

ENVIRONMENTAL AUDITING AND PENALTY MITIGATION:

Leveraging EPA's Audit Policy Under the Trump Administration

Wayne D'Angelo
Partner, Kelley Drye

Matt Schroeder
EHS Practice Lead, Fehr Graham

Joe Green
Partner, Kelley Drye



What is the EPA Audit Policy & Why are we Talking About it Now?

Provides incentives to regulated entities that voluntarily discover and fix violations of environmental laws and regulations.

Actually a Suite of Policies & Guidance:

- Audit Policy (1995/2000): “Incentives for Self- Policing: Discovery, Disclosure, Correction and Prevention of Violations;”
- Small Business Compliance Policy (2000);
- Interim Approach to Applying the Audit Polity to New Owners (2008);
- FAQ (2007); eDisclosure FAQ (2015); Updated FAQ (2021);
- “Renewed Emphasis on Self-Disclosed Violation Policies (2018);
- Policy on Confidentiality of Voluntarily Disclosed Information (1997);
- Misc. Audit Protocols, *etc.*

State Policies:

- Immunity or leniency for self-reported and corrected violations
- Treatment of audit reports/finding as privileged

Why Talk About EPA's Audit Policy Now?

Trump Policies:

- Deregulatory Agenda;
- Changed Enforcement Posture at EPA & DOJ;
- Shift in Federal/State Enforcement Roles;
- Narrower interpretations of regulatory requirements and decreased reliance on generalized mandates (e.g, general duty or “good air pollution control practices”)
- Reversal of Environmental Justice Policies

Trump Precedent:

- Fewer inspections, lower civil penalties, and fewer initiated enforcement actions
 - But increase in self-reported violations
- Renewed Emphasis” on Audit Policy (2018)



Reasons to Audit/Disclosure Under EPA's Audit Policy

- Opportunity to Address Past and Potential Future Compliance Risks
- Possible Penalty Reductions:
 - 100% reduction of gravity-based penalties if all nine Audit Policy conditions met
 - 75% reduction of gravity-based penalties if meet all conditions except detection of the violation through a systematic discovery process
 - EPA discretion to collect any economic benefit realized as a result of noncompliance
- Opportunity to prevent criminal referrals
- Reduce likelihood that EPA will request audit reports
- Mechanism for continuous/systemic improvement:
 - Resource/Roadmap for environmental compliance personnel

EPA Audit Policy: Conditions

1. *Systematic discovery* of violation: environmental audit or compliance management system.
2. *Voluntary discovery*: not detected by legally required monitoring, sampling or auditing
3. *Prompt disclosure* in writing to EPA within 21 days
 - Discovery occurs 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. *Independent discovery and disclosure*: before EPA/state/third party identify
5. *Correction and remediation* within 60 calendar days
6. *Prevent recurrence* of the violation
7. Not a *repeat violations* (*i.e.*, the specific (or closely related) violations have not occurred at the same facility within the past 3 years or those that have occurred as part of a pattern at multiple facilities owned or operated by the same entity within the past 5 years
8. *No serious actual harm*
9. *Cooperation* by the disclosing entity is required

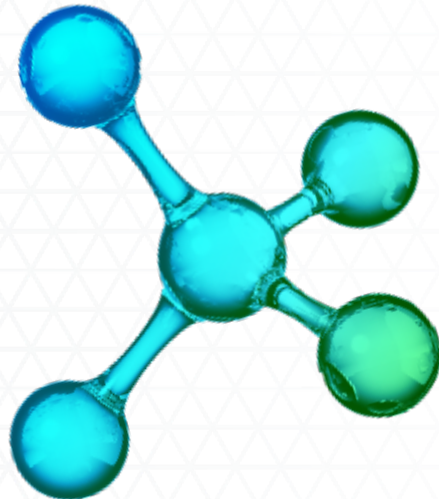
EPA Audit Policy

Self-disclosures are classified into two categories:

- Category 1: EPCRA disclosures that meet all the Audit Policy conditions
 - EPA will address and resolve when received
- Category 2: All other disclosures
 - Reviewed if/when the violation at issue arises in an inspection/enforcement context

EPA Audit Policy: Tailored Incentives

- **Small Businesses (100 or fewer employees)**
 - Violations can be discovered through non-systemic methods
 - *E.g.*, stand-alone audits and government-sponsored on-site compliance assistance activities
 - 100% reduction in gravity component regardless of systematic discovery
 - More time for corrective action
 - 180 days (up to 360 days if correction involves pollution prevention modifications)



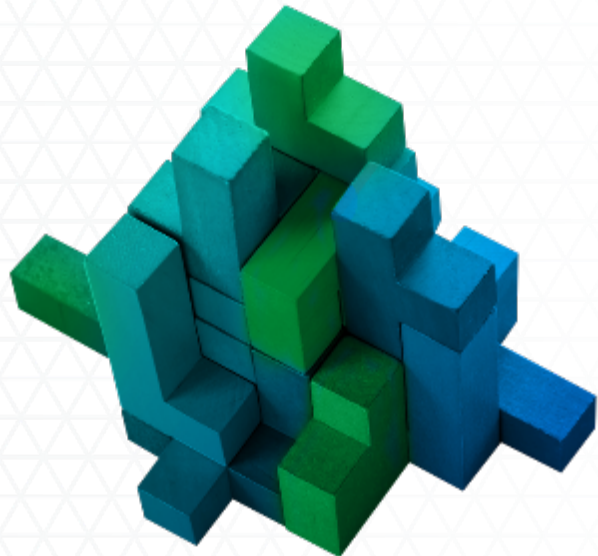
EPA Audit Policy: Tailored Incentives

- **New Owners**

- Prior to the transaction, it was not responsible for environmental compliance at the facility, did not cause the violations, and could not have prevented their occurrence;
- The violation originated with the prior owner; and,
- Prior to the transaction, neither the buyer nor the seller had the largest ownership share of the other entity, and they did not have a common corporate parent.
- Penalty Mitigation: Promptly disclose violations to EPA or enter into audit agreement with EPA within 9 months of closing
- Modified Audit Policy Conditions:
 - Systematic Discovery – pre-closing due diligence is necessarily a one-time event;
 - Voluntary Discovery – if audit agreement or disclosure occurs prior to new owner’s first required monitoring;
 - Serious or Actual Harm - no preclusion if violation/harm pre-dated ownership
 - Repeat Violations – violations prior to acquisition do not trigger repeat violation exclusion

Why Do Environmental Audits

- Limit damage to reputation and brand from allegations and judgments brought by agency enforcement processes
- Identify opportunities for improvement, best practices, industry standards
- Maintain control over the corrective action process



Planning an Environmental Audit

- Define the objective and scope of the audit
- Define audit duration
- Identify and assign competent audit team
- Confirm audit feasibility
- Prepare an audit plan
- Share audit plan/preliminary information request
- Desk review and develop audit checklist
- Onsite review of operations and interviews



Audit Report – Presentation of Findings

- Discuss in advance with counsel and consultant to determine level of detail required
- Define code citations relevant to findings – determine enforcement jurisdiction
- Draft findings presented by consultant to counsel for review and preliminary discussion
- Findings presented to client

Disclosure and Corrective Action

- Determine jurisdiction and disclosure mechanisms – Federal/State/Both
- Disclosure within 21 days of finding
- USEPA e-disclosure
- Determine if/how findings may be disclosed to state agencies
- 60-day corrective action window
- Managing multi-sites

Questions