

EPA Revises Audit Policy

The U.S. Environmental Protection Agency (EPA) has issued significant revisions to its environmental audit policy. The original policy, officially titled, “Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations,” was issued on December 22, 1995 (60 Fed. Reg. 66706) (Audit Policy).

The Audit Policy is intended by EPA to provide incentives for regulated entities to detect, promptly disclose, and expeditiously correct violations of federal environmental requirements. The Audit Policy, both in its original form and as revised, contains nine conditions, and entities that meet all of them are eligible for 100% mitigation of any gravity-based penalties that could otherwise be assessed. (“Gravity-based” refers to that portion of the penalty over and above the portion that represents an entity’s economic gain from noncompliance. The Audit Policy offers no mitigation of the “economic gain” portion of any penalty.)

The nine conditions are:

(1) **Systematic Discovery:** The violation must be discovered through an environmental audit, which is defined as a “systematic, documented, periodic and objective review of facility operations and practices related to meeting environmental requirements,” or through a “compliance management system,” which is defined in the Audit Policy;

(2) **Voluntary Discovery:** The violation must be discovered voluntarily and not through a legally mandated monitoring or sampling requirement prescribed by statute, regulation, permit, judicial or administrative order, or consent agreement;

(3) **Prompt Disclosure:** The regulated entity must fully disclose the specific violation in writing to EPA within 21 days (expanded from 10 days under the original Audit Policy) after the entity discovered that a violation has, or may have, occurred.

(4) **Discovery and Disclosure Independent of Government or Third-Party Plaintiff:** The regulated entity must discover and disclose the violation to EPA prior to a government inspection, investigation or information request, notice of a citizen suit, the filing of a complaint by a third party, the reporting of the violation to the government by a “whistleblower,” or imminent discovery of the violation by the government.

(5) **Correction and Remediation:** The regulated entity must correct the violation within 60 days and certify such correction in writing.

(6) **Prevention of Recurrence:** The regulated entity must agree in writing to take steps to prevent a recurrence of the violation.

(7) **No Repeat Violations:** The specific violation, or a closely related violation, must not have occurred within the past three years at the same facility, or within the past five years as part of a pattern at multiple facilities owned or operated by the same entity.

(8) **Other Violations Excluded:** The Audit Policy does not apply where the violation: (a) results in serious harm or “may have presented an imminent and substantial endangerment;” or (b) violates a judicial or administrative order or consent agreement.

(9) **Cooperation:** The regulated entity must cooperate as requested by EPA and provide such information as is necessary and requested by EPA to determine the applicability of the Audit Policy.

If all conditions are met except for the first one (systematic discovery), EPA will still reduce by 75% gravity-based penalties. EPA in the revised Audit Policy also reiterates that it will not recommend that violations disclosed in accordance with the Audit Policy be subject to criminal enforcement as long as EPA determines that the violation is not part of a pattern or practice involving a “prevalent management philosophy or practice that conceals or condones environmental violations” or [h]igh-level corporation officials’ or managers’ conscious involvement in, or willful blindness to, violations of Federal environmental law.” In the revised Audit Policy, EPA further repeats that it generally will not request or use an environmental audit report to initiate a civil or criminal investigation, and clarifies that this “no recommendation” policy applies even where the facility has not met the “systematic discovery” condition, but has met all other conditions (the original Audit Policy required all nine conditions to be met for the “no recommendation” policy to apply).

The revised Audit Policy is different from the original Audit Policy in the following significant respects:

- The “prompt disclosure” period is extended to 21 calendar days. The original Audit Policy required full disclosure within 10 days or any shorter period required by law. When EPA sought feedback about the original Audit Policy from the regulated community, expanding the disclosure period was the most frequent suggestion, and it was noted that disclosure beyond the 10-day time frame was a common reason for ineligibility under the Audit Policy. In the preamble to the revised Audit Policy, EPA also provides new guidance on when the disclosure clock starts ticking, explaining that the 21-day disclosure period 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.” EPA states that “[t]he ‘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.” EPA cautions that the standard “is not measured against what the individual in question thought was reasonable at the time the situation was encountered.” If in doubt as to whether a violation exists, EPA advises that “the recommended course is for the entity to proceed with the disclosure and allow the regulatory authorities to make a definitive determination.”
In the multi-facility context, EPA states that it “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.”

- Clarifies how the “prompt disclosure” requirement applies in the acquisitions context. In an acquisition, EPA states that it “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.”
- Clarifies that the “independent discovery” condition does not automatically preclude Audit Policy credit in the multi-facility context. As noted above, the Audit Policy does not apply where the regulated entity discovers and discloses a potential violation where the violation has been or is about to be discovered by the government or other third parties. The revised Audit Policy states that “[f]or 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 [EPA] 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.”
- Clarifies how the repeat violations condition applies in the acquisitions context. In the preamble to the revised Audit Policy, EPA states that, “[I]f a facility has been newly acquired, the existence of a violation prior to acquisition does not trigger the repeat violations exclusion.”
- Clarifies that penalty relief may be available even where the disclosing entity does not meet any of the conditions of the Audit Policy. For example, an entity that does not qualify for penalty relief under the Audit Policy may still be entitled to relief under other EPA media-specific enforcement policies that recognize good-faith efforts.
- Clarifies that violations discovered pursuant to an audit or compliance management system may still be considered voluntary even if required under an EPA “partnership” program in which the entity voluntarily participates, such as EPA’s regulatory flexibility pilot project known as Project XL.

The revised Audit Policy became effective on May 11, 2000.

65 Fed. Reg. 19618 (Apr. 11, 2000).

This article was prepared by Kenneth C. Gold, a partner in our Environmental Department, and previously appeared in the May, 2000 edition of the Michigan Environmental Compliance Update, a monthly newsletter prepared by the Environmental Department and published by M. Lee Smith Publishers.