PDHonline Course C213 (8 PDH)

Environmental Health and Safety (EHS) Auditing

Instructor: Jim Newton, P.E., DEE

2012

PDH Online | PDH Center

5272 Meadow Estates Drive
Fairfax, VA 22030-6658
Phone & Fax: 703-988-0088
www.PDHonline.org
www.PDHcenter.com

An Approved Continuing Education Provider

Federal Register

Tuesday,
April 11, 2000

Part VII

Environmental Protection Agency

Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations; Notice

ENVIRONMENTAL PROTECTION AGENCY

[FRL–6576–3]

Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations

AGENCY: Environmental Protection Agency (EPA, or Agency).

ACTION: Final Policy Statement.

SUMMARY: EPA today issues its revised final policy on ''Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations,'' commonly referred to as the ''Audit Policy.'' The purpose of this Policy is to enhance protection of human health and the environment by encouraging regulated entities to voluntarily discover, promptly disclose and expeditiously correct violations of Federal environmental requirements. Incentives that EPA makes available for those who meet the terms of the Audit Policy include the elimination or substantial reduction of the gravity component of civil penalties and a determination not to recommend criminal prosecution of the disclosing entity. The Policy also restates EPA's long-standing practice of not requesting copies of regulated entities' voluntary audit reports to trigger Federal enforcement investigations. Today's revised Audit Policy replaces the 1995 Audit Policy (60 FR 66706), which was issued on December 22, 1995, and took effect on January 22, 1996. Today's revisions maintain the basic structure and terms of the 1995 Audit Policy while clarifying some of its language, broadening its availability, and conforming the provisions of the Policy to actual Agency practice. The revisions being released today lengthen the prompt disclosure period to 21 days, clarify that the independent discovery condition does not automatically preclude penalty mitigation for multi-facility entities, and clarify how the prompt disclosure and repeat violation conditions apply to newly acquired companies. The revised Policy was developed in close consultation with the U.S. Department of Justice (DOJ), States, public interest groups and the regulated community. The revisions also reflect EPA's experience implementing the Policy over the past five years.

DATES: This revised Policy is effective May 11, 2000.

FOR FURTHER INFORMATION CONTACT: Catherine Malinin Dunn (202) 564–2629 or Leslie Jones (202) 564–5123. Documentation relating to the development of this Policy is contained in the environmental auditing public docket (#C–94–01). An index to the docket may be obtained by contacting the Enforcement and Compliance Docket and Information Center (ECDIC) by telephone at (202) 564–2614 or (202) 564–2119, by fax at (202) 501–1011, or by email at docket.oeca@epa.gov. ECDIC office hours are 8:00 am to 4:00 pm Monday through Friday except for Federal holidays. An index to the docket is available on the Internet at www.epa.gov/oeca/polguid/enfdock.html. Additional guidance regarding interpretation and application of the Policy is also available on the Internet at www.epa.gov/oeca/ore/apolguid.html.

SUPPLEMENTARY INFORMATION: This Notice is organized as follows:

I. Explanation of Policy

A. Introduction

On December 22, 1995, EPA issued its final policy on ''Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations'' (60 FR 66706) (Audit Policy, or Policy). The purpose of the Policy is to enhance protection of human health and the environment by encouraging regulated entities to voluntarily discover, disclose, correct and prevent violations of Federal environmental law. Benefits available to entities that make disclosures under the terms of the Policy include reductions in the amount of civil penalties and a determination not to recommend criminal prosecution of disclosing entities.

Today, EPA issues revisions to the 1995 Audit Policy. The revised Policy reflects EPA's continuing commitment to encouraging voluntary self-policing while preserving fair and effective enforcement. It lengthens the prompt disclosure period to 21 days, clarifies that the independent discovery condition does not automatically preclude Audit Policy credit in the multi-facility context, and clarifies how the prompt disclosure and repeat violations conditions apply in the acquisitions context. The revised final Policy takes effect May 11, 2000.

B. Background and History

The Audit Policy provides incentives for regulated entities to detect, promptly disclose, and expeditiously correct violations of Federal environmental requirements. The Policy contains nine conditions, and entities that meet all of them are eligible for 100% mitigation of any gravity-based penalties that otherwise could be assessed. (''Gravity-based'' refers to that portion of the penalty over and above the portion that represents the entity's economic gain from noncompliance, known as the ''economic benefit.'') Regulated entities that do not meet the first condition—systematic discovery of violations—but meet the other eight conditions are eligible for 75% mitigation of any gravity-based civil penalties. On the criminal side, EPA will generally elect not to recommend criminal prosecution

by DOJ or any other prosecuting authority for a disclosing entity that meets at least conditions two through nine—regardless of whether it meets the systematic discovery requirement—as long as its self-policing, discovery and disclosure were conducted in good faith and the entity adopts a systematic approach to preventing recurrence of the violation.

The Policy includes important safeguards to deter violations and protect public health and the environment. For example, the Policy requires entities to act to prevent recurrence of violations and to remedy any environmental harm that may have occurred. Repeat violations, those that result in actual harm to the environment, and those that may present an imminent and substantial endangerment are not eligible for relief under this Policy. Companies will not be allowed to gain an economic advantage over their competitors by delaying their investment in compliance. And entities remain criminally liable for violations that result from conscious disregard of or willful blindness to their obligations under the law, and individuals remain liable for their criminal misconduct.

When EPA issued the 1995 Audit Policy, the Agency committed to evaluate the Policy after three years. The Agency initiated this evaluation in the Spring of 1998 and published its preliminary results in the **Federal Register** on May 17, 1999 (64 FR 26745). The evaluation consisted of the following components:

- An internal survey of EPA staff who process disclosures and handle enforcement cases under the 1995 Audit Policy;
- A survey of regulated entities that used the 1995 Policy to disclose violations;
- A series of meetings and conference calls with representatives from industry, environmental organizations, and States;
- Focused stakeholder discussions on the Audit Policy at two public conferences co-sponsored by EPA's Office of Enforcement and Compliance Assurance (OECA) and the Vice President's National Partnership for Reinventing Government, entitled ''Protecting Public Health and the Environment through Innovative Approaches to Compliance'';
- A **Federal Register** notice on March 2, 1999, soliciting comments on how EPA can further protect and improve public health and the environment through new compliance and enforcement approaches (64 FR 10144); and
- An analysis of data on Audit Policy usage to date and discussions amongst EPA officials who handle Audit Policy disclosures.

The same May 17, 1999, **Federal Register** notice that published the evaluation's preliminary results also proposed revisions to the 1995 Policy and requested public comment. During the 60-day public comment period, the Agency received 29 comment letters, copies of which are available through the Enforcement and Compliance Docket and Information Center. (See contact information at the beginning of this notice.) Analysis of these comment letters together with additional data on Audit Policy usage has constituted the final stage of the Audit Policy evaluation. EPA has prepared a detailed response to the comments received; a copy of that document will also be available through the Docket and Information Center as well on the Internet at www.epa.gov/oeca/ore/apolguid.html.

Overall, the Audit Policy evaluation revealed very positive results. The Policy has encouraged voluntary self-policing while preserving fair and effective enforcement. Thus, the revisions issued today do not signal any intention to shift course regarding the Agency's position on self-policing and voluntary disclosures but instead represent an attempt to fine-tune a Policy that is already working well.

Use of the Audit Policy has been widespread. As of October 1, 1999, approximately 670 organizations had disclosed actual or potential violations at more than 2700 facilities. The number of disclosures has increased each of the four years the Policy has been in effect.

Results of the Audit Policy User's Survey revealed very high satisfaction rates among users, with 88% of respondents stating that they would use the Policy again and 84% stating that they would recommend the Policy to clients and/or their counterparts. No respondents stated an unwillingness to use the Policy again or to recommend its use to others.

The Audit Policy and related documents, including Agency interpretive guidance and general interest newsletters, are available on the Internet at www.epa.gov/oeca/ore/apolguid. Additional guidance for implementing the Policy in the context of criminal violations can be found at www.epa.gov/oeca/oceft/audpol2.html.

In addition to the Audit Policy, the Agency's revised Small Business Compliance Policy (''Small Business Policy'') is also available for small entities that employ 100 or fewer individuals. The Small Business Policy provides penalty mitigation, subject to certain conditions, for small businesses that make a good faith effort to comply with environmental requirements by discovering, disclosing and correcting violations. EPA has revised the Small Business Policy at the same time it revised the Audit Policy. The revised Small Business Policy will be available on the Internet at www.epa.gov/oeca/smbusi.html.

C. Purpose

The revised Policy being announced today is designed to encourage greater compliance with Federal laws and regulations that protect human health and the environment. It promotes a higher standard of self-policing by waiving gravity-based penalties for violations that are promptly disclosed and corrected, and which were discovered systematically—that is, through voluntary audits or compliance management systems. To provide an incentive for entities to disclose and correct violations regardless of how they were detected, the Policy reduces gravity-based penalties by 75% for violations that are voluntarily discovered and promptly disclosed and corrected, even if not discovered systematically.

EPA's enforcement program provides a strong incentive for compliance by imposing stiff sanctions for noncompliance. Enforcement has contributed to the dramatic expansion of environmental auditing as measured in numerous recent surveys. For example, in a 1995 survey by Price Waterhouse LLP, more than 90% of corporate respondents who conduct audits identified one of the reasons for doing so as the desire to find and correct violations before government inspectors discover them. (A copy of the survey is contained in the Docket as document VIII–A–76.)

At the same time, because government resources are limited, universal compliance cannot be achieved without active efforts by the regulated community to police themselves. More than half of the respondents to the same 1995 Price Waterhouse survey said that they would expand environmental auditing in exchange for reduced penalties for violations discovered and corrected. While many companies already audit or have compliance management programs in place, EPA believes that the incentives offered in this Policy will improve the frequency and quality of these self-policing efforts.

D. Incentives for Self-Policing

Section C of the Audit Policy identifies the major incentives that EPA

provides to encourage self-policing, self-disclosure, and prompt self-correction. For entities that meet the conditions of the Policy, the available incentives include waiving or reducing gravity-based civil penalties, declining to recommend criminal prosecution for regulated entities that self-police, and refraining from routine requests for audits. (As noted in Section C of the Policy, EPA has refrained from making routine requests for audit reports since issuance of its 1986 policy on environmental auditing.)

1. Eliminating Gravity-Based Penalties

In general, civil penalties that EPA assesses are comprised of two elements: the economic benefit component and the gravity-based component. The economic benefit component reflects the economic gain derived from a violator's illegal competitive advantage. Gravity-based penalties are that portion of the penalty over and above the economic benefit. They reflect the egregiousness of the violator's behavior and constitute the punitive portion of the penalty. For further discussion of these issues, see ''Calculation of the Economic Benefit of Noncompliance in EPA's Civil Penalty Enforcement Cases,'' 64 FR 32948 (June 18, 1999) and ''A Framework for Statute-Specific Approaches to Penalty Assessments,'' #GM–22 (1984), U.S. EPA General Enforcement Policy Compendium.

Under the Audit Policy, EPA will not seek gravity-based penalties for disclosing entities that meet all nine Policy conditions, including systematic discovery. (''Systematic discovery'' means the detection of a potential violation through an environmental audit or a compliance management system that reflects the entity's due diligence in preventing, detecting and correcting violations.) EPA has elected to waive gravity-based penalties for violations discovered systematically, recognizing that environmental auditing and compliance management systems play a critical role in protecting human health and the environment by identifying, correcting and ultimately preventing violations.

However, EPA reserves the right to collect any economic benefit that may have been realized as a result of noncompliance, even where the entity meets all other Policy conditions. Where the Agency determines that the economic benefit is insignificant, the Agency also may waive this component of the penalty.

EPA's decision to retain its discretion to recover economic benefit is based on two reasons. First, facing the risk that the Agency will recoup economic benefit provides an incentive for regulated entities to comply on time. Taxpayers whose payments are late expect to pay interest or a penalty; the same principle should apply to corporations and other regulated entities that have delayed their investment in compliance. Second, collecting economic benefit is fair because it protects law-abiding companies from being undercut by their noncomplying competitors, thereby preserving a level playing field.

2. 75% Reduction of Gravity-based Penalties

Gravity-based penalties will be reduced by 75% where the disclosing entity does not detect the violation through systematic discovery but otherwise meets all other Policy conditions. The Policy appropriately limits the complete waiver of gravity-based civil penalties to companies that conduct environmental auditing or have in place a compliance management system. However, to encourage disclosure and correction of violations even in the absence of systematic discovery, EPA will reduce gravity-based penalties by 75% for entities that meet conditions D(2) through D(9) of the Policy. EPA expects that a disclosure under this provision will encourage the entity to work with the Agency to resolve environmental problems and begin to develop an effective auditing program or compliance management system.

3. No Recommendations for Criminal Prosecution

In accordance with EPA's Investigative Discretion Memo dated January 12, 1994, EPA generally does not focus its criminal enforcement resources on entities that voluntarily discover, promptly disclose and expeditiously correct violations, unless there is potentially culpable behavior that merits criminal investigation. When a disclosure that meets the terms and conditions of this Policy results in a criminal investigation, EPA will generally not recommend criminal prosecution for the disclosing entity, although the Agency may recommend prosecution for culpable individuals and other entities. The 1994 Investigative Discretion Memo is available on the Internet at http://www.epa.gov/oeca/ore/ aed/comp/acomp/a11.html.

The ''no recommendation for criminal prosecution'' incentive is available for entities that meet conditions D(2) through D(9) of the Policy. Condition D(1) ''systematic discovery'' is not required to be eligible for this incentive, although the entity must be acting in good faith and must adopt a systematic approach to preventing recurring violations. Important limitations to the incentive apply. It will not be available, for example, where corporate officials are consciously involved in or willfully blind to violations, or conceal or condone noncompliance. Since the regulated entity must satisfy conditions D(2) through D(9) of the Policy, violations that cause serious harm or which may pose imminent and substantial endangerment to human health or the environment are not eligible. Finally, EPA reserves the right to recommend prosecution for the criminal conduct of any culpable individual or subsidiary organization.

While EPA may decide not to recommend criminal prosecution for disclosing entities, ultimate prosecutorial discretion resides with the U.S. Department of Justice, which will be guided by its own policy on voluntary disclosures (''Factors in Decisions on Criminal Prosecutions for Environmental Violations in the Context of Significant Voluntary Compliance or Disclosure Efforts by the Violator,'' July 1, 1991) and by its 1999 Guidance on Federal Prosecutions of Corporations. In addition, where a disclosing entity has met the conditions for avoiding a recommendation for criminal prosecution under this Policy, it will also be eligible for either 75% or 100% mitigation of gravity-based civil penalties, depending on whether the systematic discovery condition was met.

4. No Routine Requests for Audit Reports

EPA reaffirms its Policy, in effect since 1986, to refrain from routine requests for audit reports. That is, EPA has not and will not routinely request copies of audit reports to trigger enforcement investigations. Implementation of the 1995 Policy has produced no evidence that the Agency has deviated, or should deviate, from this Policy. In general, an audit that results in expeditious correction will reduce liability, not expand it. However, if the Agency has independent evidence of a violation, it may seek the information it needs to establish the extent and nature of the violation and the degree of culpability.

For discussion of the circumstances in which EPA might request an audit report to determine Policy eligibility, see the explanatory text on cooperation, section I.E.9.

E. Conditions

Section D describes the nine conditions that a regulated entity must

meet in order for the Agency to decline to seek (or to reduce) gravity-based penalties under the Policy. As explained in section I.D.1 above, regulated entities that meet all nine conditions will not face gravity-based civil penalties. If the regulated entity meets all of the conditions except for D(1)—systematic discovery—EPA will reduce gravity-based penalties by 75%. In general, EPA will not recommend criminal prosecution for disclosing entities that meet at least conditions D(2) through D(9).

1. Systematic Discovery of the Violation Through an Environmental Audit or a Compliance Management System

Under Section D(1), the violation must have been discovered through either (a) an environmental audit, or (b) a compliance management system that reflects due diligence in preventing, detecting and correcting violations. Both ''environmental audit'' and ''compliance management system'' are defined in Section B of the Policy.

The revised Policy uses the term ''compliance management system'' instead of ''due diligence,'' which was used in the 1995 Policy. This change in nomenclature is intended solely to conform the Policy language to terminology more commonly in use by industry and by regulators to refer to a systematic management plan or systematic efforts to achieve and maintain compliance. No substantive difference is intended by substituting the term ''compliance management system'' for ''due diligence,'' as the Policy clearly indicates that the compliance management system must reflect the regulated entity's due diligence in preventing, detecting and correcting violations.

Compliance management programs that train and motivate employees to prevent, detect and correct violations on a daily basis are a valuable complement to periodic auditing. Where the violation is discovered through a compliance management system and not through an audit, the disclosing entity should be prepared to document how its program reflects the due diligence criteria defined in Section B of the Policy statement. These criteria, which are adapted from existing codes of practice—such as Chapter Eight of the U.S. Sentencing Guidelines for organizational defendants, effective since 1991—are flexible enough to accommodate different types and sizes of businesses and other regulated entities. The Agency recognizes that a variety of compliance management programs are feasible, and it will determine whether basic due diligence criteria have been met in deciding whether to grant Audit Policy credit.

As a condition of penalty mitigation, EPA may require that a description of the regulated entity's compliance management system be made publicly available. The Agency believes that the availability of such information will allow the public to judge the adequacy of compliance management systems, lead to enhanced compliance, and foster greater public trust in the integrity of compliance management systems.

2. Voluntary Discovery

Under Section D(2), the violation must have been identified voluntarily, and not through a monitoring, sampling, or auditing procedure that is required by statute, regulation, permit, judicial or administrative order, or consent agreement. The Policy provides three specific examples of discovery that would not be voluntary, and therefore would not be eligible for penalty mitigation: emissions violations detected through a required continuous emissions monitor, violations of NPDES discharge limits found through prescribed monitoring, and violations discovered through a compliance audit required to be performed by the terms of a consent order or settlement agreement. The exclusion does not apply to violations that are discovered pursuant to audits that are conducted as part of a comprehensive environmental management system (EMS) required under a settlement agreement. In general, EPA supports the implementation of EMSs that promote compliance, prevent pollution and improve overall environmental performance. Precluding the availability of the Audit Policy for discoveries made through a comprehensive EMS that has been implemented pursuant to a settlement agreement might discourage entities from agreeing to implement such a system.

In some instances, certain Clean Air Act violations discovered, disclosed and corrected by a company prior to issuance of a Title V permit are eligible for penalty mitigation under the Policy. For further guidance in this area, see ''Reduced Penalties for Disclosures of Certain Clean Air Act Violations,'' Memorandum from Eric Schaeffer, Director of the EPA Office of Regulatory Enforcement, dated September 30, 1999. This document is available on the Internet at www.epa.gov/oeca/ore/apolguid.html.

The voluntary requirement applies to discovery only, not reporting. That is, any violation that is voluntarily discovered is generally eligible for Audit Policy credit, regardless of whether reporting of the violation was required after it was found.

3. Prompt Disclosure

Section D(3) requires that the entity disclose the violation in writing to EPA within 21 calendar days after discovery. If the 21st day after discovery falls on a weekend or Federal holiday, the disclosure period will be extended to the first business day following the 21st day after discovery. If a statute or regulation requires the entity to report the violation in fewer than 21 days, disclosure must be made within the time limit established by law. (For example, unpermitted releases of hazardous substances must be reported immediately under 42 U.S.C. 9603.) Disclosures under this Policy should be made to the appropriate EPA Regional office or, where multiple Regions are involved, to EPA Headquarters. The Agency will work closely with States as needed to ensure fair and efficient implementation of the Policy. For additional guidance on making disclosures, contact the Audit Policy National Coordinator at EPA Headquarters at 202–564–5123.

The 21-day disclosure period begins when the entity discovers that a violation has, or may have, occurred. The trigger for discovery is when any officer, director, employee or agent of the facility has an objectively reasonable basis for believing that a violation has, or may have, occurred. The ''objectively reasonable basis'' standard is measured against what a prudent person, having the same information as was available to the individual in question, would have believed. It is not measured against what the individual in question thought was reasonable at the time the situation was encountered. If an entity has some doubt as to the existence of a violation, the recommended course is for the entity to proceed with the disclosure and allow the regulatory authorities to make a definitive determination. Contract personnel who provide on-site services at the facility may be treated as employees or agents for purposes of the Policy.

If the 21-day period has not yet expired and an entity suspects that it will be unable to meet the deadline, the entity should contact the appropriate EPA office in advance to develop disclosure terms acceptable to EPA. For situations in which the 21-day period already has expired, the Agency may accept a late disclosure in the exceptional case, such as where there are complex circumstances, including where EPA determines the violation could not be identified and disclosed within 21 calendar days after discovery.

EPA also may extend the disclosure period when multiple facilities or acquisitions are involved.

In the multi-facility context, EPA will ordinarily extend the 21-day period to allow reasonable time for completion and review of multi-facility audits where: (a) EPA and the entity agree on the timing and scope of the audits prior to their commencement; and (b) the facilities to be audited are identified in advance. In the acquisitions context, EPA will consider extending the prompt disclosure period on a case-by-case basis. The 21-day disclosure period will begin on the date of discovery by the acquiring entity, but in no case will the period begin earlier than the date of acquisition.

In summary, Section D(3) recognizes that it is critical for EPA to receive timely reporting of violations in order to have clear notice of the violations and the opportunity to respond if necessary. Prompt disclosure is also evidence of the regulated entity's good faith in wanting to achieve or return to compliance as soon as possible. The integrity of Federal environmental law depends upon timely and accurate reporting. The public relies on timely and accurate reports from the regulated community, not only to measure compliance but to evaluate health or environmental risk and gauge progress in reducing pollutant loadings. EPA expects the Policy to encourage the kind of vigorous self-policing that will serve these objectives and does not intend that it justify delayed reporting. When violations of reporting requirements are voluntarily discovered, they must be promptly reported. When a failure to report results in imminent and substantial endangerment or serious harm to the environment, Audit Policy credit is precluded under condition D(8).

4. Discovery and Disclosure Independent of Government or Third Party Plaintiff

Under Section D(4), the entity must discover the violation independently. That is, the violation must be discovered and identified before EPA or another government agency likely would have identified the problem either through its own investigative work or from information received through a third party. This condition requires regulated entities to take the initiative to find violations on their own and disclose them promptly instead of waiting for an indication of a pending enforcement action or third-party complaint.

Section D(4)(a) lists the circumstances under which discovery and disclosure will not be considered independent. For example, a disclosure will not be independent where EPA is already investigating the facility in question. However, under subsection (a), where the entity does not know that EPA has commenced a civil investigation and proceeds in good faith to make a disclosure under the Audit Policy, EPA may, in its discretion, provide penalty mitigation under the Audit Policy. The subsection (a) exception applies only to civil investigations; it does not apply in the criminal context. Other examples of situations in which a discovery is not considered independent are where a citizens' group has provided notice of its intent to sue, where a third party has already filed a complaint, where a whistleblower has reported the potential violation to government authorities, or where discovery of the violation by the government was imminent. Condition D(4)(c)—the filing of a complaint by a third party—covers formal judicial and administrative complaints as well as informal complaints, such as a letter from a citizens' group alerting EPA to a potential environmental violation.

Regulated entities that own or operate multiple facilities are subject to section D(4)(b) in addition to D(4)(a). EPA encourages multi-facility auditing and does not intend for the ''independent discovery'' condition to preclude availability of the Audit Policy when multiple facilities are involved. Thus, if a regulated entity owns or operates multiple facilities, the fact that one of its facilities is the subject of an investigation, inspection, information request or third-party complaint does not automatically preclude the Agency from granting Audit Policy credit for disclosures of violations self-discovered at the other facilities, assuming all other Audit Policy conditions are met. However, just as in the single-facility context, where a facility is already the subject of a government inspection, investigation or information request (including a broad information request that covers multiple facilities), it will generally not be eligible for Audit Policy credit. The Audit Policy is designed to encourage regulated entities to disclose violations before any of their facilities are under investigation, not after EPA discovers violations at one facility. Nevertheless, the Agency retains its full discretion under the Audit Policy to grant penalty waivers or reductions for good-faith disclosures made in the multi-facility context. EPA has worked closely with a number of entities that have received Audit Policy credit for multi-facility disclosures, and entities contemplating multi-facility auditing are encouraged to contact the Agency with any questions concerning Audit Policy availability.

5. Correction and Remediation

Under Section D(5), the entity must remedy any harm caused by the violation and expeditiously certify in writing to appropriate Federal, State, and local authorities that it has corrected the violation. Correction and remediation in this context include responding to spills and carrying out any removal or remedial actions required by law. The certification requirement enables EPA to ensure that the regulated entity will be publicly accountable for its commitments through binding written agreements, orders or consent decrees where necessary.

Under the Policy, the entity must correct the violation within 60 calendar days from the date of discovery, or as expeditiously as possible. EPA recognizes that some violations can and should be corrected immediately, while others may take longer than 60 days to correct. For example, more time may be required if capital expenditures are involved or if technological issues are a factor. If more than 60 days will be required, the disclosing entity must so notify the Agency in writing prior to the conclusion of the 60-day period. In all cases, the regulated entity will be expected to do its utmost to achieve or return to compliance as expeditiously as possible.

If correction of the violation depends upon issuance of a permit that has been applied for but not issued by Federal or State authorities, the Agency will, where appropriate, make reasonable efforts to secure timely review of the permit.

6. Prevent Recurrence

Under Section D(6), the regulated entity must agree to take steps to prevent a recurrence of the violation after it has been disclosed. Preventive steps may include, but are not limited to, improvements to the entity's environmental auditing efforts or compliance management system.

7. No Repeat Violations

Condition D(7) bars repeat offenders from receiving Audit Policy credit. Under the repeat violations exclusion, the same or a closely-related violation must not have occurred at the same facility within the past 3 years. The 3-year period begins to run when the government or a third party has given the violator notice of a specific violation, without regard to when the original violation cited in the notice

actually occurred. Examples of notice include a complaint, consent order, notice of violation, receipt of an inspection report, citizen suit, or receipt of penalty mitigation through a compliance assistance or incentive project.

When the facility is part of a multi-facility organization, Audit Policy relief is not available if the same or a closely-related violation occurred as part of a pattern of violations at one or more of these facilities within the past 5 years. If a facility has been newly acquired, the existence of a violation prior to acquisition does not trigger the repeat violations exclusion.

The term ''violation'' includes any violation subject to a Federal, State or local civil judicial or administrative order, consent agreement, conviction or plea agreement. Recognizing that minor violations sometimes are settled without a formal action in court, the term also covers any act or omission for which the regulated entity has received a penalty reduction in the past. This condition covers situations in which the regulated entity has had clear notice of its noncompliance and an opportunity to correct the problem.

The repeat violation exclusion benefits both the public and law-abiding entities by ensuring that penalties are not waived for those entities that have previously been notified of violations and fail to prevent repeat violations. The 3-year and 5-year ''bright lines'' in the exclusion are designed to provide regulated entities with clear notice about when the Policy will be available.

8. Other Violations Excluded

Section D(8) provides that Policy benefits are not available for certain types of violations. Subsection D(8)(a) excludes violations that result in serious actual harm to the environment or which may have presented an imminent and substantial endangerment to public health or the environment. When events of such a consequential nature occur, violators are ineligible for penalty relief and other incentives under the Audit Policy. However, this condition does not bar an entity from qualifying for Audit Policy relief solely because the violation involves release of a pollutant to the environment, as such releases do not necessarily result in serious actual harm or an imminent and substantial endangerment. To date, EPA has not invoked the serious actual harm or the imminent and substantial endangerment clauses to deny Audit Policy credit for any disclosure.

Subsection D(8)(b) excludes violations of the specific terms of any order, consent agreement, or plea agreement. Once a consent agreement has been negotiated, there is little incentive to comply if there are no sanctions for violating its specific requirements. The exclusion in this section also applies to violations of the terms of any response, removal or remedial action covered by a written agreement.

9. Cooperation

Under Section D(9), the regulated entity must cooperate as required by EPA and provide the Agency with the information it needs to determine Policy applicability. The entity must not hide, destroy or tamper with possible evidence following discovery of potential environmental violations. In order for the Agency to apply the Policy fairly, it must have sufficient information to determine whether its conditions are satisfied in each individual case. In general, EPA requests audit reports to determine the applicability of this Policy only where the information contained in the audit report is not readily available elsewhere and where EPA decides that the information is necessary to determine whether the terms and conditions of the Policy have been met. In the rare instance where an EPA Regional office seeks to obtain an audit report because it is otherwise unable to determine whether Policy conditions have been met, the Regional office will notify the Office of Regulatory Enforcement at EPA headquarters.

Entities that disclose potential criminal violations may expect a more thorough review by the Agency. In criminal cases, entities will be expected to provide, at a minimum, the following: access to all requested documents; access to all employees of the disclosing entity; assistance in investigating the violation, any noncompliance problems related to the disclosure, and any environmental consequences related to the violations; access to all information relevant to the violations disclosed, including that portion of the environmental audit report or documentation from the compliance management system that revealed the violation; and access to the individuals who conducted the audit or review.

F. Opposition to Audit Privilege and Immunity

The Agency believes that the Audit Policy provides effective incentives for self-policing without impairing law enforcement, putting the environment at risk or hiding environmental compliance information from the public. Although EPA encourages environmental auditing, it must do so without compromising the integrity and enforceability of environmental laws. It is important to distinguish between EPA's Audit Policy and the audit privilege and immunity laws that exist in some States. The Agency remains firmly opposed to statutory and regulatory audit privileges and immunity. Privilege laws shield evidence of wrongdoing and prevent States from investigating even the most serious environmental violations. Immunity laws prevent States from obtaining penalties that are appropriate to the seriousness of the violation, as they are required to do under Federal law. Audit privilege and immunity laws are unnecessary, undermine law enforcement, impair protection of human health and the environment, and interfere with the public's right to know of potential and existing environmental hazards.

Statutory audit privilege and immunity run counter to encouraging the kind of openness that builds trust between regulators, the regulated community and the public. For example, privileged information on compliance contained in an audit report may include information on the cause of violations, the extent of environmental harm, and what is necessary to correct the violations and prevent their recurrence. Privileged information is unavailable to law enforcers and to members of the public who have suffered harm as a result of environmental violations. The Agency opposes statutory immunity because it diminishes law enforcement's ability to discourage wrongful behavior and interferes with a regulator's ability to punish individuals who disregard the law and place others in danger. The Agency believes that its Audit Policy provides adequate incentives for self-policing but without secrecy and without abdicating its discretion to act in cases of serious environmental violations.

Privilege, by definition, invites secrecy, instead of the openness needed to build public trust in industry's ability to self-police. American law reflects the high value that the public places on fair access to the facts. The Supreme Court, for example, has said of privileges that, '' [w]hatever their origins, these exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth.'' *United States* v. *Nixon*, 418 U.S. 683, 710 (1974). Federal courts have unanimously refused to recognize a privilege for environmental audits in the context of government investigations. See, *e.g., United States* v. *Dexter Corp.,* 132 F.R.D. 8, 10 (D.Conn. 1990)

(application of a privilege ''would effectively impede [EPA's] ability to enforce the Clean Water Act, and would be contrary to stated public policy.'') Cf. In re Grand Jury Proceedings, 861 F. Supp. 386 (D. Md. 1994) (company must comply with a subpoena under Food, Drug and Cosmetics Act for self-evaluative documents).

G. Effect on States

The revised final Policy reflects EPA's desire to provide fair and effective incentives for self-policing that have practical value to States. To that end, the Agency has consulted closely with State officials in developing this Policy. As a result, EPA believes its revised final Policy is grounded in commonsense principles that should prove useful in the development and implementation of State programs and policies.

EPA recognizes that States are partners in implementing the enforcement and compliance assurance program. When consistent with EPA's policies on protecting confidential and sensitive information, the Agency will share with State agencies information on disclosures of violations of Federally-authorized, approved or delegated programs. In addition, for States that have adopted their own audit policies in Federally-authorized, approved or delegated programs, EPA will generally defer to State penalty mitigation for self-disclosures as long as the State policy meets minimum requirements for Federal delegation. Whenever a State provides a penalty waiver or mitigation for a violation of a requirement contained in a Federally-authorized, approved or delegated program to an entity that discloses those violations in conformity with a State audit policy, the State should notify the EPA Region in which it is located. This notification will ensure that Federal and State enforcement responses are coordinated properly.

For further information about minimum delegation requirements and the effect of State audit privilege and immunity laws on enforcement authority, see ''Statement of Principles: Effect of State Audit/Immunity Privilege Laws on Enforcement Authority for Federal Programs,'' Memorandum from Steven A. Herman et al, dated February 14, 1997, to be posted on the Internet under www.epa.gov/oeca/oppa.

As always, States are encouraged to experiment with different approaches to assuring compliance as long as such approaches do not jeopardize public health or the environment, or make it profitable not to comply with Federal environmental requirements. The Agency remains opposed to State legislation that does not include these basic protections, and reserves its right to bring independent action against regulated entities for violations of Federal law that threaten human health or the environment, reflect criminal conduct or repeated noncompliance, or allow one company to profit at the expense of its law-abiding competitors.

H. Scope of Policy

EPA has developed this Policy to guide settlement actions. It is the Agency's practice to make public all compliance agreements reached under this Policy in order to provide the regulated community with fair notice of decisions and to provide affected communities and the public with information regarding Agency action. Some in the regulated community have suggested that the Agency should convert the Policy into a regulation because they feel doing so would ensure greater consistency and predictability. Following its three-year evaluation of the Policy, however, the Agency believes that there is ample evidence that the Policy has worked well and that there is no need for a formal rulemaking. Furthermore, as the Agency seeks to respond to lessons learned from its increasing experience handling self-disclosures, a policy is much easier to amend than a regulation. Nothing in today's release of the revised final Policy is intended to change the status of the Policy as guidance.

I. Implementation of Policy

1. Civil Violations

Pursuant to the Audit Policy, disclosures of civil environmental violations should be made to the EPA Region in which the entity or facility is located or, where the violations to be disclosed involve more than one EPA Region, to EPA Headquarters. The Regional or Headquarters offices decide whether application of the Audit Policy in a specific case is appropriate. Obviously, once a matter has been referred for civil judicial prosecution, DOJ becomes involved as well. Where there is evidence of a potential criminal violation, the civil offices coordinate with criminal enforcement offices at EPA and DOJ.

To resolve issues of national significance and ensure that the Policy is applied fairly and consistently across EPA Regions and at Headquarters, the Agency in 1995 created the Audit Policy Quick Response Team (QRT). The QRT is comprised of representatives from the Regions, Headquarters, and DOJ. It meets on a regular basis to address issues of interpretation and to coordinate self-disclosure initiatives. In addition, in 1999 EPA established a National Coordinator position to handle Audit Policy issues and implementation. The National Coordinator chairs the QRT and, along with the Regional Audit Policy coordinators, serves as a point of contact on Audit Policy issues in the civil context.

2. Criminal Violations

Criminal disclosures are handled by the Voluntary Disclosure Board (VDB), which was established by EPA in 1997. The VDB ensures consistent application of the Audit Policy in the criminal context by centralizing Policy interpretation and application within the Agency.

Disclosures of potential criminal violations may be made directly to the VDB, to an EPA regional criminal investigation division or to DOJ. In all cases, the VDB coordinates with the investigative team and the appropriate prosecuting authority. During the course of the investigation, the VDB routinely monitors the progress of the investigation as necessary to ensure that sufficient facts have been established to determine whether to recommend that relief under the Policy be granted.

At the conclusion of the criminal investigation, the Board makes a recommendation to the Director of EPA's Office of Criminal Enforcement, Forensics, and Training, who serves as the Deciding Official. Upon receiving the Board's recommendation, the Deciding Official makes his or her final recommendation to the appropriate United States Attorney's Office and/or DOJ. The recommendation of the Deciding Official, however, is only that—a recommendation. The United States Attorney's Office and/or DOJ retain full authority to exercise prosecutorial discretion.

3. Release of Information to the Public

Upon formal settlement, EPA places copies of settlements in the Audit Policy Docket. EPA also makes other documents related to self-disclosures publicly available, unless the disclosing entity claims them as Confidential Business Information (and that claim is validated by U.S. EPA), unless another exemption under the Freedom of Information Act is asserted and/or applies, or the Privacy Act or any other law would preclude such release. Presumptively releasable documents include compliance agreements reached under the Policy (see Section H) and descriptions of compliance management systems submitted under Section D(1).

Any material claimed to be Confidential Business Information will be treated in accordance with EPA regulations at 40 CFR Part 2. In determining what documents to release, EPA is guided by the Memorandum from Assistant Administrator Steven A. Herman entitled ''Confidentiality of Information Received Under Agency's Self-Disclosure Policy,'' available on the Internet at www.epa.gov/oeca/sahmemo.html.

II. Statement of Policy—Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations

A. Purpose

This Policy is designed to enhance protection of human health and the environment by encouraging regulated entities to voluntarily discover, disclose, correct and prevent violations of Federal environmental requirements.

B. Definitions

For purposes of this Policy, the following definitions apply:

''Environmental Audit'' is a systematic, documented, periodic and objective review by regulated entities of facility operations and practices related to meeting environmental requirements.

''Compliance Management System'' encompasses the regulated entity's documented systematic efforts, appropriate to the size and nature of its business, to prevent, detect and correct violations through all of the following:

(a) Compliance policies, standards and procedures that identify how employees and agents are to meet the requirements of laws, regulations, permits, enforceable agreements and other sources of authority for environmental requirements;

(b) Assignment of overall responsibility for overseeing compliance with policies, standards, and procedures, and assignment of specific responsibility for assuring compliance at each facility or operation;

(c) Mechanisms for systematically assuring that compliance policies, standards and procedures are being carried out, including monitoring and auditing systems reasonably designed to detect and correct violations, periodic evaluation of the overall performance of the compliance management system, and a means for employees or agents to report violations of environmental requirements without fear of retaliation;

(d) Efforts to communicate effectively the regulated entity's standards and procedures to all employees and other agents;

(e) Appropriate incentives to managers and employees to perform in accordance with the compliance policies, standards and procedures, including consistent enforcement through appropriate disciplinary mechanisms; and

(f) Procedures for the prompt and appropriate correction of any violations, and any necessary modifications to the regulated entity's compliance management system to prevent future violations.

''Environmental audit report'' means the documented analysis, conclusions, and recommendations resulting from an environmental audit, but does not include data obtained in, or testimonial evidence concerning, the environmental audit.

''Gravity-based penalties'' are that portion of a penalty over and above the economic benefit, *i.e.,* the punitive portion of the penalty, rather than that portion representing a defendant's economic gain from noncompliance.

''Regulated entity'' means any entity, including a Federal, State or municipal agency or facility, regulated under Federal environmental laws.

C. Incentives for Self-Policing

1. No Gravity-Based Penalties

If a regulated entity establishes that it satisfies all of the conditions of Section D of this Policy, EPA will not seek gravity-based penalties for violations of Federal environmental requirements discovered and disclosed by the entity.

2. Reduction of Gravity-Based Penalties by 75%

If a regulated entity establishes that it satisfies all of the conditions of Section D of this Policy except for D(1)—systematic discovery—EPA will reduce by 75% gravity-based penalties for violations of Federal environmental requirements discovered and disclosed by the entity.

3. No Recommendation for Criminal Prosecution

(a) If a regulated entity establishes that it satisfies at least conditions D(2) through D(9) of this Policy, EPA will not recommend to the U.S. Department of Justice or other prosecuting authority that criminal charges be brought against the disclosing entity, as long as EPA determines that the violation is not part of a pattern or practice that demonstrates or involves:

(i) A prevalent management philosophy or practice that conceals or condones environmental violations; or

(ii) High-level corporate officials' or managers' conscious involvement in, or willful blindness to, violations of Federal environmental law;

(b) Whether or not EPA recommends the regulated entity for criminal prosecution under this section, the Agency may recommend for prosecution the criminal acts of individual managers or employees under existing policies guiding the exercise of enforcement discretion.

4. No Routine Request for Environmental Audit Reports

EPA will neither request nor use an environmental audit report to initiate a civil or criminal investigation of an entity. For example, EPA will not request an environmental audit report in routine inspections. If the Agency has independent reason to believe that a violation has occurred, however, EPA may seek any information relevant to identifying violations or determining liability or extent of harm.

D. Conditions

1. Systematic Discovery

The violation was discovered through:

(a) An environmental audit; or

(b) A compliance management system reflecting the regulated entity's due diligence in preventing, detecting, and correcting violations. The regulated entity must provide accurate and complete documentation to the Agency as to how its compliance management system meets the criteria for due diligence outlined in Section B and how the regulated entity discovered the violation through its compliance management system. EPA may require the regulated entity to make publicly available a description of its compliance management system.

2. Voluntary Discovery

The violation was discovered voluntarily and not through a legally mandated monitoring or sampling requirement prescribed by statute, regulation, permit, judicial or administrative order, or consent agreement. For example, the Policy does not apply to:

(a) Emissions violations detected through a continuous emissions monitor (or alternative monitor established in a permit) where any such monitoring is required;

(b) Violations of National Pollutant Discharge Elimination System (NPDES) discharge limits detected through required sampling or monitoring; or

(c) Violations discovered through a compliance audit required to be performed by the terms of a consent order or settlement agreement, unless the audit is a component of agreement terms to implement a comprehensive environmental management system.

3. Prompt Disclosure

The regulated entity fully discloses the specific violation in writing to EPA within 21 days (or within such shorter time as may be required by law) after the entity discovered that the violation has, or may have, occurred. The time at which the entity discovers that a violation has, or may have, occurred begins when any officer, director, employee or agent of the facility has an objectively reasonable basis for believing that a violation has, or may have, occurred.

4. Discovery and Disclosure Independent of Government or Third-Party Plaintiff

(a) The regulated entity discovers and discloses the potential violation to EPA prior to:

(i) The commencement of a Federal, State or local agency inspection or investigation, or the issuance by such agency of an information request to the regulated entity (where EPA determines that the facility did not know that it was under civil investigation, and EPA determines that the entity is otherwise acting in good faith, the Agency may exercise its discretion to reduce or waive civil penalties in accordance with this Policy);

(ii) Notice of a citizen suit;

(iii) The filing of a complaint by a third party;

(iv) The reporting of the violation to EPA (or other government agency) by a ''whistleblower'' employee, rather than by one authorized to speak on behalf of the regulated entity; or

(v) imminent discovery of the violation by a regulatory agency.

(b) For entities that own or operate multiple facilities, the fact that one facility is already the subject of an investigation, inspection, information request or third-party complaint does not preclude the Agency from exercising its discretion to make the Audit Policy available for violations self-discovered at other facilities owned or operated by the same regulated entity.

5. Correction and Remediation

The regulated entity corrects the violation within 60 calendar days from the date of discovery, certifies in writing that the violation has been corrected, and takes appropriate measures as determined by EPA to remedy any environmental or human harm due to the violation. EPA retains the authority to order an entity to correct a violation within a specific time period shorter than 60 days whenever correction in such shorter period of time is feasible and necessary to protect public health and the environment adequately. If more than 60 days will be needed to correct the violation, the regulated entity must so notify EPA in writing before the 60-day period has passed. Where appropriate, to satisfy conditions D(5) and D(6), EPA may require a regulated entity to enter into a publicly available written agreement, administrative consent order or judicial consent decree as a condition of obtaining relief under the Audit Policy, particularly where compliance or remedial measures are complex or a lengthy schedule for attaining and maintaining compliance or remediating harm is required.

6. Prevent Recurrence

The regulated entity agrees in writing to take steps to prevent a recurrence of the violation. Such steps may include improvements to its environmental auditing or compliance management system.

7. No Repeat Violations

The specific violation (or a closely related violation) has not occurred previously within the past three years at the same facility, and has not occurred within the past five years as part of a pattern at multiple facilities owned or operated by the same entity. For the purposes of this section, a violation is:

(a) Any violation of Federal, State or local environmental law identified in a judicial or administrative order, consent agreement or order, complaint, or notice of violation, conviction or plea agreement; or

(b) Any act or omission for which the regulated entity has previously received penalty mitigation from EPA or a State or local agency.

8. Other Violations Excluded

The violation is not one which (a) resulted in serious actual harm, or may have presented an imminent and substantial endangerment, to human health or the environment, or (b) violates the specific terms of any judicial or administrative order, or consent agreement.

9. Cooperation

The regulated entity cooperates as requested by EPA and provides such information as is necessary and requested by EPA to determine applicability of this Policy.

E. Economic Benefit

EPA retains its full discretion to recover any economic benefit gained as a result of noncompliance to preserve a ''level playing field'' in which violators do not gain a competitive advantage over regulated entities that do comply. EPA may forgive the entire penalty for violations that meet conditions D(1) through D(9) and, in the Agency's opinion, do not merit any penalty due to the insignificant amount of any economic benefit.

F. Effect on State Law, Regulation or Policy

EPA will work closely with States to encourage their adoption and implementation of policies that reflect the incentives and conditions outlined in this Policy. EPA remains firmly opposed to statutory environmental audit privileges that shield evidence of environmental violations and undermine the public's right to know, as well as to blanket immunities, particularly immunities for violations that reflect criminal conduct, present serious threats or actual harm to health and the environment, allow noncomplying companies to gain an economic advantage over their competitors, or reflect a repeated failure to comply with Federal law. EPA will work with States to address any provisions of State audit privilege or immunity laws that are inconsistent with this Policy and that may prevent a timely and appropriate response to significant environmental violations. The Agency reserves its right to take necessary actions to protect public health or the environment by enforcing against any violations of Federal law.

G. Applicability

(1) This Policy applies to settlement of claims for civil penalties for any violations under all of the Federal environmental statutes that EPA administers, and supersedes any inconsistent provisions in media-specific penalty or enforcement policies and EPA's 1995 Policy on ''Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations.''

(2) To the extent that existing EPA enforcement policies are not inconsistent, they will continue to apply in conjunction with this Policy. However, a regulated entity that has received penalty mitigation for satisfying specific conditions under this Policy may not receive additional penalty mitigation for satisfying the same or similar conditions under other policies for the same violation, nor will this Policy apply to any violation that has received penalty mitigation under other policies. Where an entity has failed to meet any of conditions D(2) through D(9) and is therefore not eligible for penalty relief under this Policy, it may still be eligible for penalty

relief under other EPA media-specific enforcement policies in recognition of good faith efforts, even where, for example, the violation may have presented an imminent and substantial endangerment or resulted in serious actual harm.

(3) This Policy sets forth factors for consideration that will guide the Agency in the exercise of its enforcement discretion. It states the Agency's views as to the proper allocation of its enforcement resources. The Policy is not final agency action and is intended as guidance. This Policy is not intended, nor can it be relied upon, to create any rights enforceable by any party in litigation with the United States. As with the 1995 Audit Policy, EPA may decide to follow guidance provided in this document or to act at variance with it based on its analysis of the specific facts presented. This Policy may be revised without public notice to reflect changes in EPA's approach to providing incentives for self-policing by regulated entities, or to clarify and update text.

(4) This Policy should be used whenever applicable in settlement negotiations for both administrative and civil judicial enforcement actions. It is not intended for use in pleading, at hearing or at trial. The Policy may be applied at EPA's discretion to the settlement of administrative and judicial enforcement actions instituted prior to, but not yet resolved, as of the effective date of this Policy.

(5) For purposes of this Policy, violations discovered pursuant to an environmental audit or compliance management system may be considered voluntary even if required under an Agency ''partnership'' program in which the entity participates, such as regulatory flexibility pilot projects like Project XL. EPA will consider application of the Audit Policy to such partnership program projects on a project-by-project basis.

(6) EPA has issued interpretive guidance addressing several applicability issues pertaining to the Audit Policy. Entities considering whether to take advantage of the Audit Policy should review that guidance to see if it addresses any relevant questions. The guidance can be found on the Internet at www.epa.gov/oeca/ore/apolguid.html.

H. Public Accountability

EPA will make publicly available the terms and conditions of any compliance agreement reached under this Policy, including the nature of the violation, the remedy, and the schedule for returning to compliance.

I. Effective Date

This revised Policy is effective May 11, 2000.

Dated: March 30, 2000.

Steven A. Herman,

Assistant Administrator for Enforcement and Compliance Assurance.

[FR Doc. 00–8954 Filed 4–10–00; 8:45 am]

BILLING CODE 6560–50–P

EC-G-2002-149

Audit Policy Interpretive Guidance

January 1997

Office of Regulatory Enforcement
U.S. Environmental Protection Agency
Washington, D.C.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JAN 151997

OFFICE OF
ENFORCEMENT AND
COMPLIANCEASSURANCE

MEMORANDUM

SUBJECT: Issuance of Audit Policy Interpretive Guidance

FROM: Steven A. Herman
Assistant Administrator

TO: Regional Administrators
Assistant Attorney General, Environment and Natural Resources Division

Attached is the "Audit Policy Interpretive Guidance" that the ORE-led "Quick Response Team" (QRT) has developed since issuance of the Audit Policy, formerly known as the policy on "Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations,"60 Fed. Reg. 66706 (December 22, 1995).

As you may recall, we established the QRT to make expeditious, fair, and nationally consistent recommendations concerning the applicabile of the policy to specific enforcement cases. This Interpretive Guidance builds upon the July 1994 "Redelegations" effort, which focused Headquarters' involvement on case-specific matters raising issues of national significance e.g., novel interpretations of the Audit Policy). The attached guidance is based upon nationally significant issues that have confronted the QRT in consulting with Regions on more than two dozen cases over the past several months. During the process of evaluating these cases, the QRT has identified numerous interpretive issues that could benefit from further guidance.

This Interpretive Guidance document - presented as a series of generic Questions and Answers -- is intended to aid both the government and the regulated community in implementing the Audit Policy. Within the next two weeks, we anticipate that it will be publicly available via the Internet, at http://es.inel. gov/oeca/epapolguid. html, and through the Audit Policy Docket at Waterside Mall in Washington D.C. (202-260-7548). The QRT welcomes comment on this Interpretive Guidance and suggestions for additional interpretive issues that may be appropriate for resolution in future guidance. As new issues warranting guidance arise, ORE will issue addenda to this Guidance and will place any such updates in these two locations. We also are working to make all of these items-easily accessible on the Agency's Local Area Network (LAN) system and we will apprise you of our progress in that regard.

I very much appreciate the efforts of the Audit Policy QRT in developing this guidance, and I encourage you to take advantage of the QRT's extensive experience and expertise in dealing with Audit Policy issues. As you will note from the membership list attached to the end of the Interpretive Guidance, the QRT is led by the Office of Regulatory Enforcement and is comprised of senior staff and managers from all civil enforcement media. the criminal enforcement program, the federal facilities program, the OECA compliance and policy offices, two Regions, and the Department of Justice. The broad participation on the QRT. its senior level of involvement, and its intensive effort to resolve these issues swiftly in the attached guidance, all demonstrate the strong commitment of OECA and the Clinton Administration to ensuring that implementation of the Audit Policy continues to be an even greater success in the months ahead and beyond.

I encourage you to contact me, or to have your staff contact Gary A. Jonesi (Audit QRT Chair) at 202-564-4002, if you have any questions regarding this Interpretive Guidance.

Attachment

cc: OECA Office Directors
ORE Division Directors
Regional Counsel
Regional Enforcement Coordinators
Chief Environmental Enforcement Section, Department of Justice
Deputy & Assistant Chiefs, Environmental Enforcement Section, Department of Justice
Audit Policy Quick Response Team

Explanatory Note

This document was prepared by EPA's Audit Policy "Quick Response Team" (QRT). The QRT is chaired by the Office of Regulatory Enforcement, and it is charged with making expeditious, fair, and nationally consistent recommendations concerning the applicability of the December 22, 1995 policy on "Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations" (referred to in this document as the final Audit Policy) to specific enforcement cases. A copy of the final Audit Policy is provided as Attachment 1 to this document.

As of the date of this document, the QRT has evaluated more tan two dozen cases for potential Audit Policy application, most of which have resulted in significant gravity-based penalty reductions. Attachments 2 and 3 summarize some of those cases in the "Audit Policy Update" newsletters. During the process of evaluating these cases, the QRT has identified several interpretive issues that could benefit from further guidance. This interpretive guidance document, presented as a series of Questions and Answers (Qs and As), is intended to aid in implementation of the Audit Policy. It includes discussion of many of the most significant issues raised to the QRT's attention. The QRT welcomes comment on this document, and on additional interpretive issues that may be appropriate for resolution in future guidance. A list of QRT members is presented in Attachment 4.

This document sets forth guidance for the Agency's use in exercising its enforcement discretion. It is not final agency action and it does not create any rights, duties, obligations, or defenses, implied or otherwise, in any third parties.

This document can be found on the Internet at http://es.inel.gov/oeca/epapolguid.html, and in EPA's Audit Policy Docket located at the EPA Headquarters Air Docket, at Waterside Mall in Washington, D.C. (202-260-7548). Revisions or additions to this guidance also will be made publicly available at these two locations.

Audit Policy Interpretive Guidance

TABLE OF CONTENTS

Summary of Questions and Answers

Below is a summary of key points raised in the Interpretive Guidance's Questions and Answers. Not every rationale, supporting reference, and subtlety associated with these issues are included in this summary. Readers are advised to see the full text of the Qs and As immediately following this summary.

1. Can a violator be deemed to have voluntarily discovered its violations where the violations are discovered during the conduct of a compliance audit that is required as part of a binding settlement?

   Where a violator -- without any legal obligation to do so -- already has committed to conducting a compliance audit *prior to* any formal or informal enforcement response (e.g., complaint filing or other circumstance described in Section II.D.4. of the policy), an obligation to conduct such an audit with the same material scope and purpose can be incorporated into a binding settlement with EPA without automatically disqualifying violations discovered under the audit from obtaining penalty mitigation under the Audit Policy. (See Question #1 on page 1 for more detailed explanation.)

2. Can violations identified in a required compliance certification accompanying an initial application for a Clean Air Act Title V operating permit be eligible for penalty mitigation under the final Audit Policy?

   Generally no, because discovery of violations in these circumstances is not considered voluntary in light of the comprehensive Title V requirements to inquire, analyze, and certify as to compliance when applying for a permit. Where an applicant can demonstrate that its inquiry exceeded its obligations under 40 C.F.R. § 70.5, however, EPA may on a case-by-case basis consider the discovery of violations during such an inquiry to be voluntary and potentially eligible for penalty mitigation under the policy. Where permit application requirements under other environmental statutes do not impose a similarly comprehensive duty to inquire about, analyze, and report violations, violations discovered pursuant to such permit application requirements may qualify as voluntary discovery and, thus, are potentially eligible for Audit Policy penalty mitigation. (See Question #2 on page 2 for more detailed explanation.)

3. In order to comply with the prompt disclosure requirement, must an entity planning to perform an audit of numerous similar facilities send a separate notification to EPA within 10 days of discovering each violation, or can the violator consolidate its disclosures and submit them to EPA later?

   A violator may consolidate its submission of certain information to EPA, but the disclosure of potential violations still must be made to EPA within 10 days of discovering a violation. Thus, where a violator discovers a violation at one facility but there is reason to believe that similar violations may have occurred at other facilities, the potential violations at all facilities must be disclosed to EPA within 10 days of the initial discovery. At a minimum, such disclosures in these circumstances must contain the identity and location of all facilities that may raise similar compliance concerns, and a description of the potential violations. The violator may supplement such disclosures by sending to EPA more detailed consolidated information after the audit of all facilities has been completed, as long as the audit is concluded within a reasonably expeditious time. (See Question #3 on page 3 for more detailed explanation.)

4. Do submissions of information required by law (e.g., late submittal of an EPCRA reporting form, late submittal of a Clean Water Act discharge monitoring report) meet the requirements for disclosure under the final Audit Policy where such submissions are unaccompanied by a written disclosure that a violation has or may have occurred?

   No. Late submission of information required to be submitted by itself is not eligible for penalty mitigation under the policy. The disclosure must also notify EPA that a violation exists or may exist. (See Question #4 on page 4 for more detailed explanation.)

5. Why must disclosures be in writing and to EPA?

   This protects both EPA and the submitter by eliminating any uncertainty about the timing and content of the disclosure, and it expedites EPA's process of evaluating claims for penalty mitigation. (See Question #5 on page 5 for more detailed explanation.)

6. At what point does an entity have to disclose to EPA that a violation "may have occurred?"

   The regulated entity must disclose violations when there is an objectively reasonable factual basis for concluding that violations may have occurred. Where the facts underlying the violation are clear but the existence of a violation is in doubt due to the possibility of differing interpretations of the law, the regulated entity should disclose the potential violations. (See Question #6 on page 6 for more detailed explanation.)

7. If potential violations are disclosed before they occur, are they eligible for penalty reductions under the final Audit Policy?

   Yes, provided the regulated entity uses all best efforts to avoid the violations. The policy is designed to encourage disclosure as expeditiously as possible. This can be as late as 10 days after discovery that a violation occurred or may have occurred, or as early as when a compliance problem is identified. Once the violation actually occurs, EPA may then mitigate any potential penalty. (See Question #7 on page 7 for more detailed explanation.)

8. How does EPA determine if disclosed violations are repeated within the 3-year time frame specified in the final Audit Policy's repeat violations provision?

   The 3-year period begins to run when the government or third party has given the violator notice of a specific violation (e.g., through a complaint, consent order, notice of violation, receipt of an inspection report, citizen suit, receipt of penalty mitigation through a compliance assistance project). If the same type of violations or closely related violations occur at the same facility within three years of such notice, they are repeat violations and are ineligible for penalty mitigation under the final Audit Policy. (See Question #8 on page 8 for more detailed explanation.)

9. Do non-penalty enforcement responses such as notices of violation or warning letters constitute a previous violation for purposes of the policy's repeat violations provision?

   Generally yes, as long as the notification identifies specific violations and the allegations are not later withdrawn or defeated. (See Question #9 on page 9 for more detailed explanation.)

10. In cases where a 75% gravity-based penalty reduction is appropriate under the Audit Policy, can the penalty be further reduced in consideration of supplemental environmental projects (SEPs), good faith, or other factors as justice may require?

    Yes, as long as such further penalty mitigation is for activities that go beyond the conditions outlined in the final Audit Policy, and provided that economic benefit of noncompliance is recovered as required by existing Agency policies. (See Question #10 on page 10 for more detailed explanation.)

11. Where statute-specific penalty policies provide for different penalty reductions in cases of self-policing or voluntary disclosure, which policy takes precedence?

    The final Audit Policy takes precedence over any other policies that offer penalty reductions for satisfying the same conditions (e.g., the voluntary discovery, disclosure, and correction of violations). In most circumstances, the Audit Policy will offer more generous incentives. (See Question #11 on page 11 for more detailed explanation.)

12. Why is use of the final Audit Policy limited to settlement proceedings rather than being applicable also to adjudicatory proceedings?

    The policy is intended to create incentives for self-policing, prompt disclosure, and expeditious correction in a manner that most effectively allocates scarce Agency resources. Limiting use of the policy to settlement also reduces transaction costs for the regulated community. Making it the object of adversarial litigation is inconsistent with this carefully considered approach to streamlining the enforcement process. (See Question #12 on page 12 for more detailed explanation.)

13. Must the specific conditions of the final Audit Policy be met in order to qualify for penalty reductions, or is consistency with the general thrust of the policy sufficient (e.g., where disclosure of violations occurs within 30 days but not within the 10-day period specified in the policy)?

    The specific conditions must be met. If they are not met, EPA instead will utilize the flexibility provided under its statute-specific penalty policies to recognize good faith efforts and determine the extent to which penalty reductions are appropriate. (See Question #13 on page 13 for more detailed explanation.)

14. Should the government agree to no inspections, fewer inspections or other limits on enforcement authorities during the time periods in which an audit is being performed?

    Although not explicitly addressed in the final Audit Policy, EPA's longstanding policy is not to agree to limit its non-penalty enforcement authorities as a provision of settlement or otherwise. While EPA may consider such a facility to be a lower inspection priority than a facility that is not known to be auditing, whether and when to conduct an inspection does, and should, remain a matter of Agency discretion. (See Question #14 on page 14 for more detailed explanation.)

15. If an owner or operator discovers at its facility a violation that began when the facility was owned and/or operated by a previous entity, can the subsequent owner/operator receive penalty mitigation under the final Audit Policy? Can the previous owner/operator also obtain such mitigation?

    In both cases, the regulated entity must meet all conditions in the final Audit Policy, including the requirement for prompt disclosure. If there has been an arm's length transaction between the entities and they are considered separate, there may be situations where a subsequent owner/operator can receive penalty mitigation while the previous owner/operator cannot (e.g., where the subsequent owner discloses violations promptly to EPA and the previous owner had not disclosed such violations). Separate entities are considered independently, and applicability of the policy is based on the merits of each individual entity's actions. (See Question #15 on page 15 for more detailed explanation.)

16. Must all penalty mitigation based upon application of the final Audit Policy be effectuated through one uniform type of document such as a formal settlement agreement or is there flexibility to use other mechanisms such as informal letters?

    Existing Agency policies determine whether a formal enforcement document such as a consent order is needed, or whether an informal letter will suffice. Generally, enforceable orders are used unless there is no pending enforcement action, no penalty, and no outstanding compliance obligations. (See Question #16 on page 16 for more detailed explanation.)

#1: Discovery of Violations During Audits Required By Settlements

Q: Can a violator be deemed to have "voluntarily" discovered its violations, and thus potentially be eligible for penalty mitigation under the final Audit Policy, where the violations are discovered during the conduct of a compliance audit that is required as part of a binding settlement (e.g., in a consent decree or consent agreement)?

A: Yes, but only under certain circumstances. The final Audit Policy requires discovery of violations to be voluntary in order to obtain *any* penalty mitigation, and it defines such voluntariness so as to exclude situations where the violations are "discovered through a compliance audit required to be performed by the terms of a consent order or settlement agreement." 60 Fed. Reg. 66706, 66708 (Dec. 22, 1995). This language, however, should not be read in isolation, because doing so would unduly preclude penalty mitigation under the policy and create a significant disincentive for future settling parties to bind themselves in settlement documents to doing compliance audits. In the same section of the final policy, two key goals are expressed: (1) to encourage the conduct of audits; and (2) to "reward those discoveries that the regulated entity can legitimately attribute to its own voluntary efforts." Id. at 66708.

Where a violator -- without any legal obligation to do so -- already has committed to conducting a compliance audit *prior to* any formal or informal enforcement response (e.g., complaint filing or other circumstance described in Section II.D.4. of the policy), an obligation to conduct such an audit with the same material scope and purpose can be incorporated into a binding settlement with EPA without automatically disqualifying violations discovered under the audit from obtaining penalty mitigation under the Audit Policy.[1] In such cases, EPA should describe the voluntary nature of the audit in the settlement document, so that it is distinguishable from other provisions that are not eligible for penalty mitigation under the policy. By allowing audit provisions in settlements to be potentially eligible for penalty mitigation in these limited circumstances, EPA is able to shape the content and timing of audits, ensure their performance through enforceable terms, and more effectively achieve the goals of the final policy.

[1] Where there is any indication that the audit is less than completely voluntary (e.g., the violator committed to doing an audit after some sort of enforcement response as noted above, where the violator is a small business and received penalty credit under EPA's May 1995 Supplemental Environmental Project (SEP) policy , etc.), the violations discovered as a result of the audit are not voluntary and are not eligible for penalty mitigation under this policy.

#2: Discovery of Violations Under Clean Air Act Title V Permit Applications

Q: Can violations or potential violations that are identified in a required compliance certification accompanying an initial application for a Clean Air Act (CAA) Title V operating permit be eligible for penalty mitigation under the final Audit policy?

A: Generally no, because the manner in which such violations are discovered normally will not satisfy the policy's requirement of "voluntary discovery." Under the final Audit Policy, the violation must be "identified voluntarily, and not through a legally mandated monitoring or sampling requirement prescribed by statute, regulation, permit, judicial or administrative order, or consent agreement." 60 Fed. Reg. at 66711. The regulations implementing Title V of the CAA require applicants to analyze comprehensively and describe completely the source's compliance status, 40 C.F.R. § 70.5(c)(8), and to include in the required compliance certification a statement that the certification is "based on information and belief formed after reasonable *inquiry*." [Emphasis added] 40 C.F.R. § 70.5(d). The comprehensive nature of the compliance analysis, together with the specific mandate to conduct an "inquiry" and submit a compliance certification, imposes an affirmative duty for Title V permit applicants to review the CAA requirements to which the source is subject, and to determine the source's compliance with each requirement. To do so, applicants must find and analyze any information needed to determine compliance status, including data generated by existing monitoring and sampling methods. Since an applicant for a Title V air operating permit cannot certify to compliance or noncompliance without first evaluating all available relevant information to determine whether violations exist, a CAA Title V permit applicant generally cannot claim that the discovery of violations or potential violations was voluntary. [2]

This does not foreclose the possibility that an entity might be able to demonstrate that its inquiry exceeded its obligations under § 70.5, but any such claim would have to be reviewed on a case-by-case basis. Moreover, if disclosures of noncompliance occur outside the context of the Title V permit application process, discovery of such violations may be considered voluntary and eligible for penalty mitigation under the final Audit Policy (e.g., where both the discovery and disclosure occur well in advance of, and are not prompted by, the application process). Similarly, disclosures occurring after the permit application process (e.g., prior to a permit decision, or after permit issuance or denial) potentially could involve voluntary discovery, such as where new or previously unforeseeable violations are discovered and disclosed. Such determinations, however, would be made on a case-by-case basis.

[2] EPA emphasizes that this approach is based on the unique language of the Title V permit application regulations. Where other statutory permit application programs (e.g., the RCRA hazardous waste permit program, the Clean Water Act NPDES permit program, the Clean Air Act Acid Rain permit program, the Safe Drinking Water Act Underground Injection Control program) do not impose a similarly comprehensive duty to inquire about, analyze, and report violations at the permit application stage, violations discovered pursuant to such permit application requirements may qualify as voluntary discovery and, thus, are potentially eligible for Audit Policy penalty mitigation.

#3: Consolidation of Similar Disclosures

Q: In order to comply with the prompt disclosure requirement under the final Audit Policy, must an entity planning to perform an audit of numerous similar facilities send a separate notification to EPA within 10 days of discovering each violation, or can the violator consolidate its disclosures and submit them to EPA later?

A: Consolidation of disclosures is acceptable in certain circumstances, provided the Audit Policy's "prompt disclosure" requirement is met. This provision recognizes EPA's need to have clear and timely notice of violations, so that the Agency can respond quickly and appropriately to potential health or environmental risks and can accurately evaluate a company's compliance status. 60 Fed. Reg. at 66708. Prompt disclosure is also evidence of the regulated entity's good faith in wanting to achieve or return to compliance as soon as possible. 60 Fed. Reg. at 66708-66709. The policy requires that disclosure be made within 10 days of discovery that a violation has occurred or may have occurred, except where an applicable statute or regulation requires reporting in a shorter time frame. The Agency has the flexibility to accept later disclosures in situations where "reporting within 10 days is not practical because the violation is complex and compliance cannot be determined within that period," as long as "the circumstances do not present a serious threat and the regulated entity meets its burden of showing that the additional time was needed to determine compliance status." 60 Fed. Reg. at 66708.

EPA encourages the conduct of intensive company-wide or multi-facility audits, and a consolidated reporting framework may be appropriate in certain circumstances. Specifically, although a consolidated reporting arrangement may take many forms depending on the duration and scope of the proposed audit, the audit must be completed expeditiously and the reporting arrangement must ensure that EPA receives sufficient specific information up front to allow it to respond to any health or environmental risks that may stem from the violations. At a minimum, this must include the identity and location of all facilities that may raise similar compliance concerns and a description of the potential violations. (EPA recognizes that the description of potential violations may be generic in nature where the numerous facilities being audited conduct similar operations.) Providing this minimal information within 10 days should not be an undue hardship, and it will be a significant help to EPA in its efforts to process requests for Audit Policy penalty mitigation in an expeditious manner.

As long as the initial disclosure contains this minimum information and complies with the time period set out in the final Audit Policy, the Agency recognizes that the prompt disclosure requirement can allow for such disclosures to be supplemented at a later time (e.g., the audit results concerning the suspected violations can be consolidated into a subsequent submission to EPA). In such cases, EPA would consider the prompt disclosure requirement to have been met because the timeliness of disclosure would be based upon the initial submission of information. The Agency notes, however, that it will consider disclosures to be untimely where factual inferences can be drawn about other probable violations (e.g., where the violator's operations and practices are homogeneous in nature) if the above-mentioned minimum information regarding such violations are not disclosed within the 10-day period specified in the final Audit Policy.

#4: Submitting Information Without Disclosing Specific Violations

Q: Do submissions of information required by law (e.g., late submittal of an EPCRA reporting form, late submittal of a Clean Water Act discharge monitoring report) meet the requirements for disclosure under the final Audit Policy where such submissions are unaccompanied by a written disclosure that a violation has or may have occurred?

A: No. Under the final Audit Policy, an entity must *fully* disclose that *specific violations* occurred or may have occurred, and such disclosure must be made promptly within the specified time period in order to be eligible for penalty mitigation. 60 Fed. Reg. at 66711. The conditions of the policy are not fulfilled by the mere disclosure of facts or other information. The policy's explicit reference to "specific violations" is meant to require clear notice to EPA that a compliance problem has occurred or exists, and protects the regulated entity by eliminating any doubt as to whether a disclosure has been made. Late submission of required information without any accompanying disclosure concerning the existence of possible violations does not constitute "full disclosure of a specific violation" under the Audit Policy. Full disclosure of potential violations is necessary for EPA to get "clear notice of the violations and the opportunity to respond if necessary, as well as an accurate picture of a given facility's compliance record." 60 Fed. Reg. at 66708. Without a specific reference to the fact that the information is being submitted late and that it constitutes or may constitute a violation, EPA will not have clear notice of the potential violations and its ability to respond to potential threats may be hampered.

#5: Requirement For Disclosures To Be In Writing and to EPA

Q: Why must disclosures under the final Audit Policy be in writing and to EPA?

A: Disclosures under the Audit Policy must be "in writing to EPA," 60 Fed. Reg. at 66711, because prompt written disclosure to EPA gives it "clear notice of the violations and the opportunity to respond if necessary, as well as an accurate picture of a given facility's compliance record." 60 Fed. Reg. at 66708. Also, the policy recognizes that government resources are limited. It serves the interests of both the disclosing entity and the government to be absolutely clear about the full character and extent of the disclosure. Otherwise, unnecessary energy is expended in determining whether an oral disclosure occurred. Also, requiring disclosures to be in writing and to EPA has the effect of expediting EPA's process of evaluating claims for penalty mitigation under the final Audit Policy. Where EPA receives oral notice of violation from those who would like Audit Policy penalty mitigation, Agency staff are encouraged to advise the disclosing entity as to the importance of putting the disclosure in writing.

#6: Definition Of When A Violation "May Have Occurred"

Q: At what point does a party have to disclose to EPA that a violation "may have occurred" in order to qualify for penalty mitigation under the final Audit Policy?

A: The final Audit Policy requires that a regulated entity fully disclose "a specific violation within 10 days (or such shorter period provided by law) after it has discovered that the violation has occurred, *or may have occurred*, in writing to EPA." 60 Fed. Reg. at 66711 [emphasis added]. The policy explains that the Agency added the phrase "or may have occurred" to respond to comments received on the Interim Audit Policy, and to clarify that where an entity has some doubt about the existence of a violation, the recommended course is for it to disclose and allow the regulatory authorities to make a definitive determination about whether the violation occurred. 60 Fed. Reg. at 66709.

The regulated entity should report possible violations to the Agency when there is a reasonable basis for concluding that the violations have occurred. Two components go into this analysis: (1) an evaluation of known facts; and (2) application of legal requirements to such facts. Absolute factual and legal certainty is not necessary in order to require disclosure under the policy. This is particularly true where there is a reasonable certainty as to the facts underlying potential violations. For example, if a company discovers a release violation due to inadequate design of equipment used at one facility and this same equipment is used at other facilities it owns throughout the country, an inference can be drawn that other violations may have occurred and the company should disclose these other possible violations to the Agency at the same time it discloses the initial violation. Although additional data concerning the other facilities may be disclosed to EPA more than 10 days later, the initial disclosure should include information as to the identity, location, and nature of the suspected violations at such other facilities (see Question and Answer #3 above). In this situation, the company should investigate its other facilities to verify whether the violations actually occurred, perform any necessary corrective measures or remediation, and comply with the other criteria articulated in the Audit Policy in order to receive penalty mitigation for these other violations.

Even where the facts underlying a possible violation are clearly known, there may be some doubt as to whether such facts give rise to a violation as a matter of law (e.g., due to differing legal interpretations). As long as there is an objectively reasonable factual basis upon which to base a possible violation, disclosure should occur and EPA will make a definitive determination concerning whether such facts actually present a violation of law.

#7: Disclosure Before Violations Occur

Q: If potential violations are disclosed before they occur, are they eligible for penalty reductions under the final Audit Policy?

A: Generally yes. For example, if the violations cannot be avoided despite the regulated entity's best efforts to comply (e.g., where an upcoming requirement to retrofit a tank cannot be met due to unforeseeable technological barriers), EPA may mitigate the gravity-based penalty once the violation actually occurs.

The policy requires violators to disclose violations fully and promptly, and it defines such prompt disclosure generally to require disclosure "within 10 days (or such shorter period provided by law) after it has discovered that the violation has occurred, or may have occurred." 60 Fed. Reg. at 66711. The use of the past tense in this phrase reflects EPA's recognition of the most common types of disclosure that occur, i.e., involving past violations (as opposed to possible future violations). Nevertheless, the essence of this requirement in the policy is on prompt self-disclosure of compliance deficiencies. The language requiring disclosure generally "within 10 days" should not be read to preclude disclosure as early as possible, including before the violation actually has occurred. Once the violation actually occurs, these violations may be eligible for Audit Policy penalty mitigation where a violator can establish to EPA's satisfaction based on objective evidence that it has employed all best efforts to avoid the violations. By allowing for disclosure as soon as possible, the policy may even encourage potential violators to work with EPA in a way that can minimize or eliminate the compliance concern before it actually occurs.

#8: Determining Whether Repeat Violations Bar Penalty Mitigation

Q: How does EPA determine if disclosed violations fall within the 3-year time period specified in the final Audit Policy's repeat violations provision?

A: Violations are considered to be repeat violations that are not eligible for penalty mitigation when the subsequently discovered and disclosed violations are: (1) the same or closely related to the original violations and have occurred at the same facility within the past three years; or (2) part of a pattern of federal, State, or local violations by the company's parent organization, if any, within the past five years. 60 Fed. Reg. at 66712. The purpose of the repeat violations provision in the policy is to "deter irresponsible behavior and protect the public and environment." 60 Fed. Reg. at 66706. It also "provides companies with a continuing incentive to prevent violations, without being unfair to regulated entities responsible for managing hundreds of facilities." 60 Fed. Reg. at 66706.

Two questions must be answered in order to determine whether the violations are repeat violations ineligible for penalty mitigation under the final Audit Policy: (1) when the 3-year period begins; and (2) whether the violations which are disclosed, and for which the violator seeks penalty mitigation, fall within the subsequent 3-year period. As to the first question, the 3-year period begins to run when the violator first receives notice of the original violations. [3] Such notice can take several forms, including notification by EPA or a State or local agency through receipt of a judicial or administrative order, consent agreement or order, complaint, conviction or plea agreement, notice of violation such as a letter or inspection report, notice during an inspection, or even through a third party complaint (e.g., in a citizen suit). A violator also may be put on notice of particular environmental violations when it obtains penalty mitigation for such violations from EPA, a State, or a local agency (e.g., under EPA's Small Business Compliance Incentives policy). As noted in the final Audit Policy, these circumstances collectively "identify situations in which the regulated community has had clear notice of its noncompliance and an opportunity to correct." 60 Fed. Reg. at 66709. Where a government or third party has given such notice of noncompliance, the same or closely related violations cannot be repeated within the subsequent 3-year period following such notice. Thus, the 3-year period begins to run when such clear notice of noncompliance is received, [4] *without regard to when the original violations cited in that notice actually occurred.*

As to the second question, EPA looks to whether the disclosed violations actually *occurred* within the 3-year period following the original notice/mitigation. If the violations occurred within this period, they would be considered repeat violations and would not be eligible for penalty mitigation under the policy because corrective measures should have prevented such a recurrence. If, however, those violations occurred either before the original notice of noncompliance was received by the violator or after the 3-year period running from the original notice, they would not be considered repeat violations under the final Audit Policy. Thus, repeat violations are determined by the date that such subsequent violations occur, *without regard to when notice of such subsequent violations is given to the violator.*

---

[3] Typically, the Agency will provide written notice of violations because it recognizes the significant benefits to providing such notice in writing, including the minimization of uncertainty concerning when such notice was received and its contents.

[4] In determining whether a "pattern of violations" has occurred within the past five years, notice of earlier violations is less relevant. The inquiry into whether a pattern exists more appropriately focuses on the dates that all violations actually occurred.

#9: Informal Enforcement Responses and Repeat Violations

Q: Do non-penalty enforcement responses such as notices of violation or warning letters constitute a previous violation for purposes of the policy's repeat violations provision?

A: Generally yes. The repeat violations provision defines such violations to encompass formal and informal enforcement responses, and nonenforcement responses that result in penalty mitigation. 60 Fed. Reg. at 66712 (specifically including a reference to any violation identified in a " . . . notice of violation.") The common theme is that a government entity has notified the violator that it believes a violation has occurred, and, as a result, the government reasonably can expect the regulated entity to take whatever steps are necessary to prevent similar violations.

Notices of violation (NOVs) and warning letters may be worded in many different ways (e.g., sometimes alleging particular violations and sometimes speaking only generally in terms of an upcoming need to comply with a new requirement). The title or caption on such documents is not necessarily dispositive for purposes of the repeat violations provision. The substance of the NOV, warning letter, or other correspondence -- usually found in the text of such documents -- determines whether it provides notice of an alleged violation. If such documents give the regulated entity notice of allegations of specific deficiencies in compliance and those allegations are not later withdrawn or defeated, any subsequent violations would be considered repeat violations if they occurred within the time periods outlined in the final Audit Policy. If, however, the substance of the document merely provides a prospective statement of new requirements not yet violated (e.g., in a compliance assistance guide), the notice or letter would not be considered an enforcement response for purposes of the repeat violations provision.

#10: Further Penalty Reductions Beyond The Audit Policy

Q: In cases where a 75% gravity-based penalty reduction is appropriate under the final Audit Policy, may the penalty be further reduced in consideration of supplemental environmental projects (SEPs), good faith, or "other factors as justice may require" as long as any economic benefit of noncompliance (EBN) is recovered?

A: Where a 75% gravity-based penalty reduction is appropriate under the final Audit Policy, further penalty reductions may be obtained for activities that go beyond the specific conditions required under the final Audit Policy. For example, further reductions generally may be warranted where a violator agrees to undertake a supplemental environmental project (SEP) and the project meets the criteria established for SEPs in the Agency's SEP Policy. The Audit Policy, however, precludes "additional penalty mitigation for satisfying the same or similar conditions." 60 Fed. Reg. at 66712. Thus, if the particular project that the violator proposes to undertake as a SEP must be carried out in order to receive a penalty reduction under the audit policy, additional credit may not be given under the SEP Policy. For example, where EPA determines that an audit must be carried out at a large complex facility in order to prevent a recurrence of violations, SEP credit may not be provided for conducting this audit. Note, however, that SEP credit could be provided if EPA determined that such an audit was not necessary to prevent a recurrence of violations.

Similarly, additional penalty reductions for good faith and "other factors as justice may require" may be provided only where the specific activities justifying those reductions are not required in order to receive a 75% penalty reduction under the Audit Policy. Thus, the prompt disclosure of a violation ordinarily would not qualify a company for additional good faith penalty reductions since the disclosure clearly is required by the Audit Policy. On the other hand, a violator that takes steps to correct and remediate a violation in a manner that is above and beyond the steps normally expected in order to qualify for mitigation under the Audit Policy (e.g., quicker or more extensive correction) may qualify for a good faith reduction.

As to economic benefit of noncompliance (EBN), the Audit Policy restates the Agency's longstanding position that recovery of any significant EBN is important in order to preserve a level playing field for the regulated community. The Audit Policy does not revise or modify any other Agency policies (e.g., the SEP Policy) concerning recovery of EBN.

#11: Inconsistencies Between Audit Policy and Statute-Specific Penalty Policies

Q: Where statute-specific penalty policies provide for different penalty reductions in cases of self-policing or voluntary disclosure, which policy takes precedence?

A: The final Audit Policy states clearly that it "supersedes any *inconsistent* provisions in media-specific penalty or enforcement policies" but that such policies continue to apply where they are not inconsistent. [Emphasis added] 60 Fed. Reg. at 66712. (If not inconsistent, the Audit Policy states that such existing EPA enforcement policies continue to apply in conjunction with the Audit Policy provided that the regulated entity has not already received penalty mitigation for similar self-policing or voluntary disclosure activities. 60 Fed. Reg. at 66712.) In most circumstances, the final Audit Policy will result in a greater penalty mitigation than under any media-specific penalty or enforcement policy. In such cases, the Audit Policy's greater penalty reductions take precedence.

In some circumstances, however, the Audit Policy may provide for less penalty mitigation (e.g., 75% penalty reductions where the violations are not discovered through a systematic discovery, as opposed to potential 80% or greater reductions for such cases under another penalty policy). Here too, the Audit Policy takes precedence. This is because the Audit Policy is a more recent and more detailed statement as to the precise national strategy for providing incentives for self-policing, prompt disclosure, and expeditious correction and remediation. Therefore, in order to qualify for 75% penalty reductions or greater for activities related to voluntary discovery, disclosure, and remediation/correction, the Audit Policy provides a minimum standard of behavior that must be met.[5] As long as the criteria in the Audit Policy are met, the certainty and national consistency provided by the penalty reductions in the Audit Policy would apply.

[5] For activities unrelated to voluntary discovery, disclosure, and remediation/correction, additional penalty mitigation is available as described in Question and Answer #10.

#12: Applicability of Audit Policy in Litigation

Q: Why is use of the final Audit Policy limited to settlement proceedings rather than being applicable also to adjudicatory proceedings?

A: The final Audit Policy expressly limits its applicability to settlement contexts, and states that "[i]t is not intended for use in pleading, at hearing, or trial," 60 Fed. Reg. at 66712, because the Agency wanted to create these incentives for self-policing, prompt disclosure, and expeditious correction in a manner that most effectively allocates scarce Agency resources and reduces transaction costs for the regulated community. Subjecting the policy to litigation and judicial review is inconsistent with this carefully considered approach to streamlining the enforcement process. As noted in the final Audit Policy, EPA intends to apply the policy uniformly in settlements across all of the Agency's enforcement programs. However, where enforcement matters are not resolved through settlement, but instead proceed to litigation, the Audit Policy is not applicable, and any attempt to apply the policy in such contexts is inappropriate.

#13: Degree of Conformance to The Audit Policy's Conditions

Q: Must the specific conditions of the final Audit Policy be met in order to qualify for penalty reductions, or is consistency with the general thrust of the policy sufficient (e.g., where disclosure of violations occurs within 30 days but not within the 10-day period specified in the policy)?

A: The specific conditions must be met. Although the final Audit Policy is intended as guidance, the Summary section states EPA's intent to apply the policy uniformly across the Agency's enforcement programs. 60 Fed. Reg. at 66706. Those who disclose violations after the policy's January 22, 1996 effective date have been put on notice as to the behavior that is expected in order to get penalty reductions. EPA also has the discretion to apply the policy to disclosures occurring prior to the policy's effective date. In such cases, however, if the policy's conditions have not been met, EPA instead will utilize the flexibility provided under its statute-specific penalty policies to recognize good faith efforts and determine the extent to which penalty reductions are appropriate.

#14: EPA Inspections While Audits Are Being Performed

Q: Should the government agree to no inspections, fewer inspections, or other limits on its enforcement authorities during the time periods in which an audit is being performed?

A: Although not explicitly addressed in the final Audit Policy, EPA's longstanding policy is not to agree to limit its non-penalty enforcement authorities as a provision of settlement or otherwise. While EPA may consider such a facility to be a lower inspection priority than a facility that is not known to be auditing, whether and when to conduct an inspection does, and should, remain a matter of Agency discretion. If the Agency's inspection or other enforcement authorities were limited, this could compromise the Agency's ability to respond to citizen complaints or site conditions posing a potentially serious threat to human health or the environment, or its ability to assure the public as to the compliance status of a given facility.

#15: Impact Of Prior Owner or Operator's Pattern of Violations On Subsequent Owner/Operator's Eligibility Under The Audit Policy

Q: If an owner or operator ("owner/operator") discovers at its facility a violation that began when the facility was owned and/or operated by a previous entity, may the subsequent owner/operator receive penalty mitigation under the final Audit Policy? May the previous owner/operator also obtain such mitigation?

A: The subsequent owner/operator may obtain penalty mitigation if it meets all of the policy's conditions, including prompt disclosure to EPA as soon as it discovers the violation. For purposes of the final Audit Policy, the previous owner/operator's actions will not be imputed to the successor, except where the relationship between the companies makes imputing such actions appropriate (e.g., where the subsequent owner/operator is a wholly owned subsidiary of, and controlled by, the previous owner operator). For example, if there has been an arm's length transaction between the entities and they are considered separate (e.g., where the subsequent owner/operator is not considered merely a continuing enterprise), there may be situations where a subsequent owner/operator may receive penalty mitigation while the previous owner/operator cannot. One such situation would be where the previous owner/operator had discovered a violation during the time that it owned the facility but did not disclose such a violation to EPA. In such a case, the previous owner would fail to meet the policy's prompt disclosure condition and it would be ineligible for penalty mitigation under the final Audit Policy. If the subsequent owner/operator disclosed the violation to EPA promptly after it discovered the violation, it still could be eligible for penalty mitigation under the Audit Policy. Thus, separate entities are considered independently, and applicability of the policy is based on the merits of each individual entity's actions.

#16: Resolving Audit Policy Determinations Through Informal Or Formal Means

Q: Must all penalty mitigation based upon application of the final Audit Policy be effectuated through one uniform type of document such as a formal settlement agreement or is there flexibility to use other mechanisms such as informal letters?

A: Where applicability of the policy arises in the context of settling a pending enforcement action, the penalty mitigation will be effectuated through the normal process used to settle pending cases in the various media-specific programs that EPA enforces -- normally through formal enforceable settlement agreements.[6]

Even in enforcement matters that have not yet matured into pending cases (i.e., before any complaint is filed), an enforceable order normally is used in order to ensure payment of any penalties and/or completion of any compliance obligations. This would occur: (1) when the final Audit Policy would provide for 75% mitigation; (2) if an economic benefit penalty component was being recovered; or (3) where any compliance measures are necessary.

EPA specifically stated in the policy that it may require a regulated entity to enter into a "publicly available written agreement, administrative consent order or judicial consent decree, particularly where compliance or remedial measures are complex or a lengthy schedule for attaining and maintaining compliance or remediating harm is required." 60 Fed. Reg. at 66711. EPA also notes that it may require as a condition of settlement that any penalty mitigation premised on the final Audit Policy be contingent upon the completeness and accuracy of the violator's representations.

In the absence of a pending enforcement action, where 100% of the gravity-based penalty is being waived and there is no economic benefit penalty component and no outstanding compliance obligations, several of EPA's media-specific enforcement policies do not require that resolution of the matter occur through a formal settlement document. The final Audit Policy applies to enforcement settlements for all the regulatory statutes under which EPA seeks gravity based penalties. Flexibility is necessary to meet the myriad settlement conditions that may be employed as part of such settlements and the numerous objectives to be accomplished. The use of a uniform document for self-disclosure settlements could hamper the settlement process and may even prevent EPA from meeting some objectives of the underlying case (e.g., the need to expedite resolution of the case). Regardless of the approach taken to effectuate such penalty mitigations, EPA will track this data for purposes of implementing the repeat violations provision and it will "independently of FOIA, make publicly available any compliance agreements reached under the policy." 60 Fed. Reg. 66709.

---

[6] In matters where judicial action is contemplated, EPA consults with the Department of Justice (DOJ) in the Audit Policy determination. Where judicial actions are pending, DOJ approves and files formal consent decrees.

Friday
December 22, 1995

Federal Register

Part III

Environmental Protection Agency

Incentives for Self-Policing: **Discovery, Disclosure, Correction** and Prevention of Violations; Notice

ENVIRONMENTAL PROTECTION AGENCY

[FRL–5400–1]

Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final Policy Statement.

SUMMARY: The Environmental Protection Agency (EPA) today issues its final policy to enhance protection of human health and the environment by encouraging regulated entities to voluntarily discover, and disclose and correct violations of environmental requirements. Incentives include eliminating or substantially reducing the gravity component of civil penalties and not recommending cases for criminal prosecution where specified conditions are met, to those who voluntarily self-disclose and promptly correct violations. The policy also restates EPA's long-standing practice of not requesting voluntary audit reports to trigger enforcement investigations. This policy was developed in close consultation with the U.S. Department of Justice, states, public interest groups and the regulated community, and will be applied uniformly by the Agency's enforcement programs.

DATES: This policy is effective January 22,1996.

FOR FURTHER INFORMATION CONTACT: Additional documentation relating to the development of this policy is contained in the environmental auditing public docket. Documents from *the* docket may be obtained by calling (202) 260-7548, requesting an index to docket #C–94–01, and faxing document requests to (202) 2604400. Hours of operation are 8 a.m. to 5:30 p.m., Monday through Friday, except legal holidays. Additional contacts are Robert Fentress or Brian Riedel, at (202) 564-4107.

SUPPLEMENTARY INFORMATION:

I. Explanation of Policy

A. Introduction

The Environmental Protection Agency today issues its final policy to enhance protection of human health and *the* environment by encouraging regulated entities to discover voluntarily, disclose, correct and prevent violations of federal environmental law. Effective 30 days from today, where violations are found through voluntary environmental audits or efforts that reflect a regulated entity's due diligence, and are promptly disclosed and expeditiously corrected, EPA will not seek gravity-based (i.e., non-economic benefit) penalties and will generally not recommend criminal prosecution against the regulated entity. EPA will reduce gravity-based penalties by 75% for violations that are voluntarily discovered, and are promptly disclosed and corrected, even if not found through a formal audit or due diligence. Finally, the policy restates EPA's long-held policy and practice to refrain from routine requests for environmental audit reports.

The policy includes important safeguards to deter irresponsible behavior and protect the public and environment. For example, in addition to prompt disclosure and expeditious correction, the policy requires companies to act to prevent recurrence of the violation and to remedy any environmental harm which may have occurred. Repeated violations or those which result in actual harm or may present imminent and substantial endangerment are not eligible for relief under this policy, and companies will not be allowed to gain an economic advantage over their competitors by delaying their investment in compliance. Corporations remain criminally liable for violations that result from conscious disregard of their obligations under the law, and individuals are liable for criminal misconduct.

The issuance of this policy concludes EPA's eighteen-month public evaluation of the optimum way to encourage voluntary self-policing while preserving fair and effective enforcement. The incentives, conditions and exceptions announced today reflect thoughtful suggestions from the Department of Justice, state attorneys general and local prosecutors, state environmental agencies, the regulated community, and public interest organizations. EPA believes that it has found a balanced and responsible approach, and will conduct a study within three years to determine the effectiveness of this policy.

B. Public Process

One of the Environmental Protection Agency's most important responsibilities is ensuring compliance with federal laws that protect public health and safeguard the environment. Effective deterrence requires inspecting, bringing penalty actions and securing compliance and remediation of harm. But EPA realizes that achieving compliance also requires the cooperation of thousands of businesses and other regulated entities subject to these requirements. Accordingly, in May of 1994, the Administrator asked the Office of Enforcement and Compliance Assurance (OECA) to determine whether additional incentives were needed to encourage voluntary disclosure and correction of violations uncovered during environmental audits.

EPA began its evaluation with a two-day public meeting in July of 1994, in Washington, D.C., followed by a two-day meeting in San Francisco on January 19, 1995 with stakeholders from industry, trade groups, state environmental commissioners and attorneys general, district attorneys, public interest organizations and professional environmental auditors. The Agency also established and maintained a public docket of testimony presented at these meetings and all comment and correspondence submitted to EPA by outside parties on this issue.

In addition to considering opinion and "information from stakeholders, the Agency examined other federal and state policies related to self-policing, self-disclosure and correction. The Agency also considered relevant surveys on auditing practices in the private sector. EPA completed the first stage of this effort with the announcement of an interim policy on April 3 of this year, which defined conditions under which EPA would reduce civil penalties and not recommend criminal prosecution for companies that audited, disclosed, and corrected violations.

Interested parties were asked to submit comment on the interim policy by June 30 of this year (60 FR 16875), and EPA rec-eived over 300 responses from a wide variety of private and public organizations. (Comments on the interim audit policy are contained in the Auditing Policy Docket, hereinafter, "Docket".) Further, the American Bar Association SONREEL Subcommittee hosted five days of dialogue with representatives from the re.slated industry, states and public interest organizations in June and September of this year, which identified options for strengthening the interim policy. The changes to the interim policy announced today reflect insight gained through comments submitted to EPA, the ABA dialogue, and the Agency's practical experience implementing the interim policy.

C. *Purpose*

This policy is designed to encourage greater compliance with laws and regulations that protect human health and the environment. It promotes a higher standard of self-policing by waiving gravity-based penalties for

violations that are promptly disclosed and corrected, and which were discovered through voluntary audits or compliance management systems that demonstrate due diligence. To further promote compliance, the policy reduces gravity-based penalties by 75% for any violation voluntarily discovered and promptly disclosed and corrected, even if not found through an audit or compliance management system.

EPA's enforcement program provides a strong incentive for responsible behavior by imposing stiff sanctions for noncompliance. Enforcement has contributed to the dramatic expansion of environmental auditing measured in numerous recent surveys. For example, more than 90% of the corporate respondents to a 1995 Price-Waterhouse survey who conduct audits said that one of the reasons they did so was to find and correct violations before they were found by government inspectors. (A copy of the Price-Waterhouse survey is contained in the Docket as document VIII-A-76.)

At the same time, because government resources are limited, maximum compliance cannot be achieved without active efforts by the regulated community to police themselves. More than half of the respondents to the same 1995 Price-Waterhouse survey said that they would expand environmental auditing in exchange for reduced penalties for violations discovered and corrected. While many companies already audit or have compliance management programs, EPA believes that the incentives offered in this policy will improve the frequency and quality of these self-monitoring efforts.

D. Incentives for Self-Policing

Section C of EPA's policy identifies the major incentives that EPA will provide to encourage self-policing, self-disclosure, and prompt self-correction. These include not seeking gravity-based civil penalties or reducing them by 75%, declining to recommend criminal prosecution for regulated entities that self-police, and refraining from routine requests for audits. (As noted in Section C of the policy, EPA has refrained from making routine requests for audit reports since issuance of its 1986 policy on environmental auditing.)

1. Eliminating Gravity-Based Penalties

Under Section C(l) of the policy, EPA will **not seek gravity-based penalties for violations found through auditing that are promptly disclosed and corrected.** Gravity-based penalties will also be **waived for violations found through any documented procedure for *if-policing, where the company can show that it has a** compliance management program that meets the criteria for due diligence in Section B of the policy.

Gravity-based penalties (defined in Section B of the policy) generally reflect the seriousness of the violator's behavior. EPA has elected to waive such penalties for violations discovered through due diligence or environmental audits, recognizing that these voluntary efforts play a critical role in protecting human health and the environment by identifying, correcting and ultimately preventing violations. All of the conditions set forth in Section D, which include prompt disclosure and expeditious correction, must be satisfied for gravity-based penalties to be waived.

As in the interim policy, EPA reserves the right to collect any economic benefit that may have been realized as a result of noncompliance, even where companies meet all other conditions of the policy. Economic benefit may be waived, however, where the Agency determines that it is insignificant.

After considering public comment, EPA has decided to retain the discretion to recover economic benefit for two reasons. First, it provides an incentive to comply on time. Taxpayers expect to pay interest or a penalty fee if their tax payments are late; the same principle should apply to corporations that have delayed their investment in compliance. Second, it is fair because it protects responsible companies from being undercut by their noncomplying competitors, thereby preserving a level playing field. The concept of recovering economic benefit was supported in public comments by many stakeholders, including industry representatives (see, e.g., Docket, II-F-39, II–F–28, and II-F-18).

z. 75% Reduction of Gravity

The policy appropriately limits the complete waiver of gravity-based civil penalties to companies that meet the higher standard of environmental auditing or systematic compliance management. However, to provide additional encouragement for the kind of self-policing that benefits the public, gravity-based penalties will be reduced by 75% for a violation that is voluntarily discovered, promptly disclosed and expeditiously corrected, even if it was not found through an environmental audit and the company cannot document due diligence. EPA expects that this **will encourage companies to come forward** and work with the Agency to resolve environmental problems and begin to develop an effective compliance management program.

Gravity-based penalties will be reduced 75% only where the company meets all conditions in Sections D(2) through D(9). EPA has eliminated language from the interim policy indicating that penalties may be reduced "up to" 75% where "most" conditions are met, because the Agency believes that all of the conditions in D(2) through D(9) are reasonable end essential to achieving compliance. This change also responds to requests for greater clarity end predictability.

3. No Recommendations for Criminal Prosecution

EPA has never recommended criminal prosecution of a regulated entity based on voluntary disclosure of violations discovered through audits and disclosed to the government before an investigation was already under way. Thus, EPA will not recommend criminal prosecution for a regulated entity that uncovers violations through environmental audits or due diligence, promptly discloses and expeditiously corrects those violations, and meets all other conditions of Section D of the policy.

This policy is limited to good actors, and therefore has important limitations. It will not apply, for example, where corporate officials are consciously involved in or willfully blind to violations, or conceal or condone noncompliance. Since the regulated entity must satisfy all of the conditions of Section D of the policy, violations that caused serious harm or which may pose imminent and substantial endangerment to-human health or the environment are not covered by this policy. Finally, EPA reserves the right to recommend prosecution for the criminal conduct of any culpable individual.

Even where all of the conditions of this policy are not met, however, it is important to remember that EPA may decline to recommend prosecution of a company or individual for many other reasons under other Agency enforcement policies. For example, the Agency may decline to recommend prosecution where there is no significant harm or culpability and the individual or corporate defendant has cooperated fully.

Where a company has met the conditions for avoiding a recommendation for criminal prosecution under this policy, it will **not face any civil** liability for **gravity-based penalties. That is because the same conditions for discovery, disclosure, end correction apply in both cases. This represents a clarification of the interim policy, not a-substantive change.**

4. No Routine Requests for Audits -

EPA is reaffirming its policy, in effect since 1986, to refrain from routine requests for audits. Eighteen months of public testimony and debate have produced no evidence that the Agency has deviated, or should deviate, from this policy.

If the Agency has independent evidence of a violation, it may seek information needed to establish the extent and nature of the problem and the degree of culpability. In general, however, an audit which results in prompt correction clearly will reduce liability, not expand it. Furthermore, a review of the criminal docket did not reveal a single criminal prosecution for violations discovered as a result of an audit self-disclosed to the government.

E. Conditions

Section D describes the nine conditions that a regulated entity must meet in order for the Agency not to seek (or to reduce) gravity-based penalties under the policy. As explained in the Summary above, regulated entities that meet all nine conditions will not face gravity-based civil penalties, and will generally not have to fear criminal prosecution. Where the regulated entity meets all of the conditions except the first (D(l)), EPA will reduce gravity-based penalties by 75%.

1. Discovery of the Violation Through an Environmental Audit or Due Diligence

Under Section D(l), the violation must have been discovered through either (a) an environmental audit that is systematic, objective, and periodic as defined in the 1986 audit policy, or (b) a documented, systematic procedure or practice which reflects the regulated entity's due diligence in preventing, detecting, and correcting violations. The interim policy provided full credit for any violation found through "voluntary self-evaluation," even if the evaluation did not constitute an audit. In order to receive full credit under the final policy, any self-evaluation that is not an audit must be part of a "due diligence" program. Both "environmental audit" and "due diligence" are defined in Section B of the policy.

Where the violation is discovered through a "systematic procedure or practice" which is not an audit, the regulated entity will be asked to document how its program reflects the criteria for due diligence as defined in Section B of the policy. These criteria, which are adapted from existing codes of practice such as the 1991 Criminal Sentencing Guidelines, were fully discussed during the ABA dialogue. The criteria are flexible enough to accommodate different types and sizes of businesses. The Agency recognizes that a variety of compliance management programs may develop under the due diligence criteria, and will use its review under this policy to determine whether basic criteria have been met.

Compliance management programs which train and motivate production staff to prevent, detect and correct violations on a daily basis are a valuable complement to periodic auditing. The policy is responsive to recommendations received during public comment and from the ABA dialogue to give compliance management efforts which meet the criteria for due diligence the same penalty reduction offered for environmental audits. (See, e.g., II–F–39, II-E-18, and II-G-18 in the Docket.)

EPA may require as a condition of penalty mitigation that a description of the regulated entity's due diligence efforts be made publicly available. The Agency added this provision in response to suggestions from environmental groups, and believes that the availability of such information will allow the public to judge the adequacy of compliance management systems, lead to enhanced compliance, and foster greater public trust in the integrity of compliance management systems.

2. Voluntary Discovery and Prompt Disclosure

Under Section D(2) of the final policy, the violation must have been identified voluntarily, and not through a monitoring, sampling, or auditing procedure that is required by statute, regulation, permit, judicial or administrative order, or consent agreement. Section D(4) requires that disclosure of the violation be prompt and in writing. To avoid confusion and respond to state requests for greater clarity, disclosures under this policy should be made to EPA. The Agency will work closely with states in implementing the policy.

The requirement that discovery of the violation be voluntary is consistent with proposed federal and state bills which would reward those discoveries that the regulated entity can legitimately attribute to its own voluntary efforts.

The policy gives three specific examples of discovery that would not be voluntary, and therefore would not be eligible for penalty mitigation: emissions violations detected through a required continuous emissions monitor, violations of NPDES discharge limits found through prescribed monitoring, and violations discovered through a compliance audit required to be performed by the terms of a consent order or settlement agreement.

The final policy generally applies to any violation that is voluntarily discovered, regardless of whether the violation is required to be reported. This definition responds to comments "pointing out that reporting requirements are extensive, and that excluding them from the policy's scope would severely limit the incentive for self-policing (see, *e.g.*, II–C–48 in the Docket).

The Agency wishes to emphasize that the integrity of federal environmental law depends upon timely and accurate reporting. The public relies on timely and accurate reports from the regulated community, not only to measure compliance but to evaluate health or environmental risk and gauge progress in reducing pollutant loadings. EPA expects the policy to encourage the kind of vigorous self-policing that will serve these objectives, and not to provide an excuse for delayed reporting. Where violations of reporting requirements are voluntarily discovered, they must be promptly reported (as discussed below). Where a failure to report results in imminent and substantial endangerment or serious harm, that violation is not covered under this policy (see Condition D(8)). The policy also requires the regulated entity to prevent recurrence of the violation, to ensure that noncompliance with reporting requirements is not repeated. EPA will closely scrutinize the effect of the policy in furthering the public interest in timely and accurate reports from the regulated community.

Urider Section D(4), disclosure of the violation should be made within 1c days of its discovery, and in writing to EPA. Where a statute or regulation requires reporting be made in less than 10 days, disclosure should be made within the time limit established by law. Where reporting within ten days is not practical because the violation is complex and compliance cannot be determined within that period, the Agency may accept later disclosures if the circumstances do not present a serious threat and the regulated entity meets its burden of showing that the additional time was needed to determine compliance status.

This condition recognizes that it is critical for EPA to get timely reporting of violations in order that it might have clear notice of the violations and the opportunity to respond if necessary, as well as an accurate picture of a given facility's compliance record. Prompt disclosure is also evidence of the regulated entity's good faith in wanting

to achieve or return to compliance as soon as possible.

In the final policy, the Agency has added the words, "or may have occurred," to the sentence, "The regulated entity fully discloses that a specific violation has occurred, or may have occurred * * *." This change, which was made in response to comments received, clarifies that where an entity has some doubt about the existence of a violation, the recommended course is for it to disclose and allow the regulatory authorities to make a definitive determination.

In general, the Freedom of Information Act will govern the Agency's release of disclosures made pursuant to this policy. EPA will, independently of FOIA, make publicly available any compliance agreements reached under the policy (see Section H of the policy), as well as descriptions of due diligence programs submitted under Section D.1 of the Policy. Any material claimed to be Confidential Business Information will be treated in accordance with EPA regulations at 40 C.F.R. Part 2.

3. Discovery and Disclosure Independent of Government or Third Party Plaintiff

Under Section D(3), in order to be "voluntary", the violation must be identified and disclosed by the regulated entity prior to: the commencement of a federal state or local agency inspection, investigation, or information request; notice of a citizen suit; legal complaint by a third party; the reporting of the violation to EPA by a "whistleblower" employee; and imminent discovery of the violation by a regulatory agency.

This condition means that regulated entities must have taken the initiative to find violations and promptly report them, rather than reacting to knowledge of a pending enforcement action or third-party complaint. This concept was reflected in the interim policy and in federal and state penalty immunity laws and did not prove controversial in the public comment process.

4. Correction and Remediation

Section D(5) ensures that, in order to receive the penalty mitigation benefits available under the policy, the regulated entity not only voluntarily discovers and promptly discloses a violation, but expeditiously corrects it, remedies any harm caused by that violation (including responding to any spill and carrying out any removal or remedial action required by law), and expeditiously certifies in writing to appropriate state, local and EPA authorities that violations have been corrected. It also enables EPA to ensure that the regulated entity will be publicly accountable for its commitments through binding written agreements, orders or consent decrees where necessary.

The final policy requires the violation to be corrected within 60 days, or that the regulated entity provide written notice where violations may take longer to correct. EPA recognizes that some violations can and should be corrected immediately, while others (e.g., where capital expenditures are involved), may take longer than 60 days to correct. In all cases, the regulated entity will be expected to do its utmost to achieve or return to compliance as expeditiously as possible.

Where correction of the violation depends upon issuance of a permit which has been applied for but not issued by federal or state authorities, the Agency will, where appropriate, make reasonable efforts to secure timely review of the permit.

5. Prevent Recurrence

Under Section D(6), the regulated entity must agree to take steps to prevent a recurrence of the violation, including but not limited to improvements to its environmental auditing or due diligence efforts. The final policy makes clear that the preventive steps may include improvements to a regulated entity's environmental auditing or due diligence efforts to prevent recurrence of the violation.

In the interim policy, the Agency required that the entity implement appropriate measures to prevent a recurrence of the violation, a requirement that operates prospectively. However, a separate condition in the interim policy also required that the violation not indicate "a failure to take appropriate steps to avoid repeat or recurring violations"—a requirement that operates retrospectively. In the interest of both clarity and fairness, the Agency has decided for purposes of this condition to keep the focus prospective and thus to require only that steps be taken to prevent recurrence of the violation after it has been disclosed.

6. No Repeat Violations

In response to requests from commenters (see, e.g., II-F-39 and II-G 18 in the Docket), EPA has established "bright lines" to determine when previous violations will bar a regulated entity from obtaining relief under this policy. These will help protect the public and responsible companies by ensuring that penalties are not waived for repeat offenders. Under condition D(7), the same or closely-related violation must not have occurred "previously within the past three years at the same facility, or be part of a pattern of violations on the regulated entity's part over the past five years. This provides companies with a continuing incentive to prevent violations, without being unfair to regulated entities responsible for managing hundreds of facilities. It would be unreasonable to provide unlimited amnesty for repeated violations of the same requirement.

The term "violation" includes any violation subject to a federal or state civil judicial or administrative order, consent agreement, confliction or plea agreement. Recognizing that minor violations are sometimes settled without a formal action in court, the term also covers any act or omission for which the regulated entity has received a penalty reduction in the past. Together, these conditions identify situations in which the regulated community has had clear notice of its noncompliance and an opportunity to correct.

7. Other Violations Excluded

Section D(8) makes clear that penalty reductions are not available under this policy for violations that resulted in serious actual harm or which may have presented an imminent and substantial endangerment to public health or the environment. Such events indicate a serious failure (or absence) of a self-policing program, which should be designed to prevent such risks, and it would seriously undermine deterrence to waive penalties for such violations. These exceptions are responsive to suggestions from public interest organizations, as well as other commenters. (See, e.g., II-F-39 and II-G-18 in the Docket.)

The final policy also excludes penalty reductions for violations of the specific terms of any order, consent agreement, or plea agreement. (See, II-E-60 in the Docket.) Once a consent agreement has been negotiated, there is little incentive to comply if there are no sanctions for violating its specific requirements. The exclusion in this section applies to violations of the terms of any response, removal or remedial action covered by a written agreement.

8. Cooperation

Under Section D(9), the regulated entity must cooperate as required by EPA and provide information necessary to determine the applicability of the policy. This condition is largely unchanged from the interim policy. In the final policy, however, the Agency has added that "cooperation" includes

assistance in determining the facts of any related violations suggested by the disclosure, as well as of the disclosed violation itself. This was added to allow the agency to obtain information about any violations indicated by the disclosure, even where the violation is not initially identified by the regulated entity.

F. Opposition to Privilege

The Agency remains firmly opposed to the establishment of a statutory evidentiary privilege for environmental audits for the following reasons:

1. Privilege, by definition, invites secrecy, instead-of the openness needed to build public trust in industry's ability to self-police. American law reflects the high value that the public places on fair access to the facts. The Supreme Court, for example, has said of privileges that. "[w]hatever their origins, these exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth." *United States* v. *Nixon*, **418** U.S. 683 (1974). Federal courts have unanimously refused to recognize a privilege for environmental audits in the context of government investigations. See, e.g., *United States* v. *Dexter*, 132 F.R.D. 8, 9-10 (D.Corm. 1990) (application of a privilege "would effectively impede [EPA's] ability to enforce the Clean Water Act, and would be contrary to stated public policy.")

2. Eighteen months have failed to produce any evidence that a privilege is needed. Public testimony on the interim policy confirmed that EPA rarely uses audit reports as evidence. Furthermore, surveys demonstrate that environmental auditing has expanded rapidly over the past decade without the stimulus of a privilege. Most recently, the 1995 Price Waterhouse survey found that those few large or mid-sized companies that do not audit generally do not perceive any need to; concern about confidentiality ranked as one of the least important factors in their decisions.

3. A privilege would invite defendants to claim as "audit" material almost any evidence the government needed to establish a violation or determine who was responsible. For example, most audit privilege bills under consideration in federal and state legislatures would arguably protect factual information-such as health studies or contaminated sediment data-and not just the conclusions of the auditors. While the government might have access to required monitoring data under the law, as some industry commenters have suggested, a privilege of that nature would cloak underlying facts needed to determine whether such data were accurate.

4. An audit privilege would breed litigation, as both parties struggled to determine what material fell within its scope. The problem is compounded by the lack of any clear national standard for audits. The "*in camera*" (i.e., non-public) proceedings used to resolve these disputes under some statutory schemes would result in a series of time-consuming, expensive mini-trials.

5. The Agency's policy eliminates the need for any privilege as against the government, by reducing civil penalties and criminal liability for those companies that audit, disclose and correct violations. The 1995 Price Waterhouse survey indicated that companies would expand their auditing programs in exchange for the kind of incentives that EPA provides in its policy.

6. Finally, audit privileges are strongly opposed by the law enforcement community, including the National District Attorneys Association. as well as by public interest groups. [See. e.g., Docket, II-C-21, II–C–28, II–C–52. IV–G–10, II-C-25, II–C–3 3, II–C–52. II–C–48, and II–G–13 through II–G–24.)

G. *Effect on States*

The final policy reflects EPA's desire to develop fair and effective incentives for self-policing that will have practical value to states that share responsibility for enforcing federal environmental laws. To that end, the Agency has consulted closely with state officials in developing this policy, through a series of special meetings and conference calls in addition to the extensive opportunity for public comment. As a result. EPA believes its final policy is grounded in common-sense principles that should prove useful in the development of state programs and policies.

As always, states are encouraged to experiment with different approaches that do not jeopardize the fundamental national interest in assuring that violations of federal law do not threaten the public health or the environment. or make it profitable not to comply. The Agency remains opposed to state legislation that does not include these basic protections, and reserves its right to bring independent action against regulated entities for violations of federal law that threaten human health or the environment, reflect criminal conduct or repeated noncompliance, or allow **one company to make a substantial profit at the expense of its law-abiding competitors. Where a state has obtained appropriate sanctions** needed to deter such misconduct, there is no need for EPA action.

H. Scope of Policy

EPA has developed this document as a policy to guide settlement actions. EPA employees will be expected to follow this policy, and the Agency will take steps to assure national consktency in application. For example, the Agency will make public anv compliance " agreements reached-under-this policy, in order to provide the regulated community with fair notice of decisions and greater accountability to affected communities. Many in the regulated community recommended that the Agency convert the policy into a regulation because they felt it might ensure greater consistency and predictability. I\'bile EPA is taking steps to ensure consistency and predictability and believes that it will be successful. the Agency will consider this issue and will provide notice if it determines that a rulemaking is appropriate.

II. Statement of Policy: Incentives for Self-Policing

Discovery, Disclosure. Correction and Prevention

A. Pm-pose

This policy is designed to enhance protection of human health and the environment by encouraging regulated entities to voluntarily discover, disclose. correct and prevent violations of federal environmental requirements.

B. Definitions

For purposes of this policy, the following definitions apply:

"Environmental Audit" has the definition given to k in EPA's 1986 audit policy on environmental auditing. i.e., "a systematic, documented, periodic and objective review by regulated entities of facility operations and practices related to meeting environmental requirements. "

"Due Diligence" encompasses the regulated entity's systematic efforts. appropriate to the size and nature of its business, to prevent, detect and correct violations through all of the following:

(a) Compliance policies, standards and procedures that identify how employees and agents are to meet the requirements of laws, regulations, permits and other sources of authority for environmental requirements;

(b) Assignment of overall responsibility for overseeing compliance with policies, standards, and **procedures, end assignment of specific responsibility for assuring compliance at each facility or operation;**

(c) Mechanisms for systematically assuring that compliance policies, standards and procedures are being carried out, including monitoring and auditing systems reasonably designed to detect and correct violations, periodic evaluation of the overall performance of the compliance management system, and a means for employees or agents to report violations of environmental requirements without fear of retaliation;

(d) Efforts to communicate effectively the regulated entity's standards and procedures to all employees and other agents;

(e) Appropriate incentives to managers and employees to perform in accordance with the compliance policies, standards and procedures, including consistent enforcement through appropriate disciplinary mechanisms; and

(f) Procedures for the prompt and appropriate correction of any violations, and any necessary modifications to the regulated entity's program to prevent future violations.

"Environmental audit report" means the analysis, conclusions, and recommendations resulting from an environmental audit, but does not include data obtained in, or testimonial evidence concerning, the environmental audit.

"Gravity-based penalties" are that portion of a penalty over and above the economic benefit., i.e., the punitive portion of the penalty, rather then that portion representing a defendant's economic gain from non-compliance. (For further discussion of this concept, see "A Framework for Statute-Specific Approaches to Penalty Assessments", #GM-22, 1980, U.S. EPA General Enforcement Policy Compendium).

"Regulated entity" means any entity, including a federal, state or municipal agency or facility, regulated under federal environmental laws.

C Incentives for Self-Policing

1. No Gravity-Based Penalties

Where the regulated entity establishes that it satisfies all of the conditions of Section D of the policy, EPA will not seek gravity-based penalties for violations of federal environmental requirements.

2. Reduction of Gravity-Based Penalties by *75%*

EPA will reduce gravity-based penalties for violations of federal environmental requirements by 75% so long as the regulated entity satisfies all of the conditions of Section D(2) . through D(9) below.

3. No Criminal Recommendations

(a) EPA will not recommend to the Department of Justice or other prosecuting authority that criminal charges be brought against a regulated entity where EPA determines that all of the conditions in Section D are satisfied, so long as the violation does not demonstrate or involve:

(i) a prevalent management philosophy or practice that concealed or condoned environmental violations; or

[ii) high-level corporate officials' or managers' conscious involvement in, or willful blindness to, the violations.

(b) Whether or not EPA refers the regulated entity for criminal prosecution under this section, the Agency reserves the right to recommend prosecution for the criminal acts of individual managers or employees under existing policies guiding the exercise of enforcement discretion.

4. No Routine Request for Audits

EPA will riot request or use an environmental audit report to initiate a civil or criminal investigation of the entity. For example, EPA will not request an environmental audit report in routine inspections. If the Agency has independent reason to believe that a violation has occurred, however, EPA may seek any information relevant to identifying violations or determining liability or extent of harm.

D. Conditions

1. Systematic Discovery

The violation was discovered through:

(a) an environmental audit; or

(b) an objective, documented, systematic procedure or practice reflecting the regulated entity's due diligence in preventing, detecting, and correcting violations. The regulated entity must provide accurate and complete documentation to the Agency as to how it exercises due diligence to prevent, detect and comet violations according to the criteria for due diligence outlined in Section B. EPA may require as a condition of penalty mitigation that a description of the regulated entity's due diligence efforts be made publicly available.

2. Voluntary Discovery

-The violation was identified voluntarily, and not through a legally mandated monitoring or sampling requirement prescribed by statute, regulation, permit, judicial or administrative order, or consent agreement. For example, the policy does not apply to:

(a) emissions violations detected through a continuous emissions monitor (or alternative monitor established in a permit) where any such monitoring is required;

(b) violations of National Pollutant Discharge Elimination System (NPDES) discharge limits detected through required sampling or monitoring;

(c) violations discovered through a compliance audit required to be performed by the terms of a consent order or settlement agreement.

3. Prompt Disclosure

The regulated entity fully discloses a specific violation within 10 days (or such shorter period provided by law) after it has discovered that the violation has occurred, or may have occurred, in writing to EPA;

4. Discovery and Disclosure Independent of Government or Third Party Plaintiff

The violation must also be identified and disclosed by the regulated entity prior to:

(a) the commencement of a federal, state or local agency inspection or investigation, or the issuance by such agency of an information request to the regulated entity;

(b) notice of a citizen suit;

(c) the filing of a complaint by a third party;

(d) the reporting of the violation to EPA (or other government agency) by a "whistleblower" employee, rather than by one authorized to speak on behalf of the regulated entity; or

(e) imminent discovery of the violation by a regulatory agency;

5. Correction and Remediation

The regulated entity corrects the violation within 60 days, certifies in writing that violations have been corrected, and takes appropriate measures as determined by EPA to remedy any environmental or human harm due to the violation. If more than 60 days will be needed to correct the violation(s), the regulated entity must so notify EPA in writing before the 60-day period has passed. Where appropriate, EPA may require that to satisfy conditions 5 and 6, a regulated entity enter into a publicly available written agreement, administrative consent order or judicial consent decree particularly where compliance or remedial measures are complex or a lengthy schedule for attaining and maintaining compliance or remediating harm is required,

6. Prevent Recurrence

The regulated entity agrees in writing to take steps to prevent a recurrence of the violation, which may include improvements to its environmental auditing or due diligence efforts;

7. **No** Repeat Violations

The specific violation (or closely related violation) has not occurred previously within the past three years at the same facility, or is not part of a pattern of federal, state or local violations by the facility's parent organization (if any), which have occurred within the past five years. For the purposes of this section, a violation is:

(a) any violation of federal, state or local environmental law identified in a judicial or administrative order, consent agreement or order, complaint, or notice of violation, conviction or plea agreement; or

(b) any act or omission for which the regulated entity has previously received penalty mitigation from EPA or a state or local agency.

8. Other Violations Excluded

The violation is not one which (i) resulted in serious actual harm, or may have presented an imminent and substantial endangerment to, human health or the environment, or [ii) violates the specific terms of any judicial or administrative order, or consent agreement.

9. Cooperation

The regulated entity cooperates as requested by EPA and provides such information as is necessary and requested by EPA to determine applicability of this policy. Cooperation includes, at a minimum, providing all requested documents and access to employees and assistance in **investigating the violation, any noncompliance problems related to the disclosure, and any environmental consequences related to the violations.**

E. **Economic Benefit**

EPA will retain its full discretion to recover any economic benefit gained as a result of noncompliance to preserve a "level playing field" in which violators do not gain a competitive advantage over regulated entities that do comply. EPA may forgive the entire penalty for violations which meet conditions 1 through 9 in section D and, in the Agency's opinion, do not merit any penalty due to the insignificant amount of any economic benefit.

F. Effect on State Law, Regulation or Policy

EPA will work closely with states to encourage their adoption of policies that reflect the incentives and conditions outlined in this policy. EPA remains firmly opposed to statutory environmental audit privileges that shield evidence of environmental violations and undermine the public's right to know, as well as to blanket immunities for violations that reflect criminal conduct, present serious threats or actual harm to health and the environment, allow noncomplying companies to gain an economic advantage over their competitors, or reflect a repeated failure to comply with federal law. EPA will work with states to address any provisions of state audit privilege or immunity laws that are inconsistent with this policy, and which may prevent a timely and appropriate response to significant environmental violations. The Agency reserves its right to take necessary actions to protect public health or the environment by enforcing against any violations of federal law.

G. Applicability

(1) This policy applies to the assessment of penalties for any violations under all of the federal environmental statutes that EPA administers, and supersedes any inconsistent provisions in media-specific penalty or enforcement policies and EPA's 1986 Environmental Auditing Policy Statement.

(2) To the extent that existing EPA enforcement policies are not inconsistent, they will continue to apply in conjunction with this policy. However, a regulated entity that has received penalty mitigation for satisfying specific conditions under this policy may not receive additional penalty mitigation for satisfying the same or similar conditions under other policies for the same violation(s), nor will this policy apply to violations which have received penalty mitigation under other policies.

(3) This policy sets forth factors for consideration that will guide the Agency in the exercise of its prosecutorial discretion. It states the Agency's views as to the proper allocation of its enforcement resources. The policy is not final agency action, and is intended as guidance. It does not create any rights, duties, obligations, or defenses, implied or otherwise, in any third parties.

(4) This policy should be used whenever applicable in settlement negotiations for both administrative and civil judicial enforcement actions. It is not intended for use in pleading, at hearing or at trial. The policy maybe applied at EPA's discretion to the settlement of administrative and judicial enforcement actions instituted prior to, but not yet resolved. as of the effective date of this policy.

H. Public Accountability

(1) Within 3 years of the effective date of this policy, EPA will complete a study of the effectiveness of the policy in encouraging:

(a) changes in compliance behavior within the regulated community, including improved compliance rates;

(b) prompt disclosure and correction of violations, including timely and accurate compliance with reporting requirements;

(c] corporate compliance programs that are successful in preventing violations, improving environmental performance, and pier.oting public disclosure;

(d) consistency among state programs that provide incentives for voluntary compliance.

EPA will make the study available to the public.

(2) EPA will make publicly available the terms and conditions of any compliance agreement reached under this policy, including the nature of the violation, the remedy, and the schedule for returning to compliance.

I. Effective Date

This policy is effective January 22, 1996.

Dated: December 18,1995.

Steven A. Herman,

Assistant Administrator *for Enforcement and Compliance Assurance.*

[FR Dec. 95-31146 Filed 12-21-95; 8:45 am]

BILLING CODE 6560-50-P

AUDIT POLICY UPDATE

53 Disclosures Under Audit Policy, Including 13 Settled Cases

To date, 53 companies have come forward and disclosed environmental violations to EPA under the interim and final Audit/Self-Policing Policies. Of the 53 companies, EPA has settled cases with 13 companies and is in the process of negotiating the remaining cases. In the 13 settled cases, EPA waived all penalties against 12 companies and greatly reduced the penalties for 1 company.

Companies Receiving Audit Policy Relief:

Austin Sculpture, Pharr, TX
Auto Trim, Inc., Brownsville, TX
Bortec Industrial, El Paso, TX
Gobar Systems, Brownsville, TX
Invacare, McAllen, TX
Lambda Electronics, McAllen, TX
Magnatek, Brownsville, TX
Midwestern Machinery, Minneapolis, MN
Norton Company, Stevensville, TX
TRW Vehicle Safety Systems, McAllen, TX
TRW Automotive Product Remanu.,McAllen, TX
Teccor Electronics, Brownsville, TX
Thomson Saginaw Ball Screw, Saginaw, MI

The final Audit Policy was announced on December 22, 1995 as part of the Clinton Administration's Reinvention of Environmental Regulation. Under the final Audit Policy, EPA will greatly reduce -- and may waive completely -- penalties for companies that voluntarily'" disclose **and fix violations discovered through environmental audits or compliance management programs.**

Penalty Waiver in Minnesota PCB Case

A 48-year-old Minnesota company that refurbishes business equipment voluntarily discovered and corrected violations involving improper storage and use of Polychlorinated Biphenyls (PCBs) contained in business equipment it purchased. PCBs, regulated under the Toxic Substances Control Act, are persistent bioaccumlators which cause birth defects, hormonal disruptions, and possibly cancer in humans and animals .

In correcting the violation, the company properly disposed of over 195 lbs' of PCBs contained in 65 large capacitors" that were being unsafely stored. The Audit Policy made it possible to reduce the original penalty amount of $15,000 to zero.

Substantial Penalty Reduction in Michigan TRI Case

A Michigan manufacturer of precision metal parts for airplanes voluntarily discovered and corrected its failure to file Toxic Release Inventory (TRI) reports required under the Emergency Planning and Community Right-to-Know Act (EPCRA). The TRI reports provide information to communities and the public about toxic releases to the environment which in turn has been an impetus for industry to dramatically reduce toxic releases. Local communities and citizens have the right to know this information to make decisions affecting their lives and families. The Audit Policy made it possible to reduce Thomsonts original penalty from $60,797 to $5,000.

As part of the settlement, Thomson performed a Supplemental Environmental Project (SEP) which involved the replacement of 2500 lbs. of solvents with a safe water-based process. Another required SEP will eliminate the use of over 7000 lbs. per year of other toxic chemicals.

Penalty Waiver in 11 Texas Hazardous Waste Cases

The remaining settled cases involve 11 Texas companies that operate facilities in the Maquiladora (U.S. Border) region in Mexico. These companies had violated the transport manifest provisions of the Resource,

conservation, and Recovery Act (RCRA), e.g., failure to include an accurate EPA identifi.cation number for-the hazardous waste, generator, or transporter on the manifest forms. The manifest forms are critical for tracking hazardous waste to help ensure its proper treatment, recycling and disposal and to prevent uncontrolled release of these dangerous chemicals which can cause serious harm to public health and the environment.

The companies came forward after EPA Region 6 presented the interim audit policy at the Reynossa Maquiladora Association Annual Environmental Forum in July 1995. Thereafter EPA waived all penalties for all of the companies under the audit policy. Normally, settlements for these types of violations range from $20,000 to $45,000.

Audit Policy Docket Contains Wealth of Information

EPA established the Audit Policy Docket to make information related to the EPA audit policies, environmental auditing publ... available. In addition to hundreds of letters and other documents, the Docket contains over 300 comments that can be obtained by calling 202-260-7548 or faxing 202-260-4400 and referencing docket number C-94-01.

EPA Contacts for Making Disclosures

Regulated entities that wish to take advantage of the Policy should contact the appropriate EPA Region:

Region 1 (New England): 617-565-3441
Region 2 (NJ,NY): 212-637-5039
Region 3 (mid-atlantic): 215-597-7265
Region 4 (south,SE): 404-347-3555
Region 5 (IL,IN,MI,MN,OH,WI):312-886-9296
Region 6 (AR,LA,NM,OK,TX):214-665-2210
Region 7 (IA,KS,MO,NE): 913-551-7281
Region 8 (CO,MT,ND,SD,UT,WY):303-294-7583
Region 9 (AZ,CA,HI,NV): 415-744-1364
Region 10 (AK,ID,OR,WA): 206-553-1073

Audit Policy Update is published periodically by EPA-OECA to provide information to the public and regulated community regarding developments under the EPA Audit Policy.
Editor: Brian Riedel

Audit Policy Provides Significant Incentives to Discover, Disclose and Correct Environmental Violations

Under the final Audit/Self-Policing Policy, EPA will not seek gravity-based penalties and will not recommend criminal prosecution for companies that meet the requirements of the Policy. Gravity-based penalties represent the "seriousness" or "punitive" portion of penalties over and above the portion representing the economic gain from non-compliance. The Policy requires companies:

* to promptly disclose and correct violations,
* to prevent recurrence of the violation, and
* to remedy any environmental harm

The Policy excludes:

* repeated violations,
* violations that result in serious actual harm, and
* violations that may present an imminent and substantial endangerment.

Corporations remain criminally liable for violations resulting from conscious disregard of their legal duties, and individuals remain liable for criminal wrongdoing. EPA retains discretion to recover the economic benefit gained as a result of noncompliance so that companies will not be able to obtain an economic advantage over their competitors by delaying investments in compliance. Companies that do not discover violations through an audit or CMS, yet meet all of the other Policy conditions, will receive 75% mitigation of gravity-based penalties.

The Final Audit/Self-Policing Policy was published in the Federal Register on December 22, 1996 (60 FR 66706). It took effect on January 22, 1996. For further information, contact the Audit Policy Docket or call 202-564-4187.

EPA to Shortly Issue Q&As

EPA plans to issue a Question and Answer document on the Final Audit/Self-Policing Policy by the end of May 1996. The Q&A document will be available in the Audit Policy Docket.

EPA Audit Policy Update

January,. 1997 Enforcement and Compliance Assurance EPA 300-N-97-00 1

FROM THE ASSISTANT ADMINISTRATOR:

Voluntary auditing programs play an important role in helping companies meet their obligations to comply with environmental law. V EPA's Audit Policy, effective in January of 1996, encourages **self-policing by cutting penalties for any violations that are discovered, disclosed and corrected through voluntary audits or compliance management programs. Nor will EPA recommend criminal prosecution of regulated entities in these circumstances, although individuals remain liable for their own criminal conduct. The policy includes safeguards to protect the public and the environment, excluding violations that may result in serious harm or risk, reflect repeated noncompliance or criminal conduct, or allow a company to realize a significant economic gain from its noncompliance. (See page 4 for a more complete summary).**

So far, 105 companies have disclosed violations under of the policy proving that environmental auditing can be encouraged* **blanket amnesties** or audit privileges that would excuse serious misconduct, **frustrate** enforcement, encourage secrecy, boost litigation, **and/or** lead to public distrust. This newsletter is the second in a series of updates on implementation of EPA's audit policy, and includes information on settlements, interpretive guidance, and similar state policies. A complete copy of the audit policy and copies of settlements discussed below can be obtained **by calling** (202) 260-7548 or **faxing (202) 260-4400 and referencing docket number C-94-01. For more information, call Brian Riedel, editor of** ***Audit Policy Update, at (202) 564-4187.***

Steve **Herman,** Assistant Administrate
Office of **Enforcement** and Compliance **Assuranc**

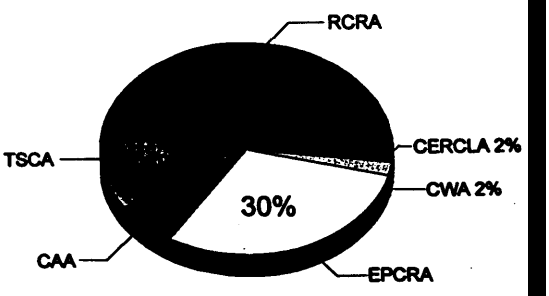
105 Companies Disclose Violations Under Audit Policy

To date, 105 companies have disclosed environmental violations at more than 350 facilities under the EPA interim and final Audit/Self-Policing Policies. Among these disclosures, EPA has already settled cases/matters with 40 companies and 48 facilities, and has agreed to waive all penalties in most of these cases. Three recent settlements are featured in this month's issue.

Companies Receiving Audit Policy Relief:

Acadia Polymers, Irongate, VA
Alyeska Pipeline, Prudhoe Bay, AK (2 facilities)
Austin Sculpture, Pharr, TX
4uto Trim, Inc., Brownsville, TX
Baldwin Piano & **Organ, Trumann, AR**
Bortec Industrial Inc., El Paso, TX
BP Exploration&OK Inc., Port Angeles, WA
CENEX, **Laurel, MT**
Clearwater Co., **Pittsburgh,** PA
Coilcraft, Inc., El Paso, TX
Cook Composites & Polymers, N. Kansas City, MO
General Electric Corp., **Waterford,** NY
Gobar Systems, Inc., Brownsville, TX
Goulston Technologies, Inc., Monroe, NC
Hasbro, Inc., El Paso, TX
Invacare, Inc., McAllen, TX
Kingsford Products, Louisville, KY
Koch Refining Co., Corpus **Christi,** TX
Lambda Electronics, Inc., McAllen, TX
Magnetek, Inc., Brownsville, TX
Microfoam Corp., Utica, NY
Midwestern Machinery, Minneapolis, MN
Minolta Co., Ramsey, NJ
No ton Company, Stephenville, TX
O Neill Industries, Philadelphia, PA
Outboard Marine Corp., El Paso, TX
Ozark-Mahoning Co., Tulsa, OK
Shure Brothers, Inc., El Paso, TX
Siemens Electromechanical Co., El Paso, TX
Simplot Dairy Products, Nampa, ID
Sunbeam-ester Co., Bay Springs, MS
Sumbesm-ester co., Coushatta, LA
Sunbeam-Oster Co., Hattiesburg, MS
Sunbeam-Oster Co., McMinnville, TN
Sunbeam-ester Co., Neosho, MO (2 facilities)
Sunbeam-ester Co., Shubata, MS
Sunbeam-ester Co., Waynesboro, MS
Transportation Electronics, El Paso, TX
TRW Vehicle Safety Systems, McAllen, TX
TRW Automotive Products Remfg., McAllen, TX
Teccor Electronics, Inc., Brownsville, TX
Thomson Saginaw Ball Screw, Saginaw, MI
Unocal Corp., Cook Inlet, AK
Vastar Resources Inc., La Plata county, CO
Wells Manufacturing Co., McAllen, TX
Zeneca, Inc., Wilmington, DE

Breakdown of Settlements **by Type**



Totals: 40 companies, 48 facilities

GE: Curbing Methanol Emissions from Storage Tanks

General Electric, Inc. voluntarily discovered, disclosed and corrected violations of the Clean Air Act (CAA) at its silicone manufacturing facility in Waterford, New York. The violations resulted from a lack of proper pollution control equipment on two methanol storage tanks. Methanol fumes are a hazardous air pollutant that contributes to smog and can cause serious health problems. EPA and the Department of Justice agreed to waive the substantial "gravity-based" component of the penalty, which reduced the actual penalty in the case to $60,684, reflecting the amount of economic benefit the company gained from noncompliance.

DOJ APPLAUDS GE SETTLEMENT

"This is a great example of what happens when companies examine their facilities, identify problems, fix them, and let the public know. It illustrates this Administration's commitment to provide incentives for those who perform prompt and responsible environmental audits."

Lois Schiffer, Assistant Attorney Genera
Environmental and Natural Resources Divisior
Department of Justic

VASTAR: Cutting CO Emissions

Vastar Resources Inc., a natural gas production company, voluntarily discovered, disclosed and corrected Clean Air Act (CAA) violations involving lack of proper pollution control equipment to limit the emission of carbon monoxide *(CO)* at facilities located on the Southern Ute Indian Reservation in La Plata County, Colorado. High levels of CO can cause serious health problems -- especially for young children, elderly and those with heart and respiratory ailments. However, EPA does not believe that CO levels were that high in this case. The company disclosed the violations after it took over operation of the facility nom another company and conducted a compliance audit. **The company then quickly brought itself into compliance by installing the proper control equipment, which will reduce CO emissions by 3,700 tons or 80% per year. Because the company met all of the conditions of the Audit Policy, the gravity-based penalty of several hundred thousand dollars was waived. Under the settlement, the company's penalty was limited to $137,949, which represents the economic benefit the company gained from not initially installing the proper equipment.**

CENEX: Helping Prevent Manufacture of Unsafe Chemicals

CENEX, Inc., a Montana company, disclosed and corrected its failure to file reports under the inventory Update Rule (IUR) of the Toxic Substances Control Act (TSCA). The lUR requires manufacturers of chemicals listed on EPA's TSCA Inventory to report current data on production volume, plant site and site-limited status. This data forms the basis for distinguishing which chemicals must undergo a review for . health and environmental effects. Under the Audit Policy, EPA mitigated $318,750 which represents 75% of the unadjusted gravity-based penalty, resulting in a total penalty of $106,250.

OZARK-MAHONING: Cleaning Up & Reporting Spill of Ferric Sulfate& Hydrofluoric Acid

Penalties were completely waived under the Audit Policy for the Ozark-Mahoning Company which voluntarily discovered, disclosed and corrected CERCLA and NPDES reporting violations at its Tulsa, Oklahoma facility. The company had failed to report to the National Response Center a spill of two CERCLA hazardous substances, ferric sulfate and hydrofluoric acid, in violation of CERCLA 103(a). The company promptly remediated the spill area and state authorities verified proper remediation.

In other violations, the company incorrectly reported pH values under its NPDES permit on four occasions. High acidity (pH) levels in waters can have a profoundly harmful effect on water quality and ecosystems. Accurate reporting of pH levels is critical for monitoring and maintaining water quality and ecosystems. Because the company met all of the Policy conditions and did not gain economically from the CERCLA and NPDES violations, the penalties were reduced to zero. Ordinarily the penalties for these types would have been approximately $8,250 for the CERCLA violation and $40,000 ($10,000 maximum for each) for the four NPDES violations.

PO=*.O*A**O =+6

PRAISE for EPA 'S POLICY

"It is an excellent policy which worked as intended in our case. Compliance with the terms of the policy results in penalty elimination or mitigation. This encourages proactive environmentally responsible behavior by companies trying to do the right thing in terms of complying with our nations environmental laws."

Peter J. Platzer
President, Midwestern Machinery Co., Inc

"It [The Audit Policy] worked quite well for us."

Rosa Delgado
Warehouse Manager, Austin Sculpture

Audit/Disclosure Can Affect Decision to Prosecute

At least three companies have not been charged with an environmental crime due to their voluntary disclosure of violations uncovered in an audit or internal investigation and their cooperation in the investigation and prosecution of subsidiary corporations or culpable individuals. While EPA has not formally invoked the 1995 Audit Policy in these cases, the decision not to charge them criminally stemmed from the same considerations now expressly set forth in the Audit Policy.

For example, in one such case, on February 7, 1996, the United States Department of Justice announced that Chiquita Brand, International was not prosecuted due to its voluntary disclosure that its subsidiary, John Morrell and Company, had illegally dumped slaughterhouse waste into the Big Sioux River in Sioux Falls, South Dakota for years and had deliberately submitted false discharge monitoring reports to conceal its crimes. John Morrell and Company and several of Morrell's corporate officials now stand convicted of conspiracy and various Clean Water Act felonies, but the government declined to prosecute Chiquita, citing the parent company's voluntary disclosure and cooperation as the prime factors. The Office of Criminal Enforcement, Forensics, and Training is establishing a process whereby criminal enforcement consideration of the Audit Policy will be made by a committee at the headquarters level. For questions regarding application of the Audit Policy in the criminal context, contact Michael Penders at (202) 564-2480.

Audit Policy Interpretive Guidance Released

✓ The Agency's Audit Policy Quick Response Team (QRT) has completed work on the Audit Policy Interpretive Guidance which addresses 16 issues arrising under the Policy. The Guidance, covers such issues as:

- When Repeat Violations Bar Penalty Mitigation
- When a Violation "May Have Been Discovered"
- Discovery of Violations Under CAA Title V Permit Applications
- Discovery of Violations During Audits Required by Settlements

The Interpretive Guidance is in the Audit Policy Docket and available on the OECA Home Page at:

http: //es. inel.gov/oeca/epapolguid.html

The QRT was formed to expeditiously, fairly, and consistently resolve nationally significant issues involving application of the Audit Policy in specific cases. Each major media enforcement program, the Department of Justice and EPA Regions are represented on the QRT, which is chaired by the Office of Regulatory Enforcement within EPA's Office of Enforcement and Compliance Assurance (OECA). For more information on the Guidance, call Gary Jonesi at (202) 564-4002.

Florida and California Adopt Policies Similar to Audit Policy

U.S. EPA Regional Administrator John H. Hankinson, Jr., in a letter dated September 26, 1996, applauded the state of Florida for adopting a policy modeled on EPA's. Mr. Hankinson reassured Virginia Wetherell, Secretary of the Florida Department of Environmental Protection (DEP) that, "EPA would cooperate closely with Florida by eliminating duplicative reporting or burdensome paperwork." Hankinson said, "[W]e see no need for any additional administrative or bureaucratic processes that may burden Florida's ability to carry out its environmental programs."

"I am very pleased the EPA is working with the Department to streamline the procedure and reduce the amount ofpaperwork required of regulated interests who desire to take advantage of EPA's and DEP's self-audit policies. This determination by EPA is a significant addition to the incentives we have identified for regulated interests to establish a self-audit program. The policy is good for business and good for the environment and offers an excellent opportunity for EPA, DEP and regulated interests to work in partnership toward mutually beneficial goals. "

Virginia B. Wetherell
Secretary, Florida DEP

A copy of the letter is available in the Audit Policy Docket. For further information about the Florida DEP Directive on Incentives for Self-Evaluation, contact Molly Palmer at (206) 553-6521. The California EPA also has recently adopted an audit policy similar to the U.S. EPA Audit Policy. For further information about the Cal EPA Policy on Incentives for Self-Evaluation, contact Gerald Johnston at (9 16) 322-7310.

Settled Audit Policy Case/Matter Documents Contained in Audit Policy Docket

The Audit Policy Docket contains document related-to cases and matters settled under the Audit Policy to date. Examples of documents include disclosure letters, EPA responses, Consent Agreements and Consent Orders, and letters of intent not to enforce. In addition, the Docket contains hundreds of other documents, such as the new Interpretive Guidance, and comments and letters related to the Policy and environmental auditing. The Docket is accessible by calling (202) 260-7548 or faxing (202) 260-4400 and referencing docket number C-94-01.

Other Self-Disclosure Programs

The EPA Audit Policy is but one example of how compliance incentives have encouraged companies to disclose and correct violations without providing blanket amnesties. Other examples include the TSCA Compliance Audit **Program (CAP)** and **EPA Region 7's Subpart 000 (Clean Air Act, testing and reporting) voluntary Compliance Program.** Under CAP, about 125 companies disclosed approximately 11,000 "substantial risk" TSCA section 8(e) reports in exchange for reduced penalties and an overall penalty cap of $1 million per company. Under the Subpart 000 program, 52 nonmetallic mineral processing companies in Missouri self-disclosed violations of air emission (NSPS) reporting and/or testing requirements in exchange for dramatically reduced penalties. In both programs, participants paid the economic benefit they gained from noncompliance. For more information about the TSCA CAP, call Caroline Abeam at (202) 564-4163, or about the subpart 000 program, call Becky Dolph, at (913) 551-7281.

Summarv of Audit Policv

Voluntary audit programs play an important role in helping companies meet their obligation to comply with environmental laws. EPA's audit policy, effective in January of 1996, will greatly reduce and sometimes eliminate penalties for companies that discover, disclose and correct violations through voluntary audits or compliance management programs, while including safeguards to protect the public and the environment from the most serious violations.

☞ **The Policy requires companies to:**

promptly **disclose and correct violations, prevent recurrence of the violation, and remedy any environmental harm.**

☞ **The Policy excludes:**

repeated violations, violations that result in serious actual harm, and violations that may present an imminent and substantial endangerment.

Corporations remain criminally liable for violations resulting from willful or conscious avoidance of their legal duties, and individuals remain liable for criminal wrongdoing. EPA retains discretion to recover the economic benefit gained as a result of noncompliance, so that companies will not be able to obtain an economic advantage over their competitors by delaying investment in compliance. Companies that do not discover violations through an auditor CMS, yet meet all of the other Policy conditions, will receive 75% mitigation of gravity-based penalties.

The Final Audit/Self-Policing policy was published in the *Federal Register* on December 22, 1996 (60 FR 66706). It took effect on January 22, 1996. For further information, contact the Audit Policy Docket or call 202-564-4187.

& WHO TO CALL:

Regulated: entities that wish. to take advantage of the Policy should fax or send a written disclosure to the appropriate EPA Regional contact listed below. Note that the written disclosure must be made within 10 days of the violation's discovery: "-"

Region 1 (CT,ME,MA,NH,RI,VT), Sam Silverman: 617-565-3441 (telephone) / 1141 (fax)
Region 2 (NJ,NY,PR,VI), John Wilk: 212-637-4059/4035
Region 3 (DE,DC,MD,PA,VA,WV), Janet Viniski: 215-566-2999/2905
Region 4 (AL,FL,GA,KY,MS,NC,SC,TN), Bill **Anderson: 404-562-9655/9663**
Region 5 (IL,IN,MI,MN,OH,WI), Tinka Hyde: 312-886-9296/353-1120
Region 6 (AR,LA,NM,OK,TX), Barbara Greenfield: 214-665-2210/7446
Region 7 (IA,KS,MO,NE), Becky Dolph: 913-551-728117925
Region 8 (CO,MT,ND,SD,UT,WY), Michael **Risner:** 303-3 12-6890/6953
Region 9 (AZ,CA,HI,NV), Leslie Guinan: 415-744-1339
Region 10 (AK,ID,OR,WA), Jackson Fox 206-553-1073/0163

Audit Policy is published periodically by EPA-OECA to provide information to the public and regulated community regarding developments under the EPA Audit Policy.
Editor: Brian Riedel

Attachment 4

Audit Policy "Quick Response Team" (QRT)

Gary Jonesi, Chair (Office of Regulatory Enforcement (ORE), OECA)
Brian Riedel, Vice Chair (Office of Planning and Policy Analysis, OECA)
Michael Penders (Office of Criminal Enforcement, Forensics, and Training, OECA)
Mark Garvey (Toxics and Pesticides Enforcement Division, ORE, OECA)
Nadine Steinberg (Water Enforcement Division, ORE, OECA)
Leslie Oif (Air Enforcement Division, ORE, OECA)
Caroline Makepeace (Multimedia Enforcement Division, ORE, OECA)
Joan Olmstead (RCRA Enforcement Division, ORE, OECA)
Mimi Guernica (Office of Compliance, OECA)
Jean Rice (Federal Facilities Enforcement Office, OECA)
Joel Blumstein (Office of Environmental Stewardship, EPA Region I)
Bertram Frey (Office of Regional Counsel, EPA Region V)
Karen Dworkin (Environmental Enforcement Section, U .S. Department of Justice)

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

APR 30 2007

ASSISTANT ADMINISTRATOR
FOR ENFORCEMENT AND
COMPLIANCE ASSURANCE

MEMORANDUM

SUBJECT: Issuance of "Audit Policy: Frequently Asked Questions" (2007)

FROM: Granta Y. Nakayama

TO: Regional Administrators

It has been more than ten years since EPA began offering compliance incentives through the Audit Policy.[1] Over the course of the implementation of the Audit Policy, over 4,000 entities have discovered and disclosed violations at more than 11,300 facilities (through FY 2006). Seven years ago, EPA issued a revised Audit Policy following extensive outreach and stakeholder input.

Today, I am issuing the "Audit Policy: Frequently Asked Questions," a series of questions and answers designed to further aid EPA in implementing, and the regulated community in using, the Audit Policy. This document highlights interpretations of the Policy that have arisen in recent years and responds to requests for clarification by the regulated community; it is intended to supplement EPA's "Audit Policy Interpretive Guidance" (January 15, 1997).

As part of the Agency's Strategic Plan, EPA has set a FY 2011 goal of increasing the number of facilities that use EPA incentive policies to conduct environmental audits or take other actions that reduce, treat, or eliminate pollution or improve environmental management practices. Additionally, EPA's FY 2008 Annual Performance Plan and Congressional Justification (EPA's Budget) sets a target to reduce, treat, or eliminate 400,000 pounds of pollutants as a result of audit agreements. The Office of Enforcement and Compliance Assurance (OECA) anticipates that clarification of the Audit Policy will help to achieve EPA's Strategic Plan goals, as well as yield increased pollutant reductions through the resolution of Audit Policy disclosures.

[1] Formally entitled as the policy on "Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations," 65 Fed. Reg. 19,618 (April 11, 2000), the 2000 Policy revised the original, issued in 1995 (60 Fed. Reg. 66,706 (December 22, 1995) and effective January 22, 1996).

In recognition of the numerous acquisitions occurring within the regulated community today, I am identifying *new owners* as an opportunity to meet OECA goals related to the use of the Audit Policy. The Frequently Asked Questions document recognizes owners of newly acquired facilities as uniquely situated to examine and improve performance at newly acquired facilities. Specifically, the answers to the questions posed provide that:

**** Violations discovered at newly acquired facilities as part of the new owner's re-examination of facility compliance under Title V of the Clean Air Act are considered voluntarily discovered for purposes of the Audit Policy provided the owner notifies EPA prior to submission of its first annual compliance certification. (Question 2);***

**** New owners may be eligible for penalty mitigation under the Audit Policy for violations at newly acquired facilities irrespective of the disclosing entity's compliance history (Question 5); and***

**** EPA is committed to examining the appropriate assessment of economic benefit in the acquisitions context. In the near future, EPA intends to seek public comment on whether the Agency should offer tailored incentives to new owners that self-disclose violations pursuant to the Audit Policy. (Question 9)***

In addition to recognizing new owners, I want to encourage regulated entities interested in assessing and maintaining compliance with federal environmental requirements to enter into *corporate-wide auditing agreements* with EPA. Corporate-wide auditing agreements provide an advance understanding between EPA and the entity regarding audit and disclosure schedules, and other aspects of Audit Policy conditions. Such agreements may help to eliminate redundancies by consolidating transactions, provide additional time to determine whether suspected violations have occurred or are occurring, and maximize penalty certainty.

EPA is committed to working with entities interested in proactively managing their facilities and operations to correct violations with minimized costs or risks. I encourage you to assist the regulated entities to avail themselves of the incentives offered under EPA's Audit Policy.

I very much appreciate the efforts of the Audit Policy Coordination Team (ACT) in developing this Guidance. If you have questions regarding the Audit Policy: Frequently Asked Questions, you may contact Phil Milton at (202) 564-5029 or milton.philip@epa.gov. This document may be found on EPA's Audit Policy webpage at http://www.epa.gov/compliance/incentives/auditing/auditpolicy.html.

Attachment

cc: OECA Office Directors
OCE Division Directors
Regional Counsel

Regional Enforcement Coordinators
Regional Audit Policy Contacts
Assistant Attorney General, Environment and Natural Resources Division, Department of Justice (DOJ)
Bruce Gelber, Chief, Environmental Enforcement Section, DOJ
Deputy & Assistant Chiefs, Environmental Enforcement Section, DOJ
Audit Policy Coordination Team

Audit Policy Coordination Team (ACT)

HQ:	Phil Milton, Chair (OCE)
	Jon Silberman, Vice Chair (OPPAC)
	J.T. Morgan (OCEFT)
DOJ:	Anna Thode
Region 1:	Joel Blumstein
Region 2:	John Gorman/Diane Fiorito
Region 3:	Betty Barnes/John Ruggero
Region 4:	Becky Allenbach/Paul Schwartz
Region 5:	Jodi Swanson-Wilson/John Steketee
Region 6:	Marcia Moncreiffe/Eli Martinez
Region 7:	Becky Dolph
Region 8:	David Rochlin
Region 9:	Daniel Reich
Region 10:	Meg Silver

Audit Policy: Frequently Asked Questions

April 2007

Office of Civil Enforcement
Office of Enforcement and Compliance Assurance
U.S. Environmental Protection Agency
Washington, D.C.

Explanatory Note

This document was prepared by EPA's Audit Policy Coordination Team (ACT). The ACT is chaired by the Office of Civil Enforcement, and it is charged with making fair and nationally consistent recommendations concerning the applicability of the April 11, 2000 policy on "Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations" (referred to in this document as the Audit Policy).

The "Audit Policy: Frequently Asked Questions" highlights policy interpretations that have arisen in the Audit Program in recent years and responds to requests for clarification by the regulated community; it is intended to supplement EPA's "Audit Policy Interpretive Guidance" (January 15, 1997) (referred to as the 1997 Guidance). This frequently asked questions document, presented as a series of Questions and Answers (Qs and As), is intended to aid in implementation of the Audit Policy. It includes discussion of many of the most significant issues raised to the ACT's attention. The ACT welcomes comments on this document, and on additional interpretive issues that may be appropriate for resolution in future guidance. A list of ACT members is provided in the cover memo to this document.

This document provides information about how the Agency exercises its enforcement discretion. It is not final agency action and it does not create any rights, duties, obligations, or defenses, implied or otherwise, in any third parties.

This document can be found on the Internet at http://www.epa.gov/compliance/incentives/auditing/auditpolicy.html. Revisions or additions to this document also will be made publicly available at the internet.

Audit Policy: Frequently Asked Questions

TABLE OF CONTENTS

Q1: ***What revisions were made to the original Audit Policy when EPA revised the Audit Policy in April 2000?***

A1: After a two-year evaluation, EPA revised the Audit Policy based on extensive public outreach and the Agency's experience in handling self-disclosure cases. Key revisions to the Audit Policy included: (1) lengthening the amount of time from 10 to 21 days that entities have to disclose a violation after it is discovered; (2) clarifying that a facility may qualify for Audit Policy credit even if another facility owned or operated by the same parent organization is already the subject of an inspection, investigation or information request; (3) clarifying that entities will have at least 21 days after acquisition to disclose violations discovered at newly acquired facilities; and (4) clarifying that repeat violations will not disqualify newly acquired facilities for Audit Policy credit if the violations existed prior to acquisition. See 65 Fed. Reg. 19618, 19623 (April 11, 2000).

Q2: ***To meet Condition 2 of EPA's Audit Policy, disclosed violations should be discovered "voluntarily." Are there circumstances in which violations discovered during the Clean Air Act (CAA) Title V permit application and annual compliance certifications could be eligible for penalty relief under the Policy?***

A2: Generally, CAA violations discovered during activities supporting Title V certification requirements are not eligible for penalty mitigation under the Policy. The regulations implementing the Title V permit program (40 C.F.R. § 70.5) establish a legal duty for permit holders to analyze comprehensively the source's compliance status and certify annually as to CAA compliance. Condition 2 of the Audit Policy requires that disclosed violations must not be discovered through a legally mandated monitoring or sampling requirement prescribed by statute or regulation; therefore, examination of CAA compliance accompanying a Title V annual certification is not voluntary.

In 1999, EPA clarified that in some instances, certain CAA violations discovered, disclosed, and corrected by a company *prior* to issuance of a Title V permit may be eligible for penalty mitigation (see "Reduced Penalties for Disclosures of Certain Clean Air Act Violations," dated September 30, 1999, http://www.epa.gov/compliance/resources/policies/incentives/auditing/caa-tit.pdf). The 1999 memorandum states that the Policy may apply where a company "(a) reviews its prior decision regarding the application of New Source Review (NSR) and Prevention of Significant Deterioration (PSD) requirements that was made in good faith and (b) discloses to EPA a violation discovered through such a review and agrees to correct it prior to Title V permit issuance, and (c) otherwise meets conditions 3 through 9 of the Audit Policy."

Since issuance of the 1999 memorandum, EPA has considered whether CAA violations discovered by a new owner during a compliance examination conducted subsequent to permit issuance, but prior to submission of the first Title V annual certification following acquisition, could be considered eligible for penalty mitigation under the Policy. EPA wants to encourage new owners to re-examine facility compliance and facility operations, correct violations and upgrade deficient equipment and practices. Thus, for new owners that in good faith undertake such efforts and inform the Agency of such actions, either by disclosure in writing or entry into

an Audit Agreement, prior to submission of its first annual Title V certification, the violations disclosed would be considered voluntarily discovered for purposes of the Audit Policy. In creating an opportunity for new owners to use the Audit Policy for violations discovered during compliance examinations, EPA is not attempting to define "reasonable inquiry"[1] or suggest that sources are not under obligation to disclose CAA violations detected while a Title V permit is pending or during annual certification after permit issuance. For instance, nothing within the opportunities afforded through the Audit Policy relieves a source of the ongoing obligation to comply with PSD/NSR requirements. Rather, to encourage further assessment of the compliance status of operations with which a new owner may have limited familiarity and to encourage the disclosure and correction of violations and improvement in operations at the facility, EPA is clarifying that a new owner can potentially use the Audit Policy up until the first Title V annual certification due date.

The following are examples of disclosures which EPA would consider to meet the voluntary discovery condition of the Audit Policy, if disclosed prior to the first Title V certification due date: a new owner discovers and discloses a CAA violation at a recently acquired Title V source (*e.g.*, the prior owner had relied on inaccurate calculations and/or used an incorrect formula to make its Title V certifications, or the prior owner failed to apply for a Title V permit). Such a discovery after purchase could have resulted from re-examination of in-house documentation and/or observation of daily operations. Another example may be where a new owner discovers that a gauge relied upon by the prior owner to establish or maintain operating parameters was not properly calibrated.

EPA will consider violations such as these on a case-by-case basis to ensure that the disclosing entity is a "new owner" and qualifies for consideration under the Audit Policy. In addition, in these situations, as with all Audit Policy disclosures, if a particular disclosure does not qualify for credit under the Audit Policy, it may still be eligible for penalty mitigation pursuant to the applicable enforcement response or penalty policy.

Q3: ***To meet Condition 5 of EPA's Audit Policy, an entity must correct and remediate a violation within 60 days of date of discovery. Are there instances in which the 60-day correction period may be extended? What happens when correction is not possible?***

A3: The Audit Policy requires that violations be corrected within 60 days of discovery. However, EPA recognizes that not all violations can be corrected within that time frame. EPA may allow an extension for corrections that require significant expenditures, involve technically complex issues, or involve decisions for which an entity seeks or is required to obtain EPA or State input or approval. As stated in the Audit Policy (65 Fed. Reg. at 19626), if more than 60 days will be required for correction, an entity must notify EPA in writing prior to the conclusion

[1] Under the regulations governing Title V permit applications and annual compliance certifications, any application form, report or compliance certification is required to contain a certification by a responsible official of truth, accuracy, and completeness. The regulations further provide that "[t]his certification and any other certification required under this part shall state that, based on information and belief formed after reasonable inquiry, the statements and information in the document are true, accurate, and complete." 40 CFR § 70.5(d).

of the 60-day period. Examples of instances for which extensions might be sought include corrections involving changes to emissions treatment technology and restoration or replacement of certain containment systems.

Moreover, EPA also recognizes that certain violations that involve parties, facilities, or wastes over which an entity no longer has control (*e.g.*, the transport of hazardous waste without a RCRA manifest) may not in fact be correctable by the entity. In these circumstances, violators will still be eligible for Audit Policy consideration even if the violation cannot be corrected, provided the violator adopts specific and appropriate measures to prevent recurrence and takes any other steps necessary to address the violation (*e.g.*, carrying out any removal or remedial actions required by law).

Q4: ***Condition 7 of EPA's Audit Policy excludes violations considered to be repeat violations. The condition includes as repeat violations those disclosed as part of a "corporate pattern." How does EPA interpret the corporate pattern exclusion?***

A4: Condition 7 ("No Repeat Violations") of the Audit Policy excludes the situation in which the disclosed violation is the same as or closely related to another violation (or violations) that has occurred "within the past five years as part of a pattern at multiple facilities owned or operated by the same entity." That exclusion is often referred to as the "corporate pattern" exclusion (although it applies to any type of entity). The repeat violation exclusion "ensures that penalties are not waived for those entities that have previously been notified of violations and fail to prevent repeat violations." 65 Fed. Reg. 19618, 19623 (April 11, 2000).

In general terms, the Audit Policy defines a violation as one that is identified by a regulator in a settlement or order, or that has otherwise been the subject of penalty mitigation. The corporate pattern exclusion does not preclude an entity from disclosing numerous violations discovered as part of a single audit. This is because the Agency's analysis in determining whether a "pattern" exists relates more to the nature, timing and context of discovery and disclosure than to the number of violations disclosed at any one time. Thus, for example, an entity could conduct an audit that yields the discovery and disclosure of 40 violations of the same type at numerous facilities. If those violations are discovered as part of one effort and disclosed together, EPA views those violations (as defined in the Policy and discussed in the Preamble) as one disclosure and views them as "one violation" for purposes of evaluating subsequent disclosures for corporate pattern. The reason for this view is that the disclosure and supporting audit represent one time at which the entity became aware (or was put on notice) of noncompliance - whether involving one violation or numerous violations.

Similarly, if an entity discovers violations at one facility and has reason to believe that the same or similar violations exist at other heterogeneous[2] facilities, the corporate pattern prohibition would generally not preclude an entity from disclosing the additional violations sequentially, if

[2] Question 3 of EPA's "Audit Policy Interpretive Guidance" (1997) notes that the Agency will consider disclosures to be untimely where factual inferences can be drawn about other probable violations (*e.g.*, where the violator's operations and practices are homogeneous in nature) and they are not promptly disclosed.

the disclosures are part of a single, comprehensive look at similar violations across all of an entity's facilities. In order to be considered part of a single comprehensive look, entities are encouraged to make use of EPA's corporate auditing agreements, which provide a means of addressing potential noncompliance on a corporate-wide basis. Auditing agreements also allow an entity to plan a corporate-wide audit with an advance understanding between the entity and EPA regarding schedules for conducting the audit and disclosing beyond the 21-day disclosure requirement for single-facility disclosures. For more information, see the September 2000 *Audit Policy Update* Special Issue, "Corporate -Wide Agreements: An Effective Approach for Companies to Improve Environmental Compliance" http://www.epa.gov/compliance/resources/newsletters/incentives/auditupdate/fall2000.pdf and "Use of Corporate Auditing Agreements for Audit Policy Disclosures" (May 7, 2001). Entities disclosing violations at different facilities in more than one EPA Region should make such disclosures to EPA Headquarters.

Some companies have opted not to disclose newly discovered violations following a prior disclosure (or enforcement action) for the same or closely related violations. These companies elect not to disclose a violation, but rather to "save" their use of the Audit Policy for a yet to be discovered "more significant" closely related violation. EPA believes that companies make their decision, at least in part due to uncertainty over whether one or more past violations constitute "a pattern." EPA encourages disclosures as a vehicle for assuring compliance with the nation's environmental laws and evaluates the facts relevant to "corporate pattern" with that objective in mind. EPA will not deny Audit Policy treatment to subsequent violations if the disclosing company has, after being put on notice by its prior disclosure(s) or enforcement action(s), taken appropriate actions to address comprehensively the cause or causes of the previous violations. If a company has taken such actions, and a subsequent violation nevertheless occurs, EPA will not view the subsequent violation as part of a corporate pattern. Accordingly, there is no specific number of prior violations that will automatically exclude a violation from Audit Policy consideration under the corporate pattern exclusion. In the eleven year history of the program, EPA has only invoked the "corporate pattern" bar in a fraction of one percent of all cases. EPA will continue to apply this exclusion narrowly, with national oversight to ensure consistency, and with a goal of encouraging those who violate the law to disclose and correct those violations promptly. It is important to note that disclosures of any sort may be eligible for penalty mitigation, even if the Audit Policy consideration is unavailable.

Q5: ***How is a new owner's disclosure of a violation at a newly acquired facility affected by an existing "corporate pattern," established pursuant to Condition 7 ("No Repeat Violations") of the Audit Policy?***

A5: Question 15 of EPA's "Audit Policy Interpretive Guidance" (1997) provides that separate entities are considered independently, and applicability of the Audit Policy is based on the merits of each entity's actions. More specifically, the 1997 Guidance states that a previous owner/ operator's actions will not be imputed to the successor. That guidance does not address the impact of the successor's history of violations on the applicability of the Audit Policy with respect to the successor's newly acquired facility.

EPA generally considers successors that undertake examinations of newly acquired facilities to be eligible *irrespective of* the successor's history of violations at other facilities. EPA's primary interest is to encourage newly acquired facilities to undergo a comprehensive examination of and improvements to its environmental compliance and management systems. Notwithstanding a successor's history of violations at their other facilities, if its efforts to examine and improve upon an acquired facility's environmental operations are thorough and are likely to result in improved compliance, EPA's intent is to encourage such examinations.

Q6: ***Condition 8 of EPA's Audit Policy excludes violations that result in serious actual harm to the environment or which may have presented an imminent and substantial endangerment to public health or the environment. How does EPA interpret this condition*****?**

A6: Although many environmental violations involve the release of pollutants, such violations do not necessarily result in serious actual harm or present an imminent and substantial endangerment. In the context of EPA's Audit Program, EPA takes a case-by-case approach and has rarely excluded disclosures on this basis. Of the nearly 3,500 disclosures to EPA made to date, EPA is aware of only two instances in which the Agency denied Audit Policy credit based on serious actual harm or an imminent and substantial endangerment. One of those instances involved a release that required community evacuation of the surrounding area; the other instance involved the death of an employee.

Q7: ***Condition 9 of EPA's Audit Policy provides that an entity seeking penalty mitigation under the Policy must cooperate "as required" by EPA. Does that condition mean that those entities that have litigated against EPA in the past on other matters are precluded from using the Policy? What about entities with ongoing disputes with EPA on other matters?***

A7: EPA considers Condition 9 solely in the context of EPA's consideration and resolution of disclosures made pursuant to the Audit Policy. EPA's Audit Program is a transactional one, meaning that the nature and the extent of the disclosure determines the scope of the transaction (and federal relief granted mirrors that scope), in that the relief granted is limited to the facts specific to the disclosure. With respect to this condition, EPA looks only to whether an entity cooperated with the Agency in the Agency's consideration of the entity's request for treatment under the Audit Policy; not whether the entity has cooperated with the Agency in past matters or whether the entity is in litigation with the Agency on other matters.

Also, where conditions of the Audit Policy require specific consideration of prior or ongoing enforcement activity (*e.g.*, Condition 4: Discovery and Disclosure Independent of Government of Third-Party Plaintiff, or Condition 7: No Repeat Violations), such consideration is narrowly tailored for the purposes of that condition only.

Because one public benefit of the Audit Policy is the potential for conserving government resources, excessive delay or non-responsiveness by an entity is one indicator of limited cooperation. EPA may determine that an entity has not been responsive, timely, or open within the context of the disclosure transaction and may deny credit on that basis.

Q8: ***Should a disclosure be made to the U.S. EPA, or the State in which the violation occurred?***

A8: Whether an entity should make a disclosure to EPA, the State, or both, depends on the type of regulation violated, availability of a State audit program, and the scope of legal relief sought by the entity. The answer is based, in part, on what the entity aims to achieve.

For violations of federal laws for which no State authorized program exists (*e.g.*, the Emergency Planning and Community Right to Know Act), because a State possesses no legal authority to resolve violations under those statutes, disclosures should be made to EPA. For violations of federal statutes for which a State-authorized program exists (*e.g.*, the Clean Water Act), an entity may choose to disclose to either regulator or both; however, if a resolution of the federal claim for that violation is desired, disclosure to EPA is the only means to secure it.

For States with audit programs that reflect the incentives and conditions contained in EPA's Audit Policy, EPA develops reciprocal agreements between an EPA Regional Office and a State. Such agreements typically establish an understanding that, although each agency maintains its sovereign legal authorities, each generally intends to defer to the other's resolution of disclosed violations. For entities not seeking a federal resolution with respect to the claim, this arrangement may provide enough assurance that it deems a disclosure to EPA unnecessary. Parties should inquire with the relevant Region or State for more information.

Q9: ***EPA's Audit Policy waives 100% of gravity-based penalties for disclosed violations that meet the nine conditions of the Policy. The Policy states that EPA retains discretion to recover any economic benefit gained as a result of noncompliance. How does EPA exercise that discretion?***

A9: EPA's general commitment to recapture economic benefit assures more widespread compliance with the law by reducing the incentive to avoid or postpone compliance. A violator generally derives economic benefit by investing the money that should have been spent on compliance. Assessment of economic benefit serves to level the playing field among law-abiding entities and those that have obtained an economic benefit from their noncompliance.

EPA recognizes that there may be circumstances in which recapturing economic benefit is neither efficient nor appropriate. As stated in the Audit Policy, EPA may forgive the entire penalty for violations that meet all of the conditions of the Policy and, in the Agency's opinion, "do not merit any penalty due to the insignificant amount of any economic benefit." 65 Fed. Reg. 19618, 19626 (April 11, 2000). In resolving disclosures made under the Audit Policy, EPA generally defers to the relevant program penalty policies (available at http://www.epa.gov/compliance/resources/policies/civil/index.html) governing the statutory or regulatory requirement at issue. Many of EPA's penalty policies establish *de minimis* penalty amounts under which collection is not routinely sought because of the resource demands that would be assumed by the Agency. Indeed, many disclosures involve recordkeeping and reporting violations which, unless numerous violations are disclosed, often do not have significant economic benefit and have thus been resolved without penalty under the Audit Policy.

In addition, it is EPA's intention that settlements under the Audit Policy assess economic benefit after consideration of all factors of settlement. EPA uses its enforcement discretion to assess a benefit amount that is consistent with its overall approach to sector-wide compliance. The central guiding principle underlying decisions regarding assessment of economic benefit in the Audit Policy context is fairness.

Guided by the principle of fairness, EPA is examining the question of whether and to what extent a new owner, in the context of business acquisitions, gains an economic benefit from noncompliance existing at its newly acquired facilities at the time of acquisition. In the near future, EPA intends to seek public comment on whether the Agency should offer tailored incentives to new owners that self-disclose violations pursuant to the Audit Policy. In particular, the Agency is interested in receiving public comment on whether and to what extent to assess economic benefit, if any, for violations at newly acquired facilities disclosed by new owners.

Q10: ***What happens if EPA conducts an inspection while an audit is being performed but before disclosure is made pursuant to an Audit Agreement with EPA?***

A10: EPA is unaware of any specific instances where inspections were conducted at an entity performing an audit under an audit agreement. If such an EPA inspection did take place and violations were discovered. EPA might allow Audit Policy penalty mitigation for the violations discovered, assuming such violations fell within the scope of the Audit Agreement with EPA.

While EPA may consider a facility known to be auditing to be a lower inspection priority than a facility that is not known to be auditing, whether and when to conduct an inspection does, and should, remain a matter of Agency discretion. If the Agency's inspection or other enforcement authorities were so limited, it could compromise the Agency's ability to respond to citizen complaints or site conditions posing a potentially serious threat to human health or the environment, its ability to assure the public as to the compliance status of a given facility, or provide the appearance that the audit shields an entity from inspection.

Audit Policy consideration in these circumstances would still require that the violation discovered by EPA fall within the scope of the regulated entity's proposed audit. EPA's discovery of such violations through its inspection will not preclude an entity from Audit Policy consideration on the basis on failing to meet Condition 4 – "Discovery and Disclosure Independent of Government or Third Party Plaintiff," provided the date of commencement of the inspection is after the date of the Audit Agreement. If there has not been an audit agreement with or prior notification to EPA, then any violations discovered by EPA during an inspection would not be eligible for Audit Policy mitigation, even if the facility had an on-going audit at the time of the inspection and subsequently disclosed those violations.