



RICK SNYDER
GOVERNOR

STATE OF MICHIGAN
DEPARTMENT OF AGRICULTURE
AND RURAL DEVELOPMENT

JAMIE CLOVER ADAMS
DIRECTOR

November 19, 2013

Mr. Doug Ringler, Director
Office of Internal Audit Services
Office of the State Budget
George W. Romney Building, 6th Floor
111 South Capitol
Lansing, Michigan 48913

Dear Mr. Ringler:

In accordance with the State of Michigan, Financial Management Guide, Part VII, enclosed is a summary table identifying our responses and corrective action plans to address recommendations contained within the Office of the Auditor General's audit report of the Michigan Department of Agriculture and Rural Development Performance Audit of the Weights and Measures Program – Consumer Protection Section, MDARD, OAG Report #791-0127-12.

Questions regarding the summary table or corrective action plans should be directed to David Bruce, Chief Financial Officer, bruced9@michigan.gov or (517) 284-5743.

Sincerely Yours,

Signature Redacted

David M. Bruce, Director
Operational Services and Central Licensing

DMB/lra

Enclosure

cc: John Roberts, Executive Office, Office of Chief of Staff
Jill Bierstetel, Office of the Auditor General
Mary Ann Cleary, House Fiscal Agency
Ellen Jeffries, Senate Fiscal Agency
Phil Potvin, House Agriculture Appropriations Sub-Committee
Mike Green, Senate Agriculture Appropriations Sub-Committee
Kevin Daley, Chair, House Agriculture Committee
Joe Hune, Chair, Senate Agriculture Committee
Jamie Clover Adams, Director, Michigan Department of Agriculture
Gordon Wenk, Chief Deputy Director, MDARD
Derek Bajema, Legislative Liaison, MDARD
Jennifer Holton, Director of Communications
Bonnie Moon, Director, Laboratory Division, MDARD
Craig VanBuren, Director, MFQ/W&M Programs, MDARD
Bryan Weiler, Michigan Department of Technology, Management and Budget



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**MICHIGAN DEPARTMENT OF AGRICULTURE & RURAL DEVELOPMENT
PERFORMANCE AUDIT OF THE WEIGHTS AND MEASURES PROGRAM
CONSUMER PROTECTION SECTION, LABORATORY DIVISION
EXHIBIT B: 60-DAY SUMMARY OF AGENCY RESPONSES TO
RECOMMENDATIONS -- 10/1/2009 thru 10/31/2012**

1. Audit recommendations the agency complied with:
 - Finding 2

2. Audit recommendations the agency agrees with and will comply:
 - Finding 3: Will seek to comply by October 1, 2015 contingent on available resources.
 - Finding 4: Will comply by October 1, 2014.

3. Audit recommendations the agency disagrees with:
 - Finding 1

**MICHIGAN DEPARTMENT OF AGRICULTURE AND RURAL DEVELOPMENT
PERFORMANCE AUDIT
WEIGHTS AND MEASURE PROGRAM
CONSUMER PROTECTION SECTION, LABORATORY DIVISION
OAG REPORT # 791-0127-12
AUGUST, 2013**

FINDING

1. Procedures for Fines and Economic Benefit Penalties

MDARD had not established detailed written procedures for imposing fines and economic benefit penalties on businesses with inaccurate weighing and measuring devices and short weight packages. Establishing such procedures would help ensure that fines and economic benefit penalties were properly imposed and documented.

The Weights and Measures Act (Act 283, P.A. 1964, as amended) gives MDARD the authority to impose fines of between \$150 and \$2,500 on businesses with inaccurate weighing and measuring devices as well as short weight packages or commodities offered for sale that are not labeled with the accurate weight. The statute also allows MDARD to impose economic benefit penalties in the amount that a business realized by overcharging the public.

MDARD established and implemented Commission Policy 10, which provides a general framework for administering enforcement action including granting program management significant discretion regarding the dollar amounts of fines and penalties to be imposed. However, MDARD should establish corresponding detailed procedures to provide guidance for imposing fines and economic benefit penalties.

We reviewed MDARD's inspections of weighing and measuring devices and packages between October 2009 and October 2012. Our review disclosed:

- a. MDARD did not charge businesses that violated weighing and measuring or short weight packaging standards the full economic benefit penalty amount that it calculated. In addition, MDARD did not document why it did not impose the economic benefit penalty that it calculated. We reviewed businesses that had been assessed economic benefit penalties or had failed packaging inspections:

- (1) We judgmentally selected 5 of 14 businesses upon which MDARD assessed economic benefit penalties for having inaccurate weighing and measuring devices. We noted that, for 1 of the 5 businesses, MDARD did not charge, or document why it did not charge, the full economic benefit that the business received from consumers. MDARD inspectors estimated that the business benefitted by \$2,750; however, MDARD modified the amount and assessed only a \$2,000 fine, or 27% less than the estimated economic benefit.
 - (2) We judgmentally selected 14 of 98 businesses upon which MDARD assessed economic benefit penalties for failed packaging inspections. Also, we randomly sampled 43 of 2,269 businesses that failed packaging inspections. We noted that, for 8 (57%) of the 14 and 16 (37%) of the 43 businesses sampled, the amounts MDARD charged to the businesses for economic benefit penalties were less than the amounts MDARD inspectors calculated by between \$53 and \$7,830. MDARD did not document the reason why it did not charge the full penalty amounts. In addition, we noted that for 3 (7%) of the 43 businesses that sold short weight packages, MDARD could not provide documentation as to how the economic benefit was calculated or why the penalty was waived.
- b. MDARD did not impose a fine or an economic benefit penalty, or document why it did not impose a fine or an economic benefit penalty, on all businesses whose weighing and measuring devices failed inspection. We randomly selected 27 of 247 businesses that failed inspections. These 27 businesses had 45 inaccurate weighing and measuring devices that failed inspections. We noted that, for 44 (98%) of the 45 inaccurate devices, MDARD did not impose a fine or an economic benefit penalty or document why a fine or an economic benefit penalty was not imposed.

MDARD informed us that it is its practice to achieve compliance with State laws by gaining cooperation from a business rather than assessing fines and penalties.

RECOMMENDATION

We recommend that MDARD establish detailed written procedures for imposing fines and economic benefit penalties on businesses with inaccurate weighing and measuring devices and short weight packages.

AGENCY 60-DAY PRELIMINARY PLAN

MDARD disagrees with the recommendation. The agency follows Commission Policy 10, which utilizes progressive enforcement and allows MDARD discretion when issuing penalties. MDARD believes that it applied consistent, progressive enforcement practices in accordance with statute and MDARD policy (e.g., compliance assistance, warning letters, fines, and stop-sale orders). MDARD feels that, because of the requirements in statute and MDARD policy, it is required to determine the most appropriate enforcement action based on an assessment of all relevant factors identified during an inspection. MDARD feels that it has always gained compliance, as this is its ultimate goal.

MDARD utilizes a consistent methodology when reviewing violations, assessing monetary penalties, and revoking or suspending service registration. MDARD protocols have been in place for over a decade and have served the Weights and Measures Program, MDARD, the State, and other stakeholders well during that period. MDARD believes that its ability to resolve matters outside the court room has saved State resources and has allowed those operators who have not intentionally violated the law to initiate corrective actions with monies that would have otherwise been spent on legal fees and court costs. The statute allows for discretion, and the consent agreement process itself is one based upon a cooperative effort.

Regarding part a. of the finding, MDARD feels that economic benefit is merely an estimate put together by the inspector. The Weights and Measures Program tries to ascertain, based on reasonable information, what may have happened in the past and for how long. MDARD believes that a business is always given the benefit of the doubt as MDARD does not want to place undue penalties upon the business or business owner. The agency feels that, as a result, it usually rounds estimated economic harm down to a level that the Weights and Measures Program feels it is able to justifiably assess. In addition, the penalty is always determined for the same reason based on the evidence available and discussion with the

investigator. The fine is what management would consider justifiable should the case proceed to court.

Regarding part b. of the finding, the agency feels that, unless weighing or measuring inaccuracies are found to be in egregious error, are a repeat problem, or have resulted in a large estimated economic benefit, MDARD only requires the business to repair the device, after which it may receive a warning letter depending on the severity of the results of the inspection report.

OFFICE OF THE AUDITOR GENERAL EPILOGUE

In the agency preliminary response, MDARD indicated that it disagrees with our recommendation that it establish detailed written procedures for imposing fines and economic benefit penalties on businesses because MDARD already has established and follows Commission Policy 10. While Commission Policy 10 provides some framework for administering enforcement action, it is not comprehensive and does not provide guidance as to the relevant factors Program management should consider in the decision to not utilize progressive enforcement, in determining if an egregious error is present, and in determining what constitutes a large economic benefit. In addition, Policy 10 does not require Program management to document the factors it considered and the associated weight of each factor in determining the enforcement action taken.

FINDING

2. Reinspections of Condemned Devices

The Weights and Measures Program did not conduct timely reinspections of condemned devices. As a result, MDARD could not ensure that devices it had previously condemned were repaired and were operating in accordance with National Institute of Standards and Technology (NIST) standards.

Section 290.628c of the *Michigan Compiled Laws* requires MDARD to evaluate devices using NIST standards. When the Weights and Measures Program inspector determines that a device does not meet these standards, the inspector condemns the device. Weights and Measures Program management informed us that it instructs its inspectors to reinspect all devices condemned for repair within 35 days from the date the device was condemned.

We sampled 82 of 4,952 inspections in which Weights and Measures Program inspectors condemned one or more devices. We evaluated the documentation regarding these inspections to determine the disposition of devices and whether reinspections occurred timely. Our review disclosed that the Weights and

Measures Program did not perform reinspections within its desired 35-day time frame in 23 (28%) instances:

Number of Days Reinspections Exceeded Desired Time Frame	Number of Reinspections Not Performed Within Desired Time Frame
8 to 10 days	6
11 to 15 days	3
26 to 30 days	2
30 to 60 days	3
61 to 90 days	2
91 to 120 days	2
204 to 250 days	3
762 days	1
Reinspection not performed	1
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	23
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RECOMMENDATION

We recommend that the Weights and Measures Program conduct timely reinspections of condemned devices.

AGENCY 60-DAY PRELIMINARY PLAN

MDARD agrees and has complied with the recommendation. The agency is currently up to date on its reinspections. The reinspection of condemned devices is not a requirement the Weights and Measures Act. MDARD believes that it conducted all reinspections that should have been conducted. MDARD also believes that ensuring devices were properly repaired was done so by the Registered Service Program. In 2002, a registration program for servicepersons was created in the Act to alleviate the burden of having inspectors return to

reinspect devices and also to allow device owners to get their device back into use quicker. The registration program requires that servicepersons be knowledgeable in the requirements of the Act and in NIST Handbook 44 (Specifications, Tolerances, and Other Technical Requirements for Weighing and Measuring Devices). The servicepersons complete a Placed in Service Report, which notifies MDARD that the servicepersons have repaired a device and placed it back into commercial service. The Weights and Measures Program had an informal reinspection policy, and a written policy has been put in place that directs inspectors to conduct reinspections on "Condemned for Repair" devices as soon after the five-day period as possible but no later than 30 days. Starting in May 2011, the agency implemented and distributed to its staff a bimonthly spreadsheet that identifies which locations have condemned devices that have not been reinspected to assist staff in conducting reinspections in a manner that is conducive to the schedule and location.

FINDING

3. Monitoring of Licensed Retail Motor Fuel Outlets

The Weights and Measures Program did not inspect all licensed retail motor fuel outlets, including gasoline stations, in accordance with the Laboratory Division's recommended time frame. As a result, MDARD lacked assurance that all licensed retail motor fuel outlets were operating in compliance with applicable State statutes related to motor fuel quantity.

MDARD Laboratory Division Policy SOP MI-103 stipulates that all licensed retail motor fuel outlets are to be inspected at least once every four years. As of October 31, 2012, there were 4,773 licensed retail motor fuel outlets within the State.

MDARD did not inspect 179 (3.75%) of the 4,773 licensed retail motor fuel outlets at least once in the past four years. Furthermore, for 47 (26%) of the 179 outlets, the Weights and Measures Program lacked any support that would indicate that it had ever performed an inspection.

RECOMMENDATION

We recommend that the Weights and Measures Program inspect all licensed retail motor fuel outlets, including gasoline stations, in accordance with the Laboratory Division's recommended time frame.

AGENCY 60-DAY PRELIMINARY PLAN

MDARD agrees with the recommendation, and will seek to comply by October 1, 2015, contingent on available resources. The Weights and Measures Act does not have a requirement for how often gas stations are to be inspected; MDARD's responsibility is only to maintain oversight. MDARD has set a high standard for itself with Policy SOP MI-103, which stipulates that licensed gas establishments are to be inspected once every four years. MDARD acknowledges, and accepts the risk, that not every retail establishment will be inspected within this time frame. MDARD asserts that the small percentage of stations not checked within the four-year period has a negligible impact on the public's economic well-being. One of the major reasons for the small amount of gas stations not inspected is the lack of resources. In fiscal year 2009-10 and fiscal year 2010-11, the Weights and Measures Program lost 4 of 11 field staff. In fiscal year 2011-12, MDARD has replaced and added field staff and is bringing them up to speed on inspection requirements. This corrective action will allow MDARD to fill the gap in those 179 locations that had not been inspected in the last four years. However, there are still some locations that will not be inspected as there are a number of locations that MDARD is not capable of inspecting. These include marinas and small stations with above-ground storage tanks. In spite of these obstacles, MDARD was still able to inspect over 96% of all licensed establishments within the four-year policy requirement. In 2011, the average number of stations beyond the four-year period was 263; therefore, much improvement has been made.

FINDING

4. Risk Assessment for Inspections

MDARD did not prioritize inspections based on a risk assessment to ensure the efficient use of limited resources and help ensure that it periodically inspected high-risk devices, packages, businesses with price scanners, and businesses that post prices. Developing a process to prioritize MDARD's inspection efforts based

on an evaluation of risk factors would help ensure that MDARD is using its limited resources for the areas of greatest economic impact to the consumer.

NIST Handbook 155, *Weights and Measures Program Requirements: A Handbook for the Weights and Measures Administrator*, recommends the use of risk-based inspections as a method to reduce the amount of resources needed for inspections. MDARD identified consumer complaints as a priority; however, after complaints are investigated, MDARD has not prioritized its inspection efforts for weighing and measuring devices, short weight packages, price scanning errors, and deceptive price postings. The Weights and Measures Program employs 15 inspectors to inspect all weighing and measuring devices, packages, businesses with price scanners, and businesses that post prices. For the three-year period from October 2009 through September 2012, MDARD inspected 2,682 (1%) of Michigan's estimated 250,000 weighing and measuring devices, excluding motor fuel pumps.

Prior to fiscal year 2011-12, MDARD was required to spend most of its appropriation on motor fuel inspections. In fiscal year 2011-12, MDARD expanded its efforts to include investigating more non-motor fuel pump devices and packages. An evaluation of risk factors would help MDARD determine the devices and packages at the highest risk for being inaccurate. MDARD should develop a process to prioritize its inspection efforts based on an evaluation of all the risk factors that it believes are relevant to weighing and measuring. For example, MDARD could evaluate data of past investigations of short weight packages and inaccurate weighing and measuring devices, the lack of compliance with weights and measures legal requirements for businesses in different regions of the State, deficiencies identified by other states' weights and measures programs, and the number and frequency of consumer complaints.

RECOMMENDATION

We recommend that MDARD prioritize inspections based on a risk assessment to ensure the efficient use of limited resources and to help ensure that it periodically inspects high-risk devices, packages, businesses with price scanners, and businesses that post prices.

AGENCY 60-DAY PRELIMINARY PLAN

MDARD agrees with the recommendation and will comply by October 1, 2014. We will work with internal auditors to develop a risk-based inspection procedure. Although there currently is no formal risk assessment procedure, the Weights and Measures Program has assessed risk by reviewing device and package compliance on a yearly basis. Gas dispensers have one of the highest compliance rates and large capacity scales have the lowest compliance rates. However, due to a requirement in the budget bills for fiscal year 2006-07 through fiscal year 2009-10, MDARD was required to spend 76% of its resources on motor fuel quantity and quality. This requirement not only took away MDARD's ability to utilize risk-based inspections but was a detriment to the inspectors on keeping up with knowledge of other weighing and measuring devices. Over the last two years, the Weights and Measures Program has directed more of its staff to inspect weighing devices rather than gas stations (though the majority [59%] of inspections must still be gas station inspections as the Weights and Measures Program is mainly funded by the Refined Petroleum Fund). This places the Weights and Measures Program at risk of not inspecting all gas stations within the four-year time frame that is in policy and adds burden to the Motor Fuel Quality Program to provide assistance. Fully utilizing a risk-based approach would require changes to other policies and procedures, namely the four-year gas station inspections and the seven-business-day complaint initiation.

As risks are identified within certain areas, whether it be devices, packages, or geographical locations, MARD conducts special projects in those specific areas. The most recent examples are the Upper Peninsula Project, Scrap Yard Project, and Terminal Project.