



EPA's Audit Policy – Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations

Background: Comprehensive and systematic audits of environmental performance can be used to improve compliance with environmental laws and thereby, minimize environmental liability and damage.

Since November 5, 1985, the U.S. Environmental Protection Agency (EPA) has endorsed the conduct of internal environmental audits by providing incentives that encourage regulated entities to voluntarily discover, promptly disclose, and expeditiously correct violations of Federal environmental requirements (50 *FR* 46504). On April 11, 2000, EPA demonstrated its continuing commitment to encouraging voluntary self-policing (assessment) when EPA issued its revised final Audit Policy (Ref #1), which **took effect May 11, 2000**. Provided entities meet the terms of the Audit Policy, these incentives include the elimination or substantial reduction of the gravity component of civil penalties, which are based on the violation's potential for harm and deviation from a requirement, and a determination not to recommend criminal prosecution.

This Information Brief examines EPA's revised final policy and its use and applicability to the Department of Energy. It also provides direct links to Internet-accessible EPA guidance relevant to both its Audit Policy and designing/conducting environmental audits at Federal facilities.

- References:**
1. "Final Policy Statement: Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations; Notice," U.S. Environmental Protection Agency, 65 *FR* 19618, April 11, 2000. <http://es.epa.gov/oeca/auditpol.html>
 2. "The Yellow Book: Guide to Environmental Enforcement and Compliance at Federal Facilities," U.S. Environmental Protection Agency, EPA 315-B-98-011, February 1999. <http://es.epa.gov/oeca/fedfac/yellowbk/yellowbk.pdf>
 3. "Notice: Restatement of Policies Related to Environmental Auditing," U.S. Environmental Protection Agency, 59 *FR* 8455, July 28, 1994.
 4. "Environmental Audit Program Design Guidelines For Federal Agencies," U.S. Environmental Protection Agency, EPA300-B-96-011, Spring 1997. <http://es.epa.gov/oeca/fedfac/complian/complian.html>
 5. Executive Order (E.O.) 13148, "Greening the Government through Leadership in Environmental Management," issued April 21, 2000. <http://homer.ornl.gov/oepa/data/eo13148/2001.pdf>
 6. "Generic Protocol for Environmental Audits at Federal Facilities," U.S. Environmental Protection Agency, EPA 300-B-96-012A\B, December 1996. <http://es.epa.gov/oeca/fedfac/complian/mainintro.html>
 7. "Audit Policy Interpretive Guidance" (Questions and Answers), U.S. Environmental Protection Agency, January 1997. <http://es.epa.gov/oeca/audpolguid.pdf>
 8. "Protocol for Conducting Environmental Compliance Audits of Treatment, Storage and Disposal Facilities under the Resource Conservation and Recovery Act" (EPA-305-B-98-006), December 1998. <http://es.epa.gov/oeca/ccsmd/tsdf.pdf>
 9. "Protocol for Conducting Environmental Compliance Audits under the of Hazardous Waste Generators under the Resource Conservation and Recovery Act" (EPA-305-B-98-005), October 1998. <http://es.epa.gov/oeca/ccsmd/genpt1.pdf>
 10. "Protocol for Conducting Environmental Compliance Audits under the Comprehensive Environmental Response, Compensation, and Liability Act" (EPA-305-B-98-009), December 1998. <http://es.epa.gov/oeca/ccsmd/cercla.pdf>
 11. "Protocol for Conducting Environmental Compliance Audits under the Emergency Planning and Community Right-to-Know Act" (EPA-305-B-98-007), December 1998. <http://es.epa.gov/oeca/ccsmd/epcra.pdf>

What is the purpose of EPA’s Audit Policy?

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

Who in the regulated community can take advantage of EPA’s Audit Policy?

Since 1985, both the public and private sector have been able to use the Audit Policy. Currently, EPA agreed to reduce or waive penalties under the policy for approximately three hundred companies. However, only a few Federal facilities have taken advantage of this policy.

What penalties can be imposed on DOE and its contractors for non-compliance?

Penalties for non-compliance with Federal environmental statutes may differ between Federal and private sector organizations. EPA’s enforcement authorities for Federal agencies is generally administrative and includes orders, Notices of Violations (NOVs), and compliance agreements. However, on a statute-specific basis, EPA can pursue the full range of its enforcement responses against Federal agencies, including levying civil judicial penalties and fines.

Non-Federal operators, such as DOE’s management and operating (M&O) contractors, can be subject to the *full spectrum* of civil and criminal penalties (e.g., fines, forfeiture, and imprisonment), as applicable, for infractions at DOE facilities (Ref #2). Although contractor and tenant responsibilities and activities are often bound by the terms and conditions of the agreement (e.g., site or facility management contract; lease or rental contract), their liability is not affected by indemnification-type clauses or provisions. Rather, EPA relies on its statutory and regulatory authority, definitions, and site-specific factors to pursue the full range of enforcement responses against contractors and tenants at Federal facilities, including private leaseholders operating on Federal land.

Under certain circumstances where a contractor/tenant commits gross environmental violations, the Federal agency could be held legally

responsible if EPA determines the agency was “willfully blind” to the non-compliance activities of the tenant/contractor (Ref #4).

What is the Audit Policy process leading to penalty mitigation?

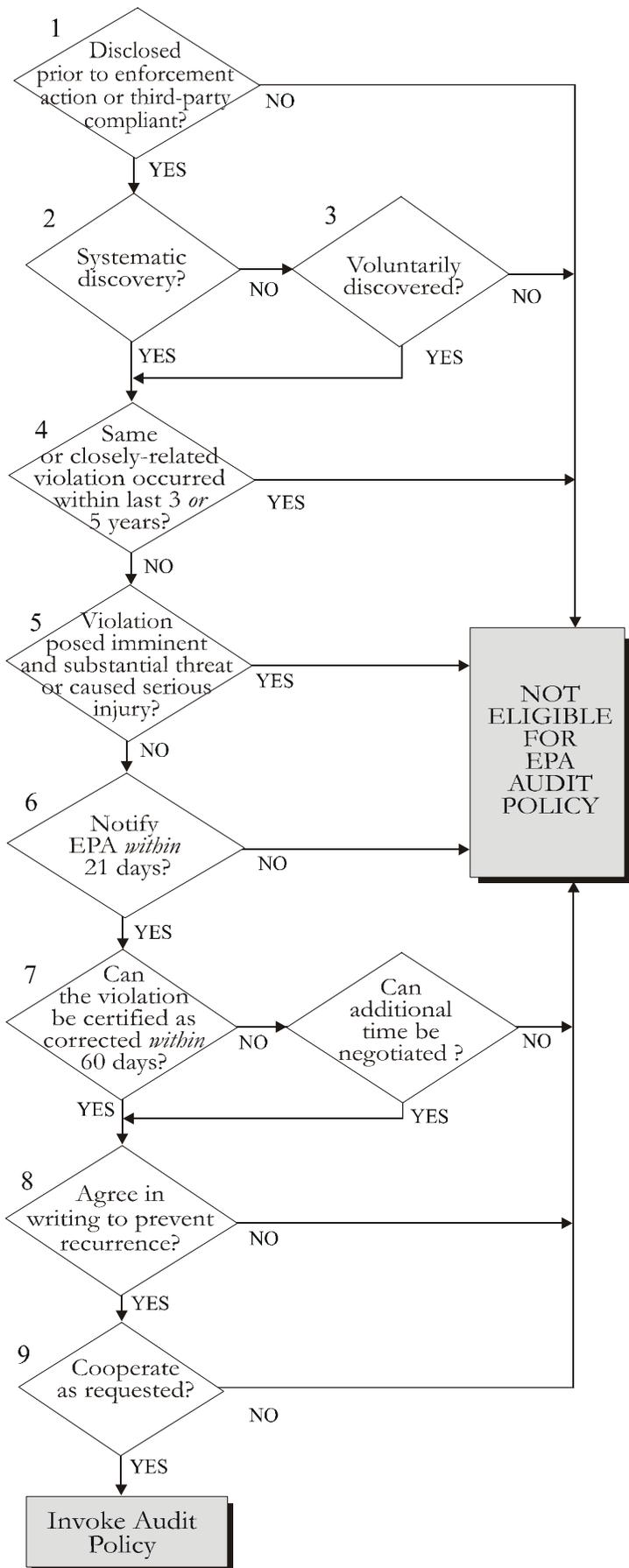
Figure 1 illustrates the procedures that DOE should follow to determine if the Audit Policy is applicable.

1. Discovery and Disclosure Independent of Regulatory Authority or Third-Party Plaintiff. DOE must disclose the violation *prior* to either a regulatory authority inspection/investigation, notice of a citizen suit, filing of a complaint by a third party, reporting by a whistleblower, or imminent discovery by a regulatory agency.

2. Systematic Discovery. The violation can be discovered through (1) an environmental audit, or (2) a compliance management system (CMS) reflecting “due diligence” in preventing, detecting, and correcting violations. Facility managers claiming the facility CMS fulfills this condition must provide accurate and complete documentation demonstrating how CMS efforts systematically prevent, detect, and correct violations and, therefore, meets the criteria for due diligence. Specifically, facility managers must demonstrate that the facility CMS includes the following: employee compliance policies, standards and procedures; assignment of responsibility for overseeing compliance with policies, standards, and procedures; monitoring and/or auditing systems for assuring that policies, standards and procedures are being carried out; communication mechanisms to convey standards and procedures to all employees and other agents; incentives for employees to perform in accordance with policies, standards and procedures, including consistent enforcement through disciplinary mechanisms; and procedures for correcting violations and modifying the CMS to prevent future violations.

Many similarities exist between the elements of a CMS and those of an environmental management system (EMS) such as an EMS that conforms to the ISO 14001 standard. EPA supports the implementation of EMSs that promote compliance, prevent pollution, and improve overall environmental

Figure 1. Audit Criteria



performance. Therefore, EPA does not preclude the availability of the Audit Policy for discoveries made through a comprehensive EMS. Consequently, discovery pursuant to an EMS audit would be consistent with the notion of due diligence.

Highlight 1. Environmental Compliance Audit Requirements and Guidance

Under a new Executive Order (E.O.) 13148 (Ref. #5), Federal agencies, including DOE, are to implement an environmental compliance audit program. These audits are to be conducted at least once every three years and encompass tenant, contractor, and concessioner activities [Section 402]. At select facilities, DOE can elect to conduct environmental management system (EMS) audits in lieu of regulatory environmental compliance audits [Section 402(b)]. EPA has developed the following guidance that may be useful for designing an audit program until such time that the facility has an EMS program in place:

- *Environmental Audit Program Design Guidelines for Federal Agencies* (Ref. #4), which focuses on designing strong environmental auditing programs at Federal facilities; and
- *Generic Protocol for Environmental Audits at Federal Facilities* (Ref. #6), which addresses the programmatic evaluation of compliance with environmental laws and regulations and their corresponding environmental practices.

3. Voluntary Discovery. Voluntary discovery means that the violation cannot be discovered through a legally mandated monitoring or sampling requirement prescribed by statute, regulation, permit, judicial or administrative order or consent agreement. For purposes of the Audit Policy, “discovery” of a violation occurs when any person has an “objectively reasonable basis” that the violation has, or may have, occurred. For example, emissions violations detected through a required continuous emissions monitoring, or a violation of NPDES discharge limits found through prescribed monitoring are not eligible.

Upon discovering a violation or possible violation (Criteria 1-3), the DOE contractor’s first response should be to immediately notify the appropriate DOE official. This includes the contracting office representative and/or contracting office technical representative. Contractors conducting day-to-day

operations have the greatest opportunity of encountering such a violation.

Once a violation has been discovered, line management should assemble the appropriate expertise (e.g., environmental specialists, general counsel, public affairs experts, etc.) to determine if the violation meets EPA's prescribed conditions for using the Audit Policy.

In instances where management has some doubt about the existence of a violation, EPA's recommended course is to disclose the incident to EPA and allow the regulatory authorities to make a definitive determination about whether the violation occurred (Ref #1 and Ref #3). This may be appropriate when the facts underlying a possible violation are clearly known but 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). Furthermore, management should consider disclosing potential violations before they occur if the potential violation cannot be avoided despite the facility's best efforts to comply (e.g., where an upcoming requirement to retrofit a tank cannot be met due to technological barriers).

4. No Repeat Violations. DOE must ensure that the same or similar violation has not occurred within the past *three* years at the same facility, and not within the past *five* years as part of a pattern at multiple facilities owned by DOE and operated by the same contractor.

5. Other Violations Excluded. Violations that result in serious actual harm or present an imminent and substantial endangerment to human health or the environment, or violate terms of any order or consent agreement are not eligible.

6. Prompt Disclosure. The intent to invoke the Audit Policy must be made in writing by DOE to EPA *within* 21 days or less of discovery. Provided all criteria are met, DOE should notify EPA of its intent to invoke the Audit Policy, initiate dialogue with EPA, and explain the potential violation. This initial dialogue should be used to clarify the data that will be provided to EPA. DOE may use EPA's *Optional Form for Disclosure Submittal* at <http://es.epa.gov/oeca/ore/checklist.pdf>, which outlines the information that EPA requires to

determine the applicability of its Audit Policy. Initial disclosures, however, may contain the "minimum information," including the identity, location (or locations of all facilities that may raise similar compliance concerns), and nature or description of the suspected violation(s). Such disclosures can be supplemented at a later time (Ref. #7). EPA Regional personnel (typically the official responsible for enforcement and compliance assistance) will issue a *Notice of Final Determination*.

7. Correction and Remediation. Within 60 calendar days of discovery, DOE must correct the violation, which may include taking appropriate measures to remedy any environmental harm; submit to EPA written certification that the violation has been corrected. If DOE expects that it will take more than 60 days to fully correct the violation, DOE must notify EPA in writing *before* the 60 day period has passed.

8. Prevent Recurrence. DOE must agree in writing to take steps to prevent a recurrence of the violation. This may be accomplished as part of the agreement, order, or decree.

9. Cooperation. Beginning with initial discovery, DOE cannot destroy or tamper with possible evidence, and must cooperate with EPA by providing information as requested to determine the applicability of the EPA Audit Policy to facility circumstances.

In addition to EPA's prescribed conditions, site-specific factors may influence a decision to use the Audit Policy. *Exhibit 1* identifies several additional factors that should be considered by decision makers evaluating their options for responding to a discovered violation.

What potential incentives does the EPA Audit Policy provide for disclosure of violations as a result of self-audits?

To increase the frequency and quality of self-policing efforts within the regulated community and, thereby, encourage greater compliance with Federal laws and regulations that protect human health and the

Exhibit 1. Other Factors to Consider

- Is the audit report subject to public disclosure under the Freedom of Information Act (FOIA) [i.e., unless widely disseminated or distributed outside DOE, predecisional and deliberative reports are FOIA exempt (Ref. #4)]
- Are there any instruments, including permits, contract provisions or indemnification agreements, lease provisions, operating agreements, etc. that specify or assign responsibility for environmental compliance?
- Whom does the statute hold responsible for noncompliance? If liability attaches to the owner/operator, both the agency and the other party to the agreement may be held responsible.
- Does the violated statute contains penalty authority against Federal agencies?
- Are national security issues/concerns involved?
- Is there any potential for criminal enforcement?
- Has the facility assessed its ability to correct the noncompliance?
- Has the state and local exposure been considered?
- Has the potential public reaction been evaluated?

environment, the EPA Audit Policy provides for the waiving of gravity-based penalties (penalties based on the severity of the violation) for violations that are promptly disclosed and corrected. To provide an incentive for entities to disclose and correct violations, the Policy reduces gravity-based penalties by **100%** for violations that are systematically discovered (EMS) and **75%** for violations (other than EMS) that are voluntarily discovered, provided they are promptly disclosed and corrected.

Section C (Incentives for Self-Policing) of the EPA Audit Policy (Ref. #1), describes the four kinds of incentives: 1) no gravity-based penalties for systematic discovery; 2) reduction of gravity-based penalties by 75% for voluntary discovery; 3) no criminal recommendations; and 4) no routine request from the regulator in the future for audit information.

For 75% gravity-based penalty reduction, are there ways to reduce the penalty even further?

According to EPA's *Audit Policy Interpretive Guidance* (Ref. #7), where a 75% gravity-based penalty reduction is appropriate, the penalty can be further reduced in consideration of supplemental environmental projects (SEPs), good faith, or other factors. An SEP is an environmentally beneficial

project that a violator agrees to undertake in settlement of an enforcement action, that the violator is not otherwise legally required to perform. In general, SEPs proposed by Defendants (or "Respondents" in administrative actions) must be significantly in excess of what is necessary to achieve and maintain compliance with all applicable environmental laws. The SEP is incorporated as an enforceable term of settlement.

Further reductions to the 75% gravity-based penalty may be considered "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" (Ref. #7).

How does State law, regulation, or policy affect implementation of EPA's Audit Policy?

EPA encourages States to experiment with different approaches to assure environmental 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. However, EPA is firmly opposed to statutory and regulatory audit privileges and immunity because the Agency believes that privilege laws shield evidence of wrongdoing and prevent States from investigating even the most serious environmental violations. The Agency opposes statutory immunity because it believes 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. In general, the Agency feels that statutory audit privilege and immunity run counter to encouraging the kind of openness that builds trust between regulators, the regulated community, and the public.

Consequently, EPA and the Department of Justice (DOJ) have stated that Federal facilities should not avail themselves of the benefits of state environmental audit privilege and immunity statutes (Feb. 12, 1997 letter from Steve Herman [EPA] and Lois Schiffer [DOJ] to General Counsel Robert Nordhaus [DOE]). EPA and DOJ have indicated that Federal facilities (including facilities operated by contractors) should not rely on state environmental audit laws to conceal information obtained through an environmental audit

or to claim immunity for environmental violations discovered and disclosed through an audit. In addition, they point out that no audit privilege exists between and among executive branch departments and agencies. Therefore, a Federal Agency cannot claim a privilege under a state audit law to withhold information from EPA or any other Federal enforcement agency.

EPA notes that 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 adequate enforcement requirements for Federal delegation.

Where can additional information be found regarding EPA's Audit Policy and the implementation process?

In addition to the guidance cited as "References" on page one and the EPA Regional and individual State web sites, the following list provides a snapshot of Audit Policy information posted on the EPA website:

- ▶ Audit Policy Support Documents – <http://es.epa.gov/oeca/ore/apolguid.html>
- ▶ Audit Policy: Incentives for Self-Policing – <http://www.epa.gov/oeca/auditpol.html>
- ▶ Confidentiality of Information Received Under Agency's Self-Disclosure Policy – <http://www.epa.gov/oeca/sahmemo.html>
- ▶ Memorandum--Subject: Implementation of the Environmental Protection Agency's Self-Policing Policy for Disclosures Involving Potential Criminal Violations – <http://es.epa.gov/oeca/oceft/audpol2.html>
- ▶ Memorandum--Subject: Reduced Penalties for Disclosures of Certain Clean Air Act Violations– <http://www.epa.gov/oeca/ore/caa-tit.pdf>
- ▶ Optional Form for Disclosure Submittal – <http://www.epa.gov/oeca/ore/checklist.pdf>
- ▶ Audit Policy Evaluation and Related Projects – <http://www.epa.gov/oeca/oppa/ape.htm>

- ▶ "Enforcement Alert" (Newsletter) – <http://www.epa.gov/oeca/ore/enfalert>
- ▶ Memorandum--Subject: Handling Self-Disclosure of 40 *CFR* 280.21 Violations in the Underground Storage Tank Program – <http://es.epa.gov/oeca/ore/rcra/cmp/021299.pdf>
- ▶ Letters to Trade Associations Promoting Self-Disclosure by Facilities (dated January 28, 1999) <http://es.epa.gov/oeca/ore/rcra/main/disclose.html>

Relative to elements that comprise a sound environmental auditing program, users are directed to EPA guidance titled *Environmental Audit Program Design Guidelines For Federal Agencies* (Ref. #4). The guidelines furnish information regarding the components of a thorough environmental management program and the kinds of issues that may arise and require addressing in environmental audits. In addition, EPA's detailed "how to" for conducting environmental audits using the various media and statute auditing protocols appears in its *Generic Protocol for Conducting Environmental Audits of Federal Facilities* (Ref. #6).

Questions of policy or questions requiring policy decisions will not be addressed in EH-413 Information Briefs unless that policy has already been established through appropriate documentation. Please refer questions concerning the material covered in this Information Brief to:

Jerry DiCerbo,
Office of Environmental
Policy & Guidance,
RCRA/CERCLA Division,
EH-413
U.S. Department of Energy
1000 Independence Ave., S.W.
Washington, DC 20585
(202) 586-5047
gerald.dicerbo@eh.doe.gov

