

STATE REVIEW FRAMEWORK

Kentucky

Clean Water Act, Clean Air Act, and Resource Conservation and Recovery Act Implementation in Federal Fiscal Year 2013

**U.S. Environmental Protection Agency
Region 4, Atlanta**

**Final Report
October 29, 2015**

Executive Summary

Introduction

EPA Region 4 enforcement staff conducted a State Review Framework (SRF) enforcement program oversight review of the Kentucky Department of Environmental Protection (DEP).

EPA bases SRF findings on data and file review metrics, and conversations with program management and staff. EPA will track recommended actions from the review in the SRF Tracker and publish reports and recommendations on EPA's ECHO web site.

Areas of Strong Performance

- Accurate compliance determinations under CAA were made for both HPV and non-HPV violations.
- CAA enforcement actions bring sources back into compliance within a specified timeframe, and HPVs were addressed in an appropriate manner.
- CAA and CWA inspection reports were timely, well written, complete, and documented accurate compliance determinations.
- CAA, CWA and RCRA collected final enforcement penalties.
- RCRA had excellent annual inspection coverage at Large Quantity Generators (LQGs) of hazardous waste.
- RCRA violations and Significant Non-compliers (SNCs) were entered timely into the national database, RCRAInfo.

Priority Issues to Address¹

The following are the top-priority issues affecting the state program's performance:

- For all programs, the accuracy of enforcement and compliance data reported into the national data systems needs improvement.
- For all programs, DEP needs to implement procedures for penalty calculations to ensure appropriate documentation of gravity and economic benefit. This is a recurring issue from SRF Rounds 1 and 2.

¹ EPA's "National Strategy for Improving Oversight of State Enforcement Performance" identifies the following as significant recurrent issues: "Widespread and persistent data inaccuracy and incompleteness, which make it hard to identify when serious problems exist or to track state actions; routine failure of states to identify and report significant noncompliance; routine failure of states to take timely or appropriate enforcement actions to return violating facilities to compliance, potentially allowing pollution to continue unabated; failure of states to take appropriate penalty actions, which results in ineffective deterrence for noncompliance and an unlevel playing field for companies that do comply; use of enforcement orders to circumvent standards or to extend permits without appropriate notice and comment; and failure to inspect and enforce in some regulated sectors."

Most Significant CWA-NPDES Program Issues

- DEP needs to improve the accuracy of data reporting in ICIS. Discrepancies between files and Integrated Compliance Information System (ICIS) data including coding of Single Event Violations and the entry of Discharge Monitoring Report (DMR) data were identified. Issues were also noted between the State's verified frozen data and their Section 106 Workplan. DEP should address the causes of inaccurate ICIS reporting. EPA will monitor DEP's efforts through oversight calls and periodic data reviews.
- DEP's enforcement responses do not always achieve a return to compliance. To address this issue, DEP should implement procedures to EPA that ensure enforcement actions promote a facility's return to compliance. EPA will monitor through existing oversight calls and other periodic data reviews.

Most Significant CAA Stationary Source Program Issues

- The accuracy of MDR data reported into AFS needs improvement. Discrepancies between the files and AFS were identified in half of the files reviewed. DEP should make corrections to the existing data and ensure future MDRs are accurately recorded.
- Whereas most MDR data was reported timely into AFS, MDR data associated with most stack tests were reported late. DEP should take steps, such as entering a "pending" date to ensure timely stack test data reporting.

Most Significant RCRA Subtitle C Program Issues

- DEP's RCRA enforcement data was found to be inaccurate in RCRAInfo. The state should implement procedures for accurate entry of enforcement data within six months of the final SRF report. EPA will review a sample of files at the end of this time period to assess the accuracy of data entry into RCRAInfo.

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I. Background on the State Review Framework

The State Review Framework (SRF) is designed to ensure that EPA conducts nationally consistent oversight. It reviews the following local, state, and EPA compliance and enforcement programs:

- Clean Water Act National Pollutant Discharge Elimination System
- Clean Air Act Stationary Sources (Title V)
- Resource Conservation and Recovery Act Subtitle C

Reviews cover:

- **Data** — completeness, accuracy, and timeliness of data entry into national data systems
- **Inspections** — meeting inspection and coverage commitments, inspection report quality, and report timeliness
- **Violations** — identification of violations, determination of significant noncompliance (SNC) for the CWA and RCRA programs and high priority violations (HPV) for the CAA program, and accuracy of compliance determinations
- **Enforcement** — timeliness and appropriateness, returning facilities to compliance
- **Penalties** — calculation including gravity and economic benefit components, assessment, and collection

EPA conducts SRF reviews in three phases:

- Analyzing information from the national data systems in the form of data metrics
- Reviewing facility files and compiling file metrics
- Development of findings and recommendations

EPA builds consultation into the SRF to ensure that EPA and the state understand the causes of issues and agree, to the degree possible, on actions needed to address them. SRF reports capture the agreements developed during the review process in order to facilitate program improvements. EPA also uses the information in the reports to develop a better understanding of enforcement and compliance nationwide, and to identify issues that require a national response.

Reports provide factual information. They do not include determinations of overall program adequacy, nor are they used to compare or rank state programs.

Each state's programs are reviewed once during each SRF cycle. The first round of SRF reviews began in FY 2004, and the second round began in FY 2009. The third round of reviews began in FY 2013 and will continue through 2017.

II. SRF Review Process

Review period: FY 2013

Key dates: September 26, 2014: letter sent to the State kicking off the Round 3 review
 Week of December 1-5, 2014: on-site file reviews for CWA, RCRA and CAA

State and EPA key contacts for review:

	Kentucky DEP	EPA Region 4
SRF Coordinator	Mark Cleland, Assistant Director, Division of Enforcement	Kelly Sisario, Enforcement Coordinator, Office of Enforcement Coordination (OEC), Office of the Regional Administrator
CAA	Kevin Flowers (retired) and Eric Eisiminger, Field Operations Branch, Division of Air Quality	Mark Fite, OEC Technical Authority Nicole Radford, Air, Pesticides & Toxics Management Division
CWA	Mark Cleland, Assistant Director, Division of Enforcement Sarah Gaddis, Compliance and Technical Assistance Branch, Division of Water	Ronald Mikulak, OEC Technical Authority Dennis Sayre, NPDES Permitting and Enforcement Branch
RCRA	Bruce Rogers and Brian Osterman - Field Operations Branch, Waste Management Division	Shannon Maher, OEC Technical Authority Houston Gilliland, RCRA & OPA Enforcement and Compliance Branch

III. SRF Findings

Findings represent EPA’s conclusions regarding state performance and are based on observations made during the data and/or file reviews and may also be informed by:

- Annual data metric reviews conducted since the state’s last SRF review
- Follow-up conversations with state agency personnel
- Review of previous SRF reports, Memoranda of Agreement, or other data sources
- Additional information collected to determine an issue’s severity and root causes

There are three categories of findings:

Meets or Exceeds Expectations: The SRF was established to define a base level or floor for enforcement program performance. This rating describes a situation where the base level is met and no performance deficiency is identified, or a state performs above national program expectations.

Area for State Attention: An activity, process, or policy that one or more SRF metrics show as a minor problem. Where appropriate, the state should correct the issue without additional EPA oversight. EPA may make recommendations to improve performance, but it will not monitor these recommendations for completion between SRF reviews. These areas are not highlighted as significant in the executive summary.

Area for State Improvement: An activity, process, or policy that one or more SRF metrics show as a significant problem that the agency is required to address. Recommendations should address root causes. These recommendations must have well-defined timelines and milestones for completion, and EPA will monitor them for completion between SRF reviews in the SRF Tracker.

Whenever a metric indicates a major performance issue, EPA will write up a finding of Area for State Improvement, regardless of other metric values pertaining to a particular element.

The relevant SRF metrics are listed within each finding. The following information is provided for each metric:

- **Metric ID Number and Description:** The metric’s SRF identification number and a description of what the metric measures.
- **Natl Goal:** The national goal, if applicable, of the metric, or the CMS commitment that the state has made.
- **Natl Avg:** The national average across all states, territories, and the District of Columbia.
- **State N:** For metrics expressed as percentages, the numerator.
- **State D:** The denominator.
- **State % or #:** The percentage, or if the metric is expressed as a whole number, the count.

Clean Air Act Findings

CAA Element 1 — Data																														
Finding 1-1	Area for State Improvement																													
Summary	The accuracy of MDR data reported into AFS needs improvement. Discrepancies between the files and AFS were identified in half of the files reviewed.																													
Explanation	<p>Metric 2b indicated that 18 of the 36 (50%) files reviewed had all MDRs reported accurately into AFS. The remaining 18 files had one or more discrepancies identified. The majority of inaccuracies related to missing air programs and subparts for applicable Maximum Achievable Control Technology (MACT) or New Source Performance Standards (NSPS) regulations. Other infrequent inaccuracies related to facility location (city, address, zip). Finally, a few sources had inaccurate activity data entered in AFS (e.g. FCEs, NOVs, orders, penalties, etc.). This incorrect data in AFS could potentially hinder EPA’s oversight and targeting efforts or result in inaccurate information being released to the public. In response to EPA’s review, KDEP has identified the causes of much of the inaccurate data and has begun making corrections.</p> <p>Metric 7b1 and supplemental file reviews indicated that KDEP’s violation reporting in AFS associated with notices of violation (NOVs) was inconsistent for non-HPV violations. However, Metric 7b3 indicated that KDEP was correctly reporting violations for all sources with HPVs.</p>																													
Relevant metrics	<table border="1"> <thead> <tr> <th>Metric ID Number and Description</th> <th>Natl Goal</th> <th>Natl Avg</th> <th>State N</th> <th>State D</th> <th>State % or #</th> </tr> </thead> <tbody> <tr> <td>2b Accurate MDR data in AFS</td> <td>100%</td> <td></td> <td>18</td> <td>36</td> <td>50.0%</td> </tr> <tr> <td>7b1 Violations reported per informal actions</td> <td>100%</td> <td>59.5%</td> <td>32</td> <td>52</td> <td>61.5%</td> </tr> <tr> <td>7b3 Violations reported per HPV identified</td> <td>100%</td> <td>57.5%</td> <td>6</td> <td>6</td> <td>100%</td> </tr> </tbody> </table>						Metric ID Number and Description	Natl Goal	Natl Avg	State N	State D	State % or #	2b Accurate MDR data in AFS	100%		18	36	50.0%	7b1 Violations reported per informal actions	100%	59.5%	32	52	61.5%	7b3 Violations reported per HPV identified	100%	57.5%	6	6	100%
Metric ID Number and Description	Natl Goal	Natl Avg	State N	State D	State % or #																									
2b Accurate MDR data in AFS	100%		18	36	50.0%																									
7b1 Violations reported per informal actions	100%	59.5%	32	52	61.5%																									
7b3 Violations reported per HPV identified	100%	57.5%	6	6	100%																									
State response	<p>The missing air programs and subparts were primarily due to a mapping issue relating to area source rules that was discovered during this audit. The mapping was corrected shortly after the on-site SRF file review. The inaccurate location information generally occurred when mailing addresses and physical source addresses differed.</p> <p>With regard to the finding that inaccurate activity data exists, KY has corrected the errors that were identified. Many of these were due to</p>																													

	keying errors. KY has corrected most of the missing NSPS air program codes as well as the inaccurate location information.
Recommendation	By 4/1/16, KDEP should make corrections to existing data to address the discrepancies EPA identified and ensure that in the future, MDRs are accurately entered into ICIS-Air. If by 1/1/17, EPA determines that KDEP’s efforts appear to be adequate to meet the national goal, the recommendation will be considered complete.

CAA Element 1 — Data

Finding 1-2	Area for State Improvement
Summary	Whereas most MDR data was reported timely into AFS, MDR data associated with most stack tests were reported late.
Explanation	<p>Metrics 3a2, 3b1and 3b3 indicated that KDEP exceeded the national average in entering MDR data for HPVs, compliance monitoring activities, and enforcement actions into AFS within the specified timeframe. However, Metric 3b2 (3.0%) indicates that most stack tests were entered late into AFS (over 120 days), although 31% of these late entries were less than 30 days late.</p> <p>The state observes a significant number of source tests in the field (almost 80%) and conducts an extensive quality assurance review of each test report received. This review, coupled with the 60 to 90 days taken by the source to submit the test report, and the lag time for upload from Tempo to AFS, resulted in the whole process typically taking 7 months (average is 211 days). KDEP has expressed a strong commitment to continuing their observations of tests in the field and conducting quality reviews of the test reports. The state anticipates that weekly uploads to ICIS-Air will reduce the average time for reporting by about three weeks. In addition, EPA has suggested that entering the date of the stack test along with a “pending” result could also help to improve timeliness. KDEP could then populate the final pass/fail result after the QA review is completed. KDEP advises that procedural changes have been implemented to begin reporting “pending” results earlier in the process.</p> <p>The accuracy and timeliness of stack test data reporting was also identified as an area for improvement during the Round 2 review. KDEP advised of a significant backlog of stack test reports to review, and in</p>

	response to EPA’s Round 2 recommendation, they developed an SOP which helped to eliminate the backlog.					
Relevant metrics	Metric ID Number and Description	Natl Goal	Natl Avg	State N	State D	State % or #
	3a2 Untimely entry of HPV determinations	0				0
	3b1 Timely reporting of compliance monitoring MDRs	100%	80.9%	749	921	81.3%
	3b2 Timely reporting of stack test dates and results	100%	75.4%	4	135	3.0%
	3b3 Timely reporting of enforcement MDRs	100%	68.7%	81	99	81.8%
State response	<p>As acknowledged, KY stack tests are extensively reviewed before the final compliance status is reported. Many EPA regulations allow 60 days from the date of the test to submit the test report and this makes it difficult for KY to adequately review and report the results by the 120-day expectation.</p> <p>As recommended, KY has implemented procedural changes to begin reporting results as “pending” earlier in the process. This combined with weekly uploads to ICIS-Air should be adequate to meet the 120-day expectation.</p>					
Recommendation	By 4/1/16, KDEP should finalize their efforts to address the causes of untimely stack test MDR reporting and make any corrections to stack test results. If by 1/1/17, EPA determines that KDEP’s efforts appear to be adequate to meet the national goal, the recommendation will be considered complete.					

CAA Element 2 — Inspections						
Finding 2-1	Meets or Exceeds Expectations					
Summary	KDEP met the negotiated frequency for inspection of sources, reviewed Title V Annual Compliance Certifications, and included all required elements in their Full Compliance Evaluations (FCEs) and Compliance Monitoring Reports (CMRs).					
Explanation	Metrics 5a and 5b indicated that KDEP provided adequate inspection coverage for the major and SM-80 sources during FY13 by ensuring that each major source was inspected at least every 2 years, and each SM-80 source was inspected at least every 5 years. In addition, Metric 5e documented that KDEP reviewed Title V annual compliance certifications submitted by major sources. Finally, Metrics 6a and 6b confirmed that all elements of an FCE and CMR required by the Clean Air Act Stationary Source Compliance Monitoring Strategy (CMS Guidance) were addressed in most facility files reviewed.					
Relevant metrics	Metric ID Number and Description	Natl Goal	Natl Avg	State N	State D	State % or #
	5a FCE coverage: majors and mega-sites	100%	88.5%	171	182	94.0%
	5b FCE coverage: SM-80s	100%	93.3%	139	141	98.6%
	5e Review of Title V annual compliance certifications	100%	81.3%	228	236	96.6%
	6a Documentation of FCE elements	100%		32	33	97%
	6b Compliance monitoring reports reviewed that provide sufficient documentation to determine facility compliance	100%		32	33	97%
State response						
Recommendation						

CAA Element 3 — Violations																														
Finding 3-1	Meets or Exceeds Expectations																													
Summary	Accurate compliance determinations were made for both HPV and non-HPV violations.																													
Explanation	<p>Metric 7a indicated that KDEP made accurate compliance determinations in 34 of 35 files reviewed (97.1%).</p> <p>Metric 8a indicated that the HPV discovery rate for majors (2.5%) was below the national average of 4.0%. This is a “review indicator” metric, and upon further evaluation of the 35 sources with violations, file reviewers concluded that KDEP is accurately identifying HPVs.</p> <p>Metric 8c confirmed that KDEP’s HPV determinations were accurate for 19 of the 21 files reviewed (90.5%). One source had a stack test failure, but was not designated as an HPV; another had frequent violations (9 in the review year), and could have been designated as an HPV under General Criteria 9.</p>																													
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Metric ID Number and Description	Natl Goal	Natl Avg	State N	State D	State % or #																									
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8a HPV discovery rate at majors		4.0%	6	239	2.5%																									
8c Accuracy of HPV determinations	100%		19	21	90.5%																									
State response																														
Recommendation																														

CAA Element 4 — Enforcement																								
Finding 4-1	Meets or Exceeds Expectations																							
Summary	Enforcement actions bring sources back into compliance within a specified timeframe, and HPVs were addressed in an appropriate manner.																							
Explanation	<p>Metric 9a indicated that all formal enforcement actions reviewed brought sources back into compliance through corrective actions in the order, or compliance was achieved prior to issuance of the order.</p> <p>Metric 10b indicated that an appropriate enforcement action was taken to address all 12 HPVs (100%) evaluated during the file review.</p>																							
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9a Formal enforcement responses that include required corrective action that will return the facility to compliance in a specified timeframe	100%		18	18	100%																			
10b Appropriate enforcement responses for HPVs	100%		12	12	100%																			
State response																								
Recommendation																								

CAA Element 4 — Enforcement							
Finding 4-2	Area for State Attention						
Summary	About one third of HPVs were not addressed in a timely manner.						
Explanation	Metric 10a indicated that two-thirds of the HPVs (8 of 12) addressed in FY13 were addressed within 270 days, which is very close to the national average of 67.5%. The four sources with HPV addressing actions exceeding 270 days ranged from about 3 to 8 months past the required timeframe. However, a review of EPA’s monthly HPV call notes indicates that the state was in active negotiations with each source, but the cases were complex, and the parties had substantially different positions on penalty and injunctive relief. These late addressing actions do not reflect a systemic problem, but more so the typical challenges of reaching a settlement on difficult cases. For future HPV cases, the state is encouraged to remain mindful of the 270 day goal for addressing HPV violations, maintain close communication with EPA throughout the negotiation process, and seek assistance if needed.						
Relevant metrics	Metric ID Number and Description		Natl Goal	Natl Avg	State N	State D	State % or #
	10a Timely action taken to address HPVs			67.5%	8	12	66.7%
State response	Kentucky agrees that timeliness issues are generally related to the challenges of reaching a settlement in difficult cases. Kentucky will continue to review its compliance and enforcement processes to find ways to improve timeliness.						
Recommendation							

CAA Element 5 — Penalties																								
Finding 5-1	Meets or Exceeds Expectations																							
Summary	KDEP documented the differences in initial and final penalty and the collection of penalties in their files and data system.																							
Explanation	<p>Metric 12a indicated that 17 of 18 penalty calculations reviewed (94.4%) fell within the pre-determined negotiating range outlined in the CRP, or documentation showing the rationale for this difference was evident in the files.</p> <p>Metric 12b confirmed that documentation of all penalty payments made by sources was included in the file.</p>																							
Relevant metrics	<table border="1"> <thead> <tr> <th>Metric ID Number and Description</th> <th>Natl Goal</th> <th>Natl Avg</th> <th>State N</th> <th>State D</th> <th>State % or #</th> </tr> </thead> <tbody> <tr> <td>12a Documentation on difference between initial and final penalty</td> <td>100%</td> <td></td> <td>17</td> <td>18</td> <td>94.4%</td> </tr> <tr> <td>12b Penalties collected</td> <td>100%</td> <td></td> <td>18</td> <td>18</td> <td>100%</td> </tr> </tbody> </table>						Metric ID Number and Description	Natl Goal	Natl Avg	State N	State D	State % or #	12a Documentation on difference between initial and final penalty	100%		17	18	94.4%	12b Penalties collected	100%		18	18	100%
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12a Documentation on difference between initial and final penalty	100%		17	18	94.4%																			
12b Penalties collected	100%		18	18	100%																			
State response																								
Recommendation																								

CAA Element 5 — Penalties																		
Finding 5-2		Area for State Improvement																
Summary		Kentucky’s penalty documentation does not include gravity and economic benefit calculations, and the BEN model or another method that produces results consistent with national policy is not used to determine economic benefit.																
Explanation		<p>Metric 11a indicates that none of the 18 penalty actions reviewed (0%) provided adequate documentation of the State’s consideration of gravity and economic benefit. KDEP provided EPA with their Case Resolution Proposals (CRPs), which document the degree to which the Maggard Factors (seriousness of violations, economic benefit, economic impact of penalty, culpability, history of non-compliance, good faith efforts, and number of notices of violation) were considered. However, neither the CRPs nor any other material in the files provided a quantitative or structured methodology for calculating gravity or economic benefit (EB). This is a continuing issue from both the Round 1 and Round 2 reviews.</p> <p>EPA’s expectation that state and local enforcement agencies document the consideration and assessment of both gravity and economic benefit is outlined in the 1993 Steve Herman memo entitled “<i>Oversight of State and Local Penalty Assessments: Revisions to the Policy Framework from State/EPA Enforcement Agreements.</i>” In addition, this memo indicates that “State and local enforcement agencies are strongly encouraged to develop written penalty policies, criteria, or procedures for penalty assessments.” KDEP maintains that KRS 13A-130, which prohibits the development of a penalty policy unless that policy is adopted into State statute or regulation, prevents them from developing a written penalty policy.</p> <p>However, since the SRF Round 2, KDEP has been developing a penalty tool to assist in the calculation of penalties across the major media programs. This program is currently in the beta-testing stage. This is a significant step towards advancing the practice of appropriate penalty calculations and documentation in the state enforcement program. However, adoption of the penalty tool is contingent on working out consistency issues with the use of the tool and the ability to get the guidance upon which the tool is based adopted into regulation.</p>																
Relevant metrics		<table border="1"> <thead> <tr> <th>Metric ID Number and Description</th> <th>Natl Goal</th> <th>Natl Avg</th> <th>State N</th> <th>State D</th> <th>State % or #</th> </tr> </thead> <tbody> <tr> <td> </td> <td> </td> <td> </td> <td> </td> <td> </td> <td> </td> </tr> </tbody> </table>					Metric ID Number and Description	Natl Goal	Natl Avg	State N	State D	State % or #						
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	<table border="1"> <tr> <td data-bbox="467 161 1000 283">11a Penalty calculations include gravity and economic benefit</td> <td data-bbox="1000 161 1179 283">100%</td> <td data-bbox="1179 161 1427 283">0 18 0%</td> </tr> </table>	11a Penalty calculations include gravity and economic benefit	100%	0 18 0%
11a Penalty calculations include gravity and economic benefit	100%	0 18 0%		
<p>State response</p>	<p>The KDEP is subject to KRS 13A-130, which prohibits modifying or expanding a statute or regulation by internal policy, memorandum, or other form of action. The Cabinet’s Office of General Counsel has, in very strong terms, recommended that penalties be established for the entire case and not on a violation-by-violation basis. In accordance with this recommendation, KDEP determines the civil penalty in accordance with KRS 224.99 using the factors listed in “NREPC vs. Wendell Maggard”. This method of establishing penalty has been upheld by the Kentucky Court of Appeals. U.S. EPA’s criteria for documenting penalty calculations are contrary to Kentucky law.</p>			
<p>Recommendation</p>	<p>By 4/1/16, KDEP should implement procedures to ensure the appropriate documentation of both gravity and economic benefit in penalty calculations. For verification purposes, for one year following issuance of the final SRF report, EPA shall review all initial and final KDEP orders and penalty calculations, including the calculations for the economic benefit of noncompliance. If by 1/1/17, these reviews indicate that the revised procedures are working and the State is documenting the consideration of gravity and economic benefit; the recommendation will be considered completed.</p>			

Clean Water Act Findings

CWA Element 1 — Data						
Finding 1-1	Meets or Exceeds Expectations					
Summary	The State exceeded National Goals for the entry of key data metrics for major facilities.					
Explanation	The State exceeded National Goals for the entry of key Data Metrics (1b1 and 1b2) for major facilities.					
Relevant metrics	Metric ID Number and Description	Natl Goal	Natl Avg	State N	State D	State % or #
	1b1 Permit limit rate for major facilities	≥95%	98.4%	134	136	98.50%
	1b2 DMR entry rate for major facilities	≥95%	97.1%	5141	5241	100%
State Response						
Recommendation						

CWA Element 1 — Data

Finding 1-2 **Area for State Improvement**

Summary The accuracy of data between files reviewed and data reflected in the national data system needs improvement.

Explanation

Of the files reviewed, discrepancies that occurred between the Detailed Facility Reports (DFRs) in EPA’s Enforcement and Compliance History Online (ECHO) and the State’s files were related primarily to inspection reports and informal actions not entered or coded in accurately. There were also discrepancies related to formal actions, penalties, facility names, and dates of inspections/informal actions. Additionally, Discharge Monitoring Report (DMR) data are not being entered into the national data system for mining activities.

There are also significant discrepancies between the FY 13 frozen data the State verified as shown in the Data Metrics Analysis and the FY 13 106 Work Plan end-of year accomplishments, particularly for Metrics 5a1, 5b1, and 5b2.

Data accuracy was an Area for State Improvement during Round 2. While progress has been made, steps taken by the State in response to the Round 2 finding have not fully addressed the data accuracy issues, so data accuracy remains an issue and continues to be an Area for State Improvement.

Relevant metrics	Metric ID Number and Description	Natl Goal	Natl Avg	State N	State D	State % or #
	2b Files reviewed where data are accurately reflected in the national data system	100%		30	42	71%

State Response

Kentucky updated the inspection data review program at the end of FY2013, which was implemented to review FY2013 inspection data. Prior to the date the FY2013 ECHO dataset was Frozen, Kentucky identified and corrected approximately 150 completed inspections that had not previously been transferred to ICIS successfully. Kentucky also identified approximately 50 inspections that had been transferred to ICIS but were missing from ECHO to allow EPA to correct those omissions. Since 2013, inspection data transfer and review processes have continued to improve and evolve, allowing Kentucky to identify six additional inspections that were completed in FY2013 that were not successfully transferred to ICIS prior to the date the FY2013 ECHO dataset was Frozen, and Kentucky has completed the data transfer of these inspections to ICIS. The six missing

inspections translates to an error rate of 0.54% of the 1115 KPDES inspections on the FY2013 106 grant commitment list, and 0.19% of the 3125 KPDES inspections completed and transferred to ICIS by Kentucky for FY2013.

Year-end and ongoing reviews since FY2013 have identified much lower initial error rates than the 150 identified in FY2013 due to improved data transfer and review procedures, demonstrating the improvement in the review process. As a result of the review process, Kentucky has identified issues with EPA’s CDX data transfer process whereby inspection data that has been correctly coded for transfer to ICIS is omitted from ICIS without notification to the state. EPA is currently researching the issue to determine how to correct the CDX transfer process.

Kentucky began entering non-coal mining DMR data into the national system in FY1992. Currently, DMR data for non-major NPDES permits are not required to be entered into the national system, all coal mining KPDES permits are non-majors. Entry of DMR data for coal mining permits is part of our current 106 Grant commitments, and Kentucky initiated processes and procedures to allow DMR data entry into the national system in 2012, however, the large number of coal mining outfalls and subsequent DMRs (estimated at 6,000 outfalls and approximately 250,000 DMRs annually) precluded manual entry of outfall and DMR data by state personnel. Kentucky’s implementation of eDMR using EPA’s NetDMR system coupled with the eNOI requirement of the KYGE40000 and KYGW40000 coal general permits which became effective in October of 2014 have allowed this data to begin to be entered into the national system. Coal mines with individual permits were required to begin eDMR submission using NetDMR in April of 2015, with 146 permits submitting 6771 DMR to date in 2015. Coal mines with general permits under KYGE40000 and KYGW40000 are required to begin eDMR submission using NetDMR within 58 days of the date their coverage becomes effective. To date, 368 coverages have been issued under these general permits and over 700 eNOIs are under review by the Division. For the 368 general permit coverages, more than 4,500 DMRs have been received with a 96% compliance rate with the NetDMR requirement (201 of 209 facilities have submitted at least 1 DMR within 58 days of their permit effective date).

Recommendation

DEP should continue to take the appropriate steps to ensure that data and information are entered and reported accurately. By 4/1/16, DEP should implement procedures (including staffing and management oversight) to ensure the accurate reporting of data into ICIS, to ensure the timely participation in the annual data verification process, and to ensure that data inaccuracies have been corrected. EPA will monitor this effort through

oversight calls and other periodic data reviews. If by 1/1/17, these reviews indicate that sufficient improvement in data accuracy is observed, this recommendation will be considered complete.

CWA Element 2 — Inspections

Finding 2-1 Meets or Exceeds Expectations

Summary The State met all but one of their FY13 Compliance Monitoring Strategy (CMS) Plan and CWA §106 Workplan inspection commitments. The exception was for major CSO inspections in which the State missed their FY 13 inspection commitment by 1.

Explanation Element 2 includes metrics that measure planned inspections completed (Metrics 4a1 – 4a10) and inspection coverages (Metrics 5a1, 5b1, and 5b2). The National Goal for this Element is for 100% of state specific CMS Plan commitments to be met. Under Metrics 4a and 5, the State met their FY 13 inspection commitments for all Metrics, except for their FY 13 inspection commitment related to 4a4 (Major CSO inspections). Six major CSO inspections were committed to in the FY13 CMS and 106 Workplan, but only five were conducted due to staffing shortages. The one major facility scheduled for inspection, and not accomplished in FY13 was inspected in FY11. It was not, however, inspected in FY14; was not scheduled for inspection in FY15, and thus did not meet the CMS inspection schedule periodicity of one inspection within a three year period. One other major facility not scheduled during the FY13 inspection cycle was also not inspected during FY11, FY12 or FY13, and did not meet the CMS inspection periodicity of one inspection within the three year period.

The State’s performance in missing this inspection commitment does not constitute a significant pattern of deficiency. It is, however, recommended that the State make every effort to meet CMS inspection commitments and further examine the inspection frequency of majors, non-majors and general permits to ensure that facilities are inspected in accordance with established CMS timeframes.

Relevant metrics

Metric ID Number and Description	Natl Goal	Natl Avg	State N	State D	State % or #
4a1 Pretreatment compliance inspections and audits	100% of CMS		46	44	105%
4a2 SIU inspections for SIUs discharging to non-authorized POTWs	100% of CMS		0	0	-
4a4 Major CSO inspections	100% of CMS		5	6	83%
4a5 SSO inspections	100% of CMS		50	50	100%

4a7 Phase I & II MS4 audits or inspections	100% of CMS	11	11	100%
4a8 Industrial stormwater inspections	100% of CMS	138	138	100%
4a9 Phase I & II SW construction inspections	100% of CMS	240	240	100%
4a10 Medium and large NPDES CAFO inspections	100% of CMS	1	1	100%
5a1 Inspection coverage of NPDES majors	100% of CMS	75	75	100%
5b1 Inspection coverage of NPDES non-majors with individual permits	100% of CMS	356	357	99+%
5b2 Inspection coverage of NPDES non-majors with general permits	100% of CMS	201	201	100%

State Response	The one major inspection referenced in the FY13 106 Workplan (Harlan STP) was inspected on 5/5/14. Kentucky did meet the CMS periodicity requirement for inspecting this facility.
Recommendation	

CWA Element 2 — Inspections						
Finding 2-2	Meets or Exceeds Expectations					
Summary	Most of the State’s inspection reports were well written and complete; provided sufficient documentation to determine compliance; and were completed in a timely manner.					
Explanation	<p>Most of the State’s inspection reports were well written; complete; and included field observations noting compliance issues, where appropriate (File Metric 6a).</p> <p>File Metric 6b addresses inspection reports completed within prescribed timeframes. For this analysis, since the State’s NPDES Enforcement Management System (EMS) did not specify timeliness goals, EPA’s EMS was used as a guide for reviewing the State’s timeliness for the completion of non-sampling reports (within 30 days) and sampling reports (within 45 days). As noted below, 90% of the reports reviewed were completed in a timely manner pursuant to EPA’s EMS, while the National Goal is 100%. The average number of days to complete an inspection report was 18 days.</p>					
Relevant metrics	Metric ID Number and Description	Natl Goal	Natl Avg	State N	State D	State % or #
	6a Inspection reports complete and sufficient to determine compliance at the facility	100%		50	51	98%
	6b Inspection reports completed within prescribed timeframe	100%		46	51	90%
State Response						
Recommendation						

CWA Element 3 — Violations

Finding 3-1	Area for State Improvement																													
Summary	The State identifies and reports Single Event Violations (SEVs) at major facilities in a timely manner as SNC or non-SNC; however, the State did not consistently enter SEV codes accurately into ICIS.																													
Explanation	<p>The file review supports the State’s efforts in identifying (File Metric 8b1) and reporting (File Metric 8c) SEVs at major facilities. It should be noted that the State does make an excellent effort at identifying and coding SEVs into ICIS for both majors (69) and non-majors (930), however, it does appear that some of the SEVs, including several unauthorized bypasses, are not being identified accurately.</p> <p>Per EPA’s <i>SEV Entry Guide for ICIS</i> (October 15, 2008) and regulations, SEVs are violations of the CWA’s NPDES requirements that are documented during a compliance inspection, reported by the facility, determined through other compliance monitoring methods by the regulatory authority, or unauthorized bypasses or discharges. SEVs do not include violations generated automatically (e.g., effluent limit violations from a Discharge Monitoring Report (DMR), or compliance schedule violations) by ICIS-NPDES. However, the State appears to be incorrectly entering facilities with DMR effluent exceedances as SEVs.</p> <p>For the reasons outlined above, this issue is now identified as an Area for State Improvement.</p>																													
Relevant metrics	<table border="1"> <thead> <tr> <th>Metric ID Number and Description</th> <th>Natl Goal</th> <th>Natl Avg</th> <th>State N</th> <th>State D</th> <th>State % or #</th> </tr> </thead> <tbody> <tr> <td>7a1 Number of major facilities with single event violations</td> <td></td> <td></td> <td></td> <td></td> <td>69</td> </tr> <tr> <td>8b1 Single-event violations accurately identified as SNC or non-SNC</td> <td>100%</td> <td></td> <td>2</td> <td>10</td> <td>20%</td> </tr> <tr> <td>8c Percentage of SEVs identified as SNC reported timely at major facilities</td> <td>100%</td> <td></td> <td>10</td> <td>10</td> <td>100%</td> </tr> </tbody> </table>						Metric ID Number and Description	Natl Goal	Natl Avg	State N	State D	State % or #	7a1 Number of major facilities with single event violations					69	8b1 Single-event violations accurately identified as SNC or non-SNC	100%		2	10	20%	8c Percentage of SEVs identified as SNC reported timely at major facilities	100%		10	10	100%
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State Response	The Division worked closely with EPA representatives to determine the requirements for single event violation types to send to ICIS. Based on that discussion, all non- DMR related violations identified during inspections would be sent to ICIS. The Division completed the automated data flow of SEVs from State systems to ICIS in late 2012, and EPA representatives agreed our 106 grant commitment to send SEVs to ICIS had been completed. A review of nationwide ICIS SEV data indicates that																													

	<p>from January 2011 through July 2015, only 1384 SSO related SEVs were entered into ICIS, with only 35 SSO related SEVs reported from Region IV EPA. Kentucky has worked successfully with KPDES permittees to increase reporting of SSOs. The disparity between the number of nationwide SSO SEVs reported in ICIS and the number of SSO events reported to Kentucky during FFY2013 is not a demonstration of substandard infrastructure in Kentucky; rather it shows a low percentage of nationwide SSO SEVs are submitted to ICIS.</p>
Recommendation	<p>By 6/30/16, DEP should implement procedures to ensure that all SEVs are identified and coded accurately (including SSOs) into the national data system. EPA will monitor the State's efforts through existing oversight calls and other periodic data reviews. If by 1/1/17, these reviews indicate that SEVs are being identified and coded accurately, the recommendation will be considered completed.</p>

CWA Element 3 — Violations							
Finding 3-2	Meets or Exceeds Expectations						
Summary	The State’s Inspection Reports documented accurate compliance determinations.						
Explanation	Most of the State’s inspection reports were well written; complete; included field observations, and compliance status that accurately documented compliance determinations. The State has developed a comprehensive inspection report format that is used effectively for documenting inspection field observations and making compliance determinations.						
Relevant metrics	Metric ID Number and Description		Natl Goal	Natl Avg	State N	State D	State % or #
	7e Inspection reports reviewed that led to an accurate compliance determination		100%		49	51	96%
State Response							
Recommendation							

CWA Element 4 — Enforcement

Finding 4-1	Area for State Improvement																							
Summary	The State’s Enforcement Responses (ERs) did not always achieve a Return to Compliance (RTC).																							
Explanation	<p>ERs did not always achieve a RTC (File Metric 9a). Of the total number of files reviewed, 23 of 33 files (70%) achieved a RTC. The other 10 files did not reflect ERs that returned a facility to compliance, as reflected by the ECHO DFRs showing continued noncompliance despite the enforcement response taken by the State.</p> <p>For major NPDES facilities, 9 of 10 files (90%) ERs achieved a RTC. For non-major NPDES facilities, 14 of 23 (61%) ERs achieved a RTC.</p> <p>When formal enforcement responses were initiated, 8 of 11 files (73%) achieved a return to compliance. When inspections or informal enforcement responses were completed without a formal enforcement response, 15 of 22 files (68%) achieved a return to compliance. In one case, a RTC was complicated by a bankruptcy and the case has been referred to the Office of General Counsel.</p> <p>As reflected by the FY 13 state-verified/frozen data, Data Metric 10a1 documents that none of the State’s 5 major facilities in SNC had timely ERs. However, 3 of these major facilities were addressed in FY 14.</p>																							
Relevant metrics	<table border="1"> <thead> <tr> <th>Metric ID Number and Description</th> <th>Natl Goal</th> <th>Natl Avg</th> <th>State N</th> <th>State D</th> <th>State % or #</th> </tr> </thead> <tbody> <tr> <td>9a Percentage of enforcement responses that return or will return source in violation to compliance</td> <td>100%</td> <td></td> <td>23</td> <td>33</td> <td>70%</td> </tr> <tr> <td>10a1 Major facilities with timely action as appropriate</td> <td></td> <td>3.6%</td> <td>0</td> <td>5</td> <td>0%</td> </tr> </tbody> </table>						Metric ID Number and Description	Natl Goal	Natl Avg	State N	State D	State % or #	9a Percentage of enforcement responses that return or will return source in violation to compliance	100%		23	33	70%	10a1 Major facilities with timely action as appropriate		3.6%	0	5	0%
Metric ID Number and Description	Natl Goal	Natl Avg	State N	State D	State % or #																			
9a Percentage of enforcement responses that return or will return source in violation to compliance	100%		23	33	70%																			
10a1 Major facilities with timely action as appropriate		3.6%	0	5	0%																			
State Response	<p>Kentucky’s CWA Section 106 Grant commitments and the NPDES Memorandum of Agreement focus compliance and enforcement requirements on major NPDES permits. Kentucky continues to apply resources toward compliance and enforcement at non-major NPDES permits beyond the scope of its commitments with U.S. EPA. In addition to meeting the inspection commitments at non-major NPDES permits, Kentucky has applied substantial resources to compliance and enforcement of NPDES permits at coal surface mining facilities. Kentucky also performs compliance and enforcement activities based on Discharge</p>																							

	<p>Monitoring Report reviews at other non-major NPDES permits as resources are available.</p> <p>Kentucky maintains that U.S. EPA’s policies on what constitutes a timely enforcement action are unreasonable. This is evidenced by the national average of 3.6% of major facilities with timely enforcement actions. Resolving environmental enforcement cases often involves working through complex issues related to technology, economics, and necessary procedure. U.S. EPA’s policy of resolving violations within 2 quarters (180) days does not always allow sufficient time to work through the enforcement process and resolve the violation in question.</p>
Recommendation	<p>By 6/30/16, DEP should implement procedures to ensure that ERs achieve a RTC and that the ERs for major facilities in SNC are timely. EPA will monitor the State’s efforts through existing oversight calls and other periodic data reviews. If by 1/1/17, these reviews indicate that the revised procedures appear to result in enforcement responses that reflect a RTC and that enforcement responses for major facilities in SNC are timely; the recommendation will be considered completed.</p>

CWA Element 4 — Enforcement																	
Finding 4-2	Area for State Attention																
Summary	The State’s Enforcement Responses (ERs) are generally timely and appropriate.																
Explanation	<p>The State generally addressed violations in an appropriate manner (File Metric 10b). For the total files reviewed, 23 of the 33 files (70%) were found to include an ER that was timely and appropriate.</p> <p>ERs at major NPDES facilities were timely for 9 of the 10 files reviewed (90%). ERs at non-major NPDES facilities were timely for 14 of the 23 files reviewed (61%).</p> <p>There were 10 files reviewed (9 of which are non-majors) where violations were addressed through informal enforcement actions when a formal enforcement action may have been more appropriate. The State should consider initiating formal enforcement actions in instances where multiple informal enforcement actions have been issued.</p> <p>The State was timely in enforcement responses for majors once a violation was discovered. In some instances, however, a period of time elapsed from the occurrence of a violation to the State’s discovery of the violation.</p> <p>The State’s enforcement responses were generally appropriate for non-major NPDES permits. Although the State has more discretion with non-major NPDES permits since SNC criteria have not been defined, there appear to be opportunities where the State could escalate its enforcement response. When non-majors are determined to have Category 1 violations, it is recommended that the State take formal action or document the justification for why a formal action was not taken.</p>																
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Metric ID Number and Description	Natl Goal	Natl Avg	State N	State D	State % or #												
10b Enforcement responses reviewed that address violations in an appropriate manner	100%		23	33	70%												

State Response	<p>Kentucky appreciates the recognition that its enforcement actions are generally timely and appropriate. Kentucky also appreciates the recognition that its enforcement actions at major NPDES facilities show a very high percentage for being timely and appropriate.</p> <p>Kentucky continues to review its NPDES compliance and enforcement programs and implement systems and procedures to improve its activities, especially with the non-major facilities. U.S. EPA has recently assisted KY in these endeavors with the development of NetDMR and promulgation of the eReporting rule which supplement KY's ongoing initiatives to receive and evaluate data in an automated manner. These efforts offer significant additional potential for addressing compliance and enforcement issues at non-major NPDES permits. Kentucky is currently looking at ways in which the implementation of these tools can provide more timely and appropriate enforcement at non-major NPDES facilities.</p>
Recommendation	

CWA Element 5 — Penalties	
Finding 5-1	Area for State Improvement
Summary	The State does not maintain any initial or final penalty calculations. Therefore, the adequacy of economic benefit calculations and rationale for adjustments between initial and final penalties could not be evaluated.
Explanation	<p>One of the objectives of the SRF is to ensure equitable treatment of violators through national policy and guidance, including systematic methods of penalty calculations. Without the availability of state penalty calculations, EPA is unable to assess the quality of the state’s overall enforcement program. None of the 14 CWA enforcement cases reviewed (0%) included actual penalty calculations. KDEP provided EPA with their Case Resolution Proposals (CRPs), which document the degree to which the “Maggard Factors” were considered (seriousness of violations, economic benefit, economic impact of penalty, culpability, history of non-compliance, good faith efforts, and number of notices of violation). However, neither the CRPs nor any other material in the files provided a quantitative or structured methodology for calculating gravity or the economic benefit of noncompliance. This is a continuing issue from both the Round 1 and Round 2 SRF reviews.</p> <p>As provided in the 1993 EPA memorandum “<i>Oversight of State and Local Penalty Assessments: Revisions to the Policy Framework for State/EPA Enforcement Agreements</i>,” it is EPA’s expectation that state enforcement agencies document the consideration and assessment of both gravity and economic benefit. In addition, the memorandum strongly encourages state agencies “to develop written penalty policies, criteria, or procedures for penalty assessments.” KDEP maintains that KRS 13A-130, which prohibits modifying or expanding a statute or regulation by internal policy, memorandum, or other form of action, prevents them from developing a written penalty policy.</p> <p>However, since the SRF Round 2, KDEP has been developing a penalty tool to assist in the calculation of penalties across the major media programs. This program is currently in the beta-testing stage. This is a significant step towards advancing the practice of appropriate penalty calculations and documentation in the state enforcement program. Adoption of the penalty tool is contingent on working out consistency issues with the use of the tool and the ability to get the guidance (upon which the tool is based) adopted into regulation.</p>

Relevant metrics	Metric ID Number and Description	Natl Goal	Natl Avg	State N	State D	State % or #
	11a Penalty calculations reviewed that consider and include gravity and economic benefit	100%		0	14	0%
12a Documentation of the difference between initial and final penalty and rationale	100%		0	14	0%	

State Response	The KDEP is subject to KRS 13A-130, which prohibits modifying or expanding a statute or regulation by internal policy, memorandum, or other form of action. The Cabinet’s Office of General Counsel has, in very strong terms, recommended that penalties be established for the entire case and not on a violation-by-violation basis. In accordance with this recommendation, KDEP determines the civil penalty in accordance with KRS 224.99 using the factors listed in “NREPC vs. Wendell Maggard”. This method of establishing penalty has been upheld by the Kentucky Court of Appeals. U.S. EPA’s criteria for documenting penalty calculations are contrary to Kentucky law.
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Recommendation	By June 30, 2016, DEP should implement procedures to ensure (1) the appropriate documentation of both gravity and economic benefit in penalty calculations, and (2) appropriate documentation of the rationale for any difference between the initial and final penalty. For verification purposes, for one year following issuance of the final SRF report, EPA shall review all initial and final DEP orders and penalty calculations, including the calculations for the economic benefit of noncompliance.
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CWA Element 5 — Penalties						
Finding 5-2	Meets or Exceeds Expectations					
Summary	The State documents the collection of penalties assessed.					
Explanation	The State effectively documents the collection of penalties assessed (File Metric 12b). The 2 cases in which the penalties have not been collected include 2 bankruptcies which have been referred to the Office of General Counsel.					
Relevant metrics	Metric ID Number and Description	Natl Goal	Natl Avg	State N	State D	State % or #
	12b Penalties collected	100%		12	14	86%
State Response						
Recommendation						

Resource Conservation and Recovery Act Findings

RCRA Element 1 — Data							
Finding 1-1	Area for State Improvement						
Summary	During the SRF evaluation, data inaccuracies were identified in the majority of files reviewed.						
Explanation	<p>During the SRF file review, information in the facility files was checked for accuracy with the information in the national RCRA database, RCRAInfo. The data was found to be accurate in only 9 of the 33 files (27.3%). The dates were incorrect for the majority of the Notices of Violation (NOVs) and proposed administrative enforcement actions. In addition, there were no final administrative actions entered into RCRAInfo. The NOV data inaccuracies appear to be related to internal data entry procedures.</p> <p>The enforcement data metrics recorded only one final enforcement case, a final judicial enforcement action, for all of FY 2013. In addition to this civil case there were seven administrative cases also finalized but were not recorded in RCRAInfo. The formal administrative actions (“Demand Letters”) were entered as proposed administrative enforcement actions with no subsequent final enforcement action entered when the enforcement was finalized. All other information in RCRAInfo was very precise - including violation data, return to compliance documentation, and penalty information.</p> <p>In the RCRA Memorandum of Agreement between KDEP and EPA (1999), the state acknowledged that EPA will evaluate its program based on the ERP and that KDEP is responsible for the correctness of data it enters. Due to the large number of files with inaccurate enforcement data, this is considered an Area for State Improvement.</p>						
Relevant metrics	Metric ID Number and Description		Natl Goal	Natl Avg	State N	State D	State % or #
	2b Complete and accurate entry of mandatory data		100%	n/a	9	33	27.3%
State Response	The Kentucky Division of Waste Management Field Operations Branch has implemented changes recommended by EPA Region 4 enforcement staff to ensure that accurate data is submitted and entered into RCRAInfo. The revision was implemented statewide on August 25,						

	2015. Compliance Monitoring and Enforcement Logs (CMEL's) have been revised to show date of inspection and date of determination for Notice of Violations and proposed administrative enforcement actions. The implementation will be overseen by the State EPA Liaison to ensure that data is entered accurately for reporting purposes.
Recommendation	Within six months of the final SRF Report, KDEP should implement procedures for accurate entry of enforcement data into RCRAInfo. At the end of the six months following the implementation of the procedures, EPA will review a sample of files to assess the accuracy of data entry into RCRAInfo. At the end of the review, if sufficient improvement is observed this recommendation will be considered complete.

RCRA Element 2 — Inspections

Finding 2-1	Meets or Exceeds Expectations																								
Summary	Kentucky met national goals for all TSD and LQG inspections.																								
Explanation	Element 2 measures three types of required inspection coverage that are outlined in the EPA RCRA Compliance Monitoring Strategy: (1) 100% coverage of operating Treatment Storage Disposal (TSD) facilities over a two-year period, (2) 20% coverage of Large Quantity Generators (LQGs) every year, and (3) 100% coverage of LQGs every five years. In FY 2013, Kentucky met expectations for all inspections in these areas. The state has excellent annual LQG inspection coverage (44.2%) that is more than double the goal of 20% coverage of the universe.																								
Relevant metrics	<table border="1"> <thead> <tr> <th>Metric ID Number and Description</th> <th>Natl Goal</th> <th>Natl Avg</th> <th>State N</th> <th>State D</th> <th>State % or #</th> </tr> </thead> <tbody> <tr> <td>5a Two-year inspection coverage of operating TSDFs</td> <td>100%</td> <td>87.6%</td> <td>13</td> <td>13</td> <td>100%</td> </tr> <tr> <td>5b Annual inspection coverage of LQGs</td> <td>20%</td> <td>21%</td> <td>121</td> <td>274</td> <td>44.2%</td> </tr> <tr> <td>5c Five-year inspection coverage of LQGs</td> <td>100%</td> <td>66.6%</td> <td>266</td> <td>274</td> <td>97.1%</td> </tr> </tbody> </table>	Metric ID Number and Description	Natl Goal	Natl Avg	State N	State D	State % or #	5a Two-year inspection coverage of operating TSDFs	100%	87.6%	13	13	100%	5b Annual inspection coverage of LQGs	20%	21%	121	274	44.2%	5c Five-year inspection coverage of LQGs	100%	66.6%	266	274	97.1%
Metric ID Number and Description	Natl Goal	Natl Avg	State N	State D	State % or #																				
5a Two-year inspection coverage of operating TSDFs	100%	87.6%	13	13	100%																				
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State Response																									
Recommendation																									

RCRA Element 2 — Inspections							
Finding 2-2	Area for State Attention						
Summary	The majority of the RCRA inspection reports provided sufficient documentation to determine compliance at the facility, and were completed in a timely manner.						
Explanation	<p>Of the 34 files selected for the SRF file review, 31 inspection reports were evaluated. Of the three files not evaluated, two facilities had closed and the third facility was under an EPA investigation. The files were reviewed for completeness and sufficiency to determine compliance with the RCRA requirements. It was found that 90.3% (28 of 31) of the inspection reports met this standard. There were three RCRA inspection reports that were missing basic information describing the management of hazardous waste at the facility, the RCRA Identification Number, and/or did not provide observations and conditions at the time of the inspection.</p> <p>The <i>KDEP Division of Waste Management Field Operations Branch Standard Operating Procedures</i> sets forth a 20-day deadline for RCRA inspection report completion. Thirty inspection reports were reviewed for timeliness (one report was omitted due to a delay on EPA’s behalf). A total of 25 inspection reports met this deadline. In summary, 83.3% of inspection reports met the state’s internal 20-day timeline with an average time for report completion at 13 days.</p> <p>The completeness, sufficiency, and timeliness of the RCRA inspection reports is considered an Area for State Attention. KDEP can examine current procedures to identify improvements without any further oversight by EPA.</p>						
Relevant metrics	Metric ID Number and Description		Natl Goal	Natl Avg	State N	State D	State % or #
	6a Inspection reports complete and sufficient to determine compliance		100%	n/a	28	31	90.3%
	6b Timeliness of inspection report completion		100%	n/a	25	30	83.3%
State Response	The KYDEP plans to conduct refresher training on the inspection process and business rules set forth in our Standard Operating Procedures to all inspection staff.						
Recommendation							

RCRA Element 3 — Violations							
Finding 3-1	Meets or Exceeds Expectations						
Summary	Kentucky makes accurate and timely compliance determinations.						
Explanation	<p>The <i>EPA Hazardous Waste ERP</i> standard is that facilities that are Secondary Violators (non-SNCs) should be addressed in 240 days or elevated to SNC status. Data metric 2a listed seven facilities as long-standing RCRA secondary violators. Upon review, the following factors were identified:</p> <ul style="list-style-type: none"> • Four facilities were EPA-lead inspections and/or enforcement; • Three facilities had been elevated to SNC status by the state and addressed through administrative or civil enforcement. <p>Therefore all state-lead SVs have been addressed appropriately.</p> <p>File Review Metric 7a assesses whether accurate compliance determinations were made based on a file review of inspection reports and other compliance monitoring activity (i.e., record reviews). The file review indicated that 100% of the files reviewed had accurate compliance determinations (31 of 31 files).</p> <p>Data Metric 8b evaluates the timeliness of SNC determinations. In FY2013, KDEP entered timely SNC determinations into RCRAInfo in 100% of the SNC facilities identified (10 of 10 facilities.)</p> <p>The three criteria for accurate and timely compliance determination meets SRF expectations.</p>						
Relevant metrics	Metric ID Number and Description		Natl Goal	Natl Avg	State N	State D	State % or #
	2a Long-standing secondary violators				7		0
	7a Accurate compliance determinations		100%		31	31	100%
	8b Timeliness of SNC determinations		100%	77.8%	10	10	100%
State Response							
Recommendation							

RCRA Element 3 — Violations							
Finding 3-2	Area for State Attention						
Summary	The majority of SNCs were identified correctly by the state in the national database and in accordance with the RCRA ERP.						
Explanation	<p>File Review Metric 8c measures the percentage of violations in the files that were accurately determined to be a SNC, which was 81.8% (9 of 11 SNC facilities).</p> <p>There were two facilities that were SNC-caliber but were designated as Secondary Violators by the state and the violations were addressed through informal enforcement rather than appropriate formal enforcement actions. In both situations, the facilities were large medical centers that had been operating as LQGs within the year or two before the inspections. The great majority of the LQG requirements had not been implemented and illegal disposal was occurring at one location.</p> <p>EPA Region 4 has committed to provide training on the Hazardous Waste ERP to the KYDEP RCRA program.</p>						
Relevant metrics	Metric ID Number and Description		Natl Goal	Natl Avg	State N	State D	State % or #
	8c Appropriate SNC determinations		100%		9	11	81.8 %
State Response	<p>The KYDEP disagrees with the findings that two facilities of SNC- caliber were incorrectly identified as secondary violators. According to RCRA EPA 2003 ERP Guidance, it defines a significant non-complier as “violators that have caused actual exposure or a substantial likelihood of exposure to hazardous waste or hazardous waste constituents; are chronic or recalcitrant violators; or deviate substantially from the terms of a permit, order, agreement or from RCRA statutory or regulatory requirements.” Most violations found at both facilities were paperwork violations with no actual exposure or substantial likelihood of exposure. Both facilities cooperated and immediately worked to mitigate the violations, some of which were corrected before the report was issued. In the case of these two facilities, one was a new hospital with its first inspection and the other facility had just completed a permit modification to a large quantity generator.</p>						
Recommendation							

RCRA Element 4 — Enforcement																														
Finding 4-1	Meets or Exceeds Expectations																													
Summary	KDEP consistently issued timely RCRA enforcement responses that returned violating facilities to compliance.																													
Explanation	<p>A total of 28 files were reviewed that included informal or formal enforcement actions. One action is still pending, and all of the remaining 27 enforcement actions (100%) returned the facilities to compliance with the RCRA requirements.</p> <p>The data metric that measures the timeliness of formal enforcement showed that 85.7% (6 of 7) of the formal enforcement actions met the ERP in FY 2013. The national goal is 80%.</p> <p>Facility noncompliance was documented in the 28 of the files reviewed. In evaluating the enforcement responses taken, 92.9% (26 of 28) cases were addressed with the appropriate enforcement response. The remaining two cases that were SNC-caliber facilities where the state addressed the violations through an informal action rather than an appropriate formal enforcement action (also referenced in Finding 3-2).</p> <p>The state met the SRF expectations for the criteria for timely and appropriate enforcement actions that return violators to compliance.</p>																													
Relevant metrics	<table border="1"> <thead> <tr> <th>Metric ID Number and Description</th> <th>Natl Goal</th> <th>Natl Avg</th> <th>State N</th> <th>State D</th> <th>State % or #</th> </tr> </thead> <tbody> <tr> <td>9a Enforcement that returns violators to compliance</td> <td>100%</td> <td>n/a</td> <td>27</td> <td>27</td> <td>100%</td> </tr> <tr> <td>10a Timely enforcement taken to address SNC</td> <td>80%</td> <td>77.3%</td> <td>6</td> <td>7</td> <td>85.7%</td> </tr> <tr> <td>10b Appropriate enforcement taken to address violations</td> <td>100%</td> <td>n/a</td> <td>26</td> <td>28</td> <td>92.9%</td> </tr> </tbody> </table>						Metric ID Number and Description	Natl Goal	Natl Avg	State N	State D	State % or #	9a Enforcement that returns violators to compliance	100%	n/a	27	27	100%	10a Timely enforcement taken to address SNC	80%	77.3%	6	7	85.7%	10b Appropriate enforcement taken to address violations	100%	n/a	26	28	92.9%
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RCRA Element 5 — Penalties	
Finding 5-1	Area for State Improvement
Summary	<p>KDEP does not maintain any initial or final penalty calculations. Therefore, the adequacy of economic benefit calculations and rationale for adjustments between initial and final penalties could not be evaluated.</p>
	<p>One of the objectives of the SRF is to ensure equitable treatment of violators through national policy and guidance, including systematic methods of penalty calculations. Without the availability of state penalty calculations, EPA is unable to assess the quality of the state’s overall enforcement program. None of the eight RCRA enforcement cases reviewed (0%) included actual penalty calculations. KDEP provided EPA with their Case Resolution Proposals (CRPs), which document the degree to which the “Maggard Factors” were considered (seriousness of violations, economic benefit, economic impact of penalty, culpability, history of non-compliance, good faith efforts, and number of notices of violation). However, neither the CRPs nor any other material in the files provided a quantitative or structured methodology for calculating gravity or the economic benefit of noncompliance. This is a continuing issue from both the Round 1 and Round 2 SRF reviews.</p> <p>As provided in the 1993 EPA memorandum “<i>Oversight of State and Local Penalty Assessments: Revisions to the Policy Framework for State/EPA Enforcement Agreements</i>”, it is EPA’s expectation that state enforcement agencies document the consideration and assessment of both gravity and economic benefit. In addition, the memorandum strongly encourages state agencies “to develop written penalty policies, criteria, or procedures for penalty assessments.” KDEP maintains that KRS 13A-130, which prohibits modifying or expanding a statute or regulation by internal policy, memorandum, or other form of action, prevents them from developing a written penalty policy.</p> <p>However, since the SRF Round 2, KDEP has been developing a penalty tool to assist in the calculation of penalties across the major media programs. This program is currently in the beta-testing stage. This is a significant step towards advancing the practice of appropriate penalty calculations and documentation in the state enforcement program. Adoption of the penalty tool is contingent on working out consistency issues with the use of the tool and the ability to get the guidance (upon which the tool is based) adopted into regulation.</p>

Relevant metrics	Metric ID Number and Description	Natl Goal	Natl Avg	State N	State D	State % or #
	11a Penalty calculations include gravity and economic benefit	100%		0	8	0%
12a Documentation on difference between initial and final penalty	100%		0	8	0%	

State Response	The KDEP is subject to KRS 13A-130, which prohibits modifying or expanding a statute or regulation by internal policy, memorandum, or other form of action. The Cabinet’s Office of General Counsel has, in very strong terms, recommended that penalties be established for the entire case and not on a violation-by-violation basis. In accordance with this recommendation, KDEP determines the civil penalty in accordance with KRS 224.99 using the factors listed in “NREPC vs. Wendell Maggard”. This method of establishing penalty has been upheld by the Kentucky Court of Appeals. U.S. EPA’s criteria for documenting penalty calculations are contrary to Kentucky law.
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Recommendation	By June 30, 2016, KDEP should implement procedures to ensure (1) the appropriate documentation of both gravity and economic benefit in penalty calculations, and (2) appropriate documentation of the rationale for any difference between the initial and final penalty. For verification purposes, for one year following issuance of the final SRF report, EPA shall review all initial and final KDEP orders and penalty calculations, including the calculations for the economic benefit of noncompliance.
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RCRA Element 5 — Penalties

Finding 5-2	Meets or Exceeds Expectations
Summary	There was documentation in the files that all final assessed penalties were collected.
Explanation	Metric 12b provides the percentage of enforcement files reviewed that document the collection of a penalty. In 100% of the files reviewed, there was memorandum verifying that KDEP had collected penalties assessed in the seven final enforcement actions, and were presently receiving penalties from a facility on a penalty payment schedule.

Relevant metrics	Metric ID Number and Description	Natl Goal	Natl Avg	State N	State D	State % or #
	12b Penalties collected	100%		8	8	100%

State Response	
Recommendation	