Land Disposal Facility Inspection Requirements: This paragraph is confusing when determining the inspection requirement for land based TSDFs. The section addresses the ground water
inspection requirements for both Groundwater Monitoring Evaluations (GMEs) and for Operation and Maintenance (OAM) inspections, but does not specify the frequency of these evaluations clearly. TSDFs that are not in the Operating TSD Universe, but still have compliance requirements should be inspected every three years (e.g. via a CEI, GME, or OAM). It is not clear if this means that this universe of TSD is no longer subject to the biannual CEI requirement, and therefore only need to be inspected every three years, or that the GME or O&M need to be done every three years in addition to the CEI requirement. In addition within this three year cycle would this mean that any of the three types of inspection would be acceptable (GME, OAM or CEI). In addition these requirements are mentioned in Section V.B.1. when the document says, 'When a TSDF is no longer accepting waste, then an OAM or GME may be appropriate'. This is too prescriptive in terms of evaluation type. If the TSDF is not receiving waste nor actively managing it and has no ground water monitoring, a FCI may be appropriate, but not CEI, GME, or OAM.

9. Section III.C.1.c. Alternative Plans (State Flexibility Plans): We appreciate the opportunity during the development of the National Program Managers Guidance document to work with EPA on developing a flexibility strategy for inspections of LQGs to give States opportunity to inspect other types of facilities. This section of the CMS reflects what is currently available through that process, but the Task Force would like to work with EPA to improve this process for the future to make the flexibility attractive to more States. We plan on addressing this issue with EPA in separate correspondence. We would like the CMS to specify the terms under which a State and EPA region can agree upon an alternative LQG universe, versus using the latest Biannual Report System (BRS) data. Many States possess a more accurate LQG universe than that defined by the BRS and EPA regions have recognized that for years. Question: Is it required for EPA Headquarters to approve the use of an alternative LQG universe or do the Regions have the ability to approve this universe?

10. Section V.A.2., Inspection Priorities: Two areas of concern appear in the listing of inspection priorities, those for citizen complaints and never inspected LQGs. States expend significant resources investigating complaints, yet there is no previous mention of them until this point in the document. No separate metric for complaints appears in the State Review Framework results, even though RCRAlnc has the means to identify evaluations resulting from complaints. If complaint investigations are a national priority, why is there no focus on them? Regions only ask to review some complaint investigation logs. Identification of Never Inspected LQGs is problematic. Many of these facilities may have been one time or episodic generators, where inspections will lead to finding close or otherwise smaller generators. Making these sites an inspection priority is not an efficient use of inspector time, although it does have the benefit of updating RCRAlnc if the inspection results in an update of the Handler Information.

11. Section V.B.1., Compliance Evaluation Inspections: The CMS for the first time introduces the concept of 'If the facility has a good track record then a FCI can be done instead of a CEI.' While the Task Force agrees that this concept is a good idea, consistent implementation and interpretation of 'a good track record of compliance' is needed to ensure that states may take advantage of this without regional interpretations interfering. We are committed to working with EPA on developing consistent standards to implement this idea. We have some specific technical concerns for this:

- OECA should note that there is no "Other" focus area sub-type defined in the list of national codes. States can create their own focus area codes and some have indeed created an "Other" to fill this gap.
- In section V there are references to best practices or minimum qualitative standards states must meet for inspections, but two of the reference documents in Appendix E are
on EPA's intranet and are not accessible to States. The title of the “Review of RCRA Inspection Report Practices” document indicates it is pertinent to a discussion of the Compliance Monitoring Strategy.

- What qualifies as “a good compliance history”?
- The term good compliance history refers to the facility compliance history, however during a recent call with EPA staff, it was mentioned that the State enforcement program would also have to have an adequate enforcement program.
- The Task Force understands that this concept may be extended to the LQG universe. We are more cautious with our support for this concept when applied to LQGs, especially when the facility may indeed be inspected only every five years. It may be difficult to establish a good compliance history.

12. Compliance Evaluation Inspections, V.B.1, paragraph 4, CEI reporting and date of Day Zero for a CEI: This paragraph begins by describing some inspection probably mischaracterized as CEIs. Although EPA states that ordinarily a Region/State need only conduct a single CEI at a facility within a year, they do not recognize that many States have laws or policies which require more frequent complete inspections than once per year, and many States still perform full CEIs at facilities which receive CERCLA wastes twice a year. The strategy should focus on when a CEI should be counted and when other types of inspections are more appropriate.

In addition, the paragraph states that when a CEI occurs over multiple days, the last day should be recorded as the date of the CEI. This is a contradiction of the current Enforcement Response Policy (ERP) dated December 2003, which says that the first day of a multi-day inspection is Day Zero. These issues were discussed when the ERP was being put together six years ago. Including this change in the CMS would require a corresponding change to the ERP, and more significantly would require a significant change to all data tracking systems employed by the States and EPA. It would require a significant amount of training and would require some very specific guidance documents to be created to allow States and regions to accurately define day zero for a CEI. This change may have a significant effect on enforcement timeliness.

The Task Force requests that at this time the CMS definition for day zero be changed to be consistent with the ERP. The definition of day zero should only be considered for change at the time the ERP is revised, until such time the definitions should remain consistent. Many State members have expressed a desire to have the change to the date of day zero, while other members wish to keep the definition of day zero as is. We believe a discussion of this issue would be a valuable item for EPA and ASTSWMO to begin over the next year, and/or when the ERP is next updated.

Listed below are a number of impacts and comments associated with a change to the definition of day zero for a CEI:

- Inability to accurately compare data entered using the first day of the inspection to data entered using the last day of the inspection. There would not be any kind of conversion that could be done to make the data comparable.
- Anyone associated with the CM&E data entering process would need to be retrained and there is no guarantee that mistakes out of habit would not occur, thus potentially creating further data inequality or inconsistency issues.
- Which part of the inspection would become Day Zero? While there could be a very slight advantage (from an enforcement perspective) of starting the enforcement timeline from a later point in time, it would not seem logical to make the end of an inspection the point that should be designated as Day Zero.
- Taking into account the revisions to the CEI definition on pg 7 of the Appendices along with the apparent proposal to change the recorded date of an inspection from the first
day to the last day would suggest that an agency could conduct follow-up activities such as sampling revisits and information requests after the actual on-site visit such that they could stay in inspection completion mode for an extended period of time thereby drastically shortening the enforcement timeline as to then have almost immediate SNC determination and/or enforcement action response times. It would seem that further clarification would need to be provided as to what a CEI would actually entail if the change is made to make the last day of an inspection the event recording date.

• The above bullet discussion would exacerbate any potential confusion to the regulated community or anyone trying to review information on ECHO or other data sources.

• One State commented that they favored having the last date of the final visit as the date of the CEI, even if it was in conflict with the ERP, therefore forcing EPA to modify the ERP to be consistent with the CMS.

• Using the last day of an inspection creates potential problems in the determination of violations since it would then be possible for a violation to be found and determined prior to the "official" date of the inspection. For example, if an inspection is 7 days long and a violation is found on day 1, is the determination date day 1 or day 7? If it is day 7, then the determined date is the same as the evaluation date BUT if the determination day is the actual date (day 1 of the week long inspection), then the determination date is before the evaluation date that found the violation. How would/could that be explained to the public?

• Even though the CMS suggests the last day of an inspection should be what’s entered into RCRAInfo as the official "date" of an inspection, they may actually think Day Zero could remain as the first day, but that would provide no advantage to anyone regarding the enforcement timeline so that doesn’t even make any sense.

• Inspection Date Discrepancy Between ERP & CMS: The CMS on page 29 and the "Day Zero" date in the ERP should be consistent. And given the choice, the ERP should be changed to reflect "Day Zero" as the date the inspection is completed. In fact, the definition of CEI in Appendix C acknowledges that an inspection may last several days and require multiple site visits. Inspectors shouldn't be "on the ERP clock" for issuing NOVs, orders, etc. while still gathering information to put together an inspection report.

• The date of the inspection should remain the first day and be consistent with the Enforcement Response Policy. Tracking two different dates would cause confusion, and the database couldn't handle multiple dates either. In addition, some years inspections have not been started until the end of the fiscal year. Would the States now have to finish the inspection before the end of the FY? The end of an inspection is less clear than the beginning, because the physical inspection may conclude, but paperwork reviews or additional submittals by the facility may continue and sample results could take a month or more to receive. The proposal in the CMS does not appear to be the best way to address States that maintain a constant presence at a site or conduct numerous inspections during the year.

13. Section V.D., Reporting and Data Quality: It would be prudent to specifically refer to updating RCRAInfo in the inspection outcomes bullets, in the item which refers to updating generator status as a result of the inspection. Because there is no re-notification requirement in the rules, if the facility is not a TSDF or LQG, the inspection may be the only opportunity for getting the EPA ID information updated. Implementers should be encouraged to capture updates in the Handler module of RCRAInfo.
Section I, first paragraph, page 9: Remove the artifact from Track Changes in the left margin.

Section I, second paragraph, third sentence, page 9: Insert the word “is” between “CMS” and “intended to”.

Section I, footnote 4, page 9: Replace Compliance Environmental Inspections (CEIs) with Compliance Evaluation Inspections (CEIs).

Section II.C., page 12: The figure at the top of the page is missing the figure identifier number.

Section II.C.1, third bullet, page 12: Delete the extra space in “which”.

Section II.C.2, eighth sentence, page 13: Insert the word “be” between “may” and “areas”.

Section II.C.2, footnote 12, page 13: The footnote states, “RCRA does not provide for authorization to Tribes, or to state or local governments.” The inclusion of the word “State” appears to be an error. Delete the word “State”.

Section III.A.1., second paragraph, page 15: Suggest changing, “In brief, as explained fully below:” to “In summary:”

Section III.B.4, bulleted list, page 18: Suggest adding a bullet item stating, “Submission of a Biennial Report to the Administrator” to the list of program elements for TSDF inspections. Submission of reports is on the list for Generators and should also be included in the list for TSDFs.

Section III.B.4., bulleted list, page 18: Suggest adding a bullet item to the list of program elements for TSDF inspections stating, “General Inspection Requirements, Security, and Preparedness & Prevention”.

Section III.C.1.b, first paragraph, first sentence, page 19: For clarity, the word “generator” at the beginning of the sentence should be replaced with the term “Large Quantity Generator”.

Section III.C.1.b., bulleted list page 20: Suggest adding a bullet item to the list of program elements for LQG inspections stating, “Contingency Plan, General Inspection Requirements, Security, and Preparedness & Prevention”.

Section III.C.1.b., fifth bullet item, page 20: Proper handling of waste on-site should include the proper use of a “containment building”.

Section III.C.1.b., seventh bullet item, page 20: Suggest the bullet referencing a “report to the Administrator” be changed to “a Biennial Report to the Administrator.”

Section IV.A., first paragraph, third sentence, page 24: Suggest replacing the word “concomitantly” with a more commonly used word like “concurrently.”

Section IV.B., third paragraph, last sentence, page 25: Remove the artifact from Track Changes in the left margin.
Section V.B.1, last paragraph, second sentence, page 28: The word "be" should be inserted between the words "not" and "conducted," as in, "This review indicates that some inspections may not be conducted..."

Section VI.A, last sentence, page 32: The word "then" should be changed to "than," as in "...hazardous waste streams, than to focus inordinate..."

Section V.A.2., fourth bullet item, page 27: Suggest changing the bullet "Non-notifier facilities believed to generate hazardous waste" to "Non-notifier facilities believed to generate hazardous waste in quantities that would require notification".

Section V.B.1., first paragraph, last sentence, page 28: Suggest adding "as a substitute for a CEI" to the end of the parenthetical remark.

Section V.B.1., fourth paragraph, second sentence, page 28: change "...may not conducted...." to "...may not have been conducted...."

Section V.D., Reporting Reminders Box, page 31: Reference is made in the Reporting Reminder box to Section IV.B.1 for recording information in RCRAInfo. However, there is no Section IV.B.1 in the document.

Section V.D., footnote 40, page 31: Insert Internet address.

Appendix A, Acronym List, page 3: Replace Compliance Environmental Inspection with Compliance Evaluation Inspection.

Appendix B, third bullet under "Inspector Support", page 5: The first use of EPA is spelled "EP A". Delete the extra space in "EPA".

Appendix B, fourth bullet under "Data Collection, Review, and Reporting, page 6: Delete the extra space in "RCRA Info".

Appendix B, fifth bullet under "Data Collection, Review, and Reporting, page 6: Delete the extra space after the fifth bullet.

Appendix C, third bullet (Compliance Evaluation Inspection), second paragraph, first sentence, page 7: Change the word "if" to the word "of".

Appendix C, third bullet (Compliance Evaluation Inspection), second paragraph, second sentence, page 7: Insert a comma after "site" and after "requirements" as in, "...documents maintained by the site, an evaluation of the site's compliance with all applicable requirements, and adequate sampling..."

Appendix C, fifth bullet (Focused Compliance Inspection), second sentence, page 8: Replace "E1F" with "BIF".

Appendix D, 11th bullet, page 11: Replace "EP A" with "EPA".

Section II.B, footnote 9, page 10; Section IV.B., footnote 34, page 24; Section VI.B., footnote 41, page 32; Appendix B, footnote 2, page 5: A number of the reference documents cited in the draft CMS have EPA Intranet links associated with them; these links should be replaced with Internet links that are publicly accessible.