

March 27, 2012

Mr. Arthur A. Elkins, Jr.
Inspector General
Environmental Protection Agency
1200 Pennsylvania Ave., NW
Mailcode: 2410T
Washington, DC 20460

Re: Comments on the EPA Inspector General Report, *EPA Must Improve Oversight of State Enforcement*, Report No. 12-P-0113, December 9, 2011

Dear Mr. Elkins:

The Association of State and Territorial Solid Waste Management Officials (ASTSWMO) has reviewed the December 9, 2011 report titled *EPA Must Improve Oversight of State Enforcement* (the Report) and is compelled to respond due to what we believe is a **misleading** assessment of State Hazardous Waste Program oversight of regulated entities within their jurisdictions. ASTSWMO represents the waste management and remediation programs of the 50 States, five Territories and the District of Columbia (States). Our membership includes State waste program experts in the management and regulation of solid and hazardous waste; therefore, our comments will be directed exclusively toward those issues in the Report pertaining to State oversight under Subtitle C of the federal Resource Conservation and Recovery Act (RCRA).

Since its inception in 1974, a significant portion of ASTSWMO's mission has been to ensure States have a voice in affecting relevant waste management policies developed by EPA, and we fully support efforts by EPA to ensure federally-mandated programs are implemented consistently by authorized State programs. While we acknowledge there may be some inconsistencies among State programs with respect to how the RCRA program is implemented, this is not completely unexpected given the wide diversity of States and EPA regions involved, each with a unique set of issues and challenges to address, and the complexity of the regulations to be enforced. With this in mind, ASTSWMO takes issue with the broad-brushed conclusion drawn by the Report that "State enforcement programs are underperforming...noncompliance is high and the level of enforcement is low." According to the Report, "EPA Administrator Lisa P. Jackson identified the need to build strong state and tribal partnerships as one of the Agency's seven priorities." We could not agree more; however, partnerships cannot be fostered without collaboration between all involved parties – especially if based upon erroneous or misleading information.

In its analysis, EPA's Office of the Inspector General (OIG) used only three criteria to assess State enforcement programs: (1) the percent of facilities inspected each year;¹ (2) the percent of inspections that identified significant non-compliance (SNC);² and (3) the percent of enforcement actions with a penalty.³ The remainder of this letter will briefly describe flaws in these criteria and their use as sole measures of State performance. Taken alone or as a group, they do not accurately represent the effectiveness of State regulatory programs across the United States. While no program is perfect, ASTSWMO believes that as a whole, States maintain effective enforcement programs that are protective of human health and the environment, and do so in accordance with long-standing EPA policies and procedures. Finally, we will provide our thoughts regarding three of the six recommendations listed on page 21 of the Report that ASTSWMO supports. Please note that individual States may also provide comments that may differ from those presented here.

Percent of Facilities Inspected Is Not an Accurate Measure of State Inspection Efforts

ASTSWMO believes this measure should be used with circumspection when evaluating whether or not States are adequately conducting their compliance and enforcement roles.

1. Measure does not reflect a uniform universe of regulated facilities across all States.

Inspection coverage should be normalized to include a uniform baseline universe of facilities across all States. There are at least three reasons for this:

A. The database of notifiers is a constantly moving target because States and EPA are updating RCRAInfo daily as new handlers are added, generator statuses change, etc. For example, in a given year a State may have a large increase in the number of handlers resulting in an apparent decrease in inspection coverage. Because of this, we disagree with the statement on page 29 of the Report that "...the universe does not change very much from year to year."

B. Most States have a large number of facilities which are notified, but are either not currently managing hazardous waste or are no longer in business. A more valid universe would have been obtained by removing from the calculation any facility identified in RCRAInfo as either non-handler or out-of-business. As an example, the "inspectable" universe in one State (notifiers, excluding those identified as non-handler or out-of-business) was approximately 2,800 facilities, not over 6,000 that have EPA ID numbers in that State.

¹ Calculated as number of inspections divided by total number of facilities in RCRAInfo.

² Calculated as number of SNCs divided by total number of inspections.

³ Calculated as number of final formal enforcement actions with a penalty divided by total number of formal enforcement actions.

C. The OIG's measure does not appear to consider variations in State laws affecting the size of the regulated universe. For instance, some States require conditionally exempt small quantity generators to obtain EPA ID numbers while many do not. Some States also regulate additional waste streams not included in the base RCRA program.⁴ Still other States require EPA ID numbers to be obtained for one-time generation events.

These three considerations alone are important factors directly affecting the apparent size of regulated universes in each State. The OIG should have made an effort to ensure uniformity of the regulated universe across all States to improve the validity of the measure.

2. Measure does not reflect long-standing requirements of the RCRA Compliance Monitoring Strategy (CMS).

Federal grant commitments require States to focus inspection coverage toward large and small quantity generators, and permitted treatment, storage, and disposal facilities (TSDFs), as reflected in the CMS. EPA has not set a goal in the CMS for States to inspect a certain percentage of all notified facilities. The CMS sets a standard that 20% of large quantity generators (LQGs) be inspected each year (so that 100% are inspected every five years), and a second standard that each commercial hazardous waste TSDF be inspected at least every two years (e.g., 50% inspected each year). When inspections of only large and small quantity generators and permitted TSDFs are considered, one State's inspection coverage jumps from the 2% noted in the Report to approximately 40%. This is a much more accurate measure of that State's inspection efforts. Because grants have been relatively flat for the past several years, many States cannot expand beyond these core inspection requirements.

Not only do nearly all States meet or exceed the CMS goals, they also perform many inspections of other types of notified entities⁵ as well as perform other "inspections" when responding to situations such as citizen complaints or spills of hazardous materials. While EPA Regions evaluate State performance based on goals outlined in the CMS, the OIG measured State performance using an alternative standard not reflective of current EPA policies. The OIG should have evaluated State performance according to standards established by EPA and to which States have always been held. We believe the RCRA State Multi-Year Report in ECHO (which is based upon EPA's State Review Framework (SRF) reviews) would have been a more accurate report to have used for data analysis.

⁴ For example, some States regulate PCBs under their RCRA programs while others include media contaminated with petroleum hydrocarbons.

⁵ For example, most States have a large number of conditionally exempt small quantity generators who, under the base federal program, are not required to obtain EPA ID numbers and are not included within the CMS goals.

3. *Measure does not consider flexibilities authorized by EPA so States can focus resources on unique, local issues or EPA initiatives.*

The Report notes that States had only inspected an average of 62% of the large quantity generators (LQGs) during the five-year period ending in 2010, whereas the national goal set by EPA in the RCRA CMS is 100% (20% of LQGs inspected per year, so that 100% are inspected after five years). The Report suggests this is a deficiency in State inspection efforts. However, the 62% raw statistic from EPA databases does not consider that the CMS also authorizes States and Regions to negotiate alternate inspection commitments based upon individual State priorities, Regional initiatives, and other factors. Given that inspection flexibilities are allowed by the CMS and any utilized would have been approved by EPA, relying solely on a statistic, without drilling deeper into the numbers to ascertain reasons for apparent “deficiencies,” presents an unfair analysis of State inspection efforts. While EPA encourages States to use flexibilities, the OIG appears to be punishing them for doing so.

In summary, we believe that if the OIG were to evaluate inspection coverage based upon State-negotiated agreements with the Regions and conclusions outlined in SRF reviews, the finding would be that States meet **or even exceed** their inspection commitments at nearly a 100% level.

Identification Rate of Significant Non-Compliance (SNC) Is Not an Accurate Measure of State Enforcement Efforts

In response to EPA comments on the draft Report, the OIG noted that it considered “higher SNC rates as indicators of improved performance.” At first blush, a State having a high SNC identification rate could be considered a better performer with respect to enforcement efforts; however, there may be very valid reasons for a State to have a “low” SNC identification rate.

SNC identification rates alone are inconclusive in measuring State enforcement activities without a more thorough evaluation of State program activities. As EPA noted in its comments to the draft OIG report, low SNC identification rates may be a result of incomplete data entry into EPA databases. Low SNC identification rates can just as conceivably be attributed to causes such as generally good compliance by regulated entities, which could be attributable to relatively high State inspection numbers, State actions to follow up on compliance, a high number of compliance assistance visits, etc. The OIG made no apparent effort to evaluate this. In fact, one might suspect that the OIG carried out its evaluation with a preconceived notion that there is general, widespread non-compliance by regulated entities and because it found a “low” SNC identification rate, concluded, without sufficient research, that States must not be performing their jobs adequately.

Conversely, a high SNC identification rate is not necessarily an indicator of good performance by a State program. Rather, it is an upside down measurement that incentivizes States to identify more SNCs. The goal of State regulators should be to achieve 100% compliance by the

regulated community, and go beyond compliance such as in waste reduction efforts. If States approach that goal, fewer SNCs will be identified and the States would be evaluated as poor performers, if OIG's methodology were followed.

Finally, many Regions conduct semi-annual reviews of their State inspection/enforcement programs and examine apparent deficiencies in meeting national goals with State RCRA managers. To make a fair assessment of State performance, conclusions drawn in these reviews, as well as those from the more comprehensive SRF reviews, should factor into the OIG assessment.

Percent of Enforcement Actions with a Penalty Is Not an Accurate Measure of State Enforcement Efforts

On the surface, this may appear to be a valid assessment of State performance; however, it too has logic flaws and is not truly reflective of State enforcement efforts.

- 1. Measure does not reflect long-standing requirements of EPA's RCRA Enforcement Response Policy (ERP).*

The ERP requires States to issue formal orders and assess penalties when facilities are identified as SNC. The OIG should have used the ERP requirement as one of the measures to evaluate State performance. Some States have statutory authority to assess penalties even when a facility may not actually be a SNC, which may skew their penalty assessment percentage upward. Including "non-SNC" penalties when comparing State programs, then drawing conclusions about State implementation of federal programs, is unfair to those States without such statutory authorities. States may also have very valid reasons for not assessing penalties when required by the ERP, such as facility abandonment, non-viable responsible parties, or bankruptcies filed prior to the inspection. A far more accurate assessment of State performance on a national basis would be through an evaluation of this measure both in terms of the raw data and results from SRF reviews where these factors would have been evaluated.

- 2. Measure does not consider the appropriateness of a given penalty.*

The ERP sets standards by which penalties should be calculated and provides a matrix for assessing the gravity-based portion of penalties. Merely counting the number of penalty orders issued without considering whether or not those penalties are appropriate for the gravity of the violations identified does not tell the complete story. Again, using the SRF reviews in conjunction with the raw data output will provide a much more accurate measure of State performance.

3. *Measure completely ignores other informal State enforcement efforts.*

States can and do initiate many enforcement actions that are not captured by the OIG's measure. Failure to include some acknowledgement of those informal enforcement actions gives the appearance of low program performance when in fact these informal actions are far more common and are the primary tool for returning facilities to compliance. Again, use of SRF results which include this in the evaluation of State performance provides a much more representative picture of State enforcement efforts.

4. *Measure was calculated in a manner that underestimated State penalty actions.*

In calculating this percentage, the denominator used by the OIG included both initial and final formal actions issued by the States. Initial formal actions should not have been included in the calculation because they are the starting point for negotiations with a facility and may or may not result in a final action with a penalty. The final formal actions used in the denominator include several RCRAInfo codes that do not contemplate a penalty.⁶ Those types of formal actions also should have been eliminated from the calculation. As a result, the total number of formal actions used in the calculation was overestimated, thus underestimating State penalty actions.

ASTSWMO Comments on the OIG Recommendations

Page 21 of the Report identifies six recommendations OIG believes EPA should implement to address the alleged deficiencies in State enforcement programs. These are:

1. Give EPA's Office of Enforcement and Compliance Assurance authority for all nationwide enforcement resources and workforce allocation.
2. Cancel outdated guidance and policy documents and clarify remaining guidance into EPA documents that are publicly accessible.
3. Establish clear and consistent national enforcement benchmarks.
4. Establish a clear and credible escalation policy for EPA intervention in States that do not adequately enforce RCRA requirements.
5. Establish procedures to reallocate enforcement resources to intervene when appropriate under its escalation policy.
6. Develop a state performance scorecard to publically track state enforcement activities and results from year to year.

⁶ For instance, 320 (Final Imminent and Substantial Endangerment Order) and 515 (Civil action referred back to State) are two codes that are "final actions" but do not carry penalties.

ASTSWMO offers the following comments on the three recommendations we support.

ASTSWMO supports Recommendation 2. EPA's RCRA Online resource contains hundreds of EPA policy statements issued over the years, many of which date back to the early days of RCRA in the 1980s. Many of the latter policies conflict with earlier policies yet it is not easily recognizable when an earlier policy has been superseded.

ASTSWMO supports Recommendation 3. However, we believe the RCRA CMS already outlines fairly clear national enforcement benchmarks while maintaining the important flexibilities States need to address their unique, local problems. Any revisions to EPA enforcement policies must be completed in close coordination with the States to ensure States retain needed flexibilities to address their local issues.

ASTSWMO also supports Recommendation 6. We believe the public has a right to know how well their government agencies are performing their duties; however, any scorecard must be based on ***meaningful*** measurements that are consistently applied across the nation. Ideally, meaningful measurements should be developed with State input. The OIG's choice of measures for its Report clearly shows how performance can be misinterpreted when measurements are selected that have questionable merit in assessing State performance. We also believe SRF reviews already provide a meaningful scorecard of State performance. During the SRF development process, ASTSWMO voiced its opposition to a numerical score for the reviews because scores can be misused and invite incorrect or invalid comparisons between States. The OIG Report reaffirms this concern.

In conclusion, ASTSWMO agrees that environmental laws should be implemented by the States and EPA in a fair and equitable manner. We strongly disagree, however, with the OIG's conclusion that "noncompliance is high and the level of enforcement is low" with respect to State enforcement programs across the entire country. The OIG used three simplistic measures to characterize a broad and complex program. To make matters worse, it did not use accurate or replicable data to calculate these measures, thus presenting an inaccurate and misleading picture of State enforcement programs.

Based upon EPA's comments to the draft Report, we are under the impression EPA shares our concerns with the erroneous and simplistic nature of the OIG evaluation. We are also concerned how EPA might initiate changes in response to the Report and its recommendations. Any reaction that requires realignment or expansion of already tapped-out State resources would be untenable.

We appreciate the opportunity to comment on the Report. Please do not hesitate to contact me (406-444-6748) or ASTSWMO Executive Director Mary Zdanowicz (202-624-5351) if you have any questions or need any additional information.

Sincerely,

A handwritten signature in black ink, appearing to read 'Ed Thamke', is centered on the page. The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Ed Thamke (MT)
ASTSWMO President

cc: ASTSWMO Board of Directors
Lisa Lund, EPA OECA
Suzanne Rudzinski, EPA ORCR
Mary Zdanowicz, ASTSWMO
Dania Rodriguez, ASTSWMO
Tammie Hynum, ASTSWMO Hazardous Waste Subcommittee Chair
ASTSWMO Hazardous Waste State Managers and Task Force Members