

# Steering a Compliance Audit & Knowing When to Self-Disclose

*ACC E&S Network Legal Update*

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# Roadmap

- Why Consider Using Audit Programs
- EPA Audit Policy
  - 9 Elements
  - eDisclosure system
  - New Owners
  - Practice Pointers
- State audit policies



# Benefits of Environmental Compliance Audits

- Audits can be used to evaluate whether an organization's operations, facilities, equipment and supply chains comply with applicable environmental laws and regulations, voluntary standards, and the organization's policies and procedures.
- Audits can be designed to discover, correct and prevent recurrence of environmental violations, and, where appropriate, disclose those violations.
  - Proactive rather than reactive
  - Identify potential violations and correct before they are discovered by regulators
  - Disclose if necessary

# Audit considerations

Objectives

Scope

- Multimedia?
- Targeted?

Timing and duration

# Why Consider Audit Programs?

- Civil penalty forgiveness
  - Timely disclose and correct
  - Transparency to regulators (and public if not CBI)
- Validation or Implementation of EHS Management Systems
- Evaluate and integrate newly acquired facilities and operations

# EPA New Owner Policy



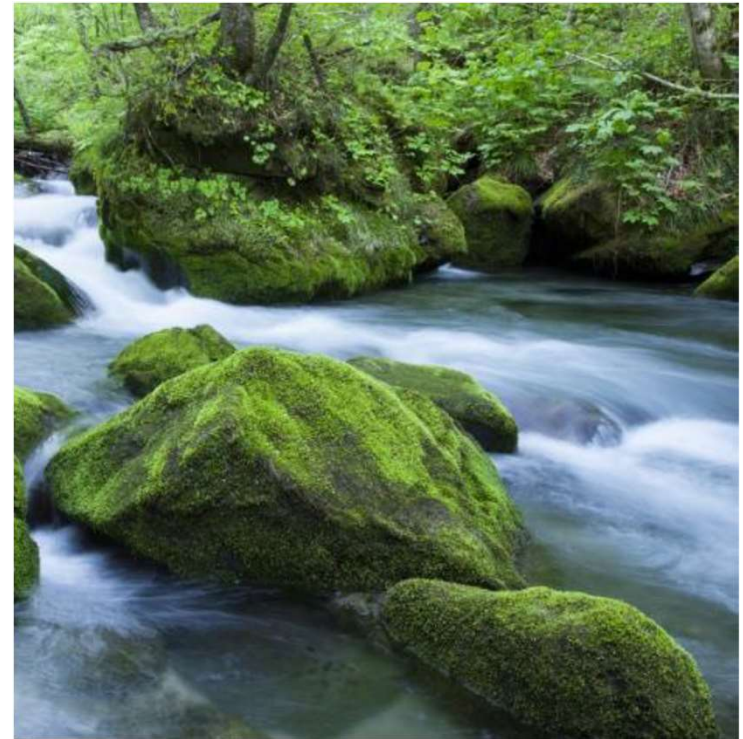
EPA offers additional incentives to new owners under its New Owner Policy.



A new owner is eligible for up to nine months after the date of the transaction closing and must meet EPA's definition of a "new owner."

# Nine Elements of EPA Policy

- Systematic discovery
- Voluntary discovery
- Prompt disclosure
- Independent discovery
- Timely correction
- Prevent recurrence
- No repeat violations
- No excluded violations
- Cooperation



# What is EPA's Audit Policy?

- **Voluntary, Voluntary, Voluntary!**
- Encourages regulated entities to voluntarily discover and fix environmental violations

**65 Fed. Reg. 19618 (Apr. 11, 2000)**  
("Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations")

## Benefits:

- Reduction of 100% of gravity-based penalties if all nine of the Policy's conditions are met
- No recommendation for criminal prosecution for entities that disclose criminal violations if all of the applicable conditions under the Policy are met
- No routine requests for audit reports

## Risks:

- May draw unwanted EPA attention to violator
- Failure to meet policy conditions may result in penalties



# EPA Audit Policy Conditions

## January 2021 FAQ's:

**Voluntary discovery:** regardless of whether the regulated entity may be required to report the violation after finding it

**Potential violations:** "may have" violated the law

During the course of an audit, each new discovery is subject to its own **21 day disclosure deadline**

**"Serious actual harm"/"imminent and substantial endangerment":** case-by-case, but rarely excluded (less than 12 times out of 28,000 cases)

Examples include instances involving community evacuation or employee death

# Voluntary Self-Disclosure

- E-Disclosure\*
  - CDX registration
  - Initial submission must be made within 21 days of discovery – very bare-bones
  - Correction/remediation must be achieved *within 60 days of discovery* (or request extension, 30 days granted without explanation, up to 180 days with justification)
  - Compliance certification must be submitted *within 60 days of disclosure*

\*unless disclosure submitted under New Owner Audit Policy or relates to potential criminal violation – these are handled manually

**Section 1: Voluntary Disclosure**

**Voluntary Disclosure Name:**

**Disclosure Status:**

**Disclosure Initiation Date:**

**\* Disclosure Policy:**

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**Section 2: Add Violation**

**\* Violation Discovery Date:**

**Disclosure Group Name:**

**\* Select Facility:**

If no facilities are listed below, click on the green Manage Facilities button to add any needed facilities.

Select	Registry ID	Program ID	Facility Name	Facility Address
No Facilities Found				

[Manage Facilities](#)

**\* Select Violations:**

[Expand all](#) [Collapse all](#)

Select	Statute /Section ID	Section (Program)
<input type="checkbox"/>	CAA	Clean Air Act
<input type="checkbox"/>	CERCLA	Comprehensive Environmental Response, Compensation, and Liability Act
<input type="checkbox"/>	CWA	Clean Water Act
<input type="checkbox"/>	EPCRA	Emergency Planning and Community Right-to-Know Act
<input type="checkbox"/>	FIFRA	Federal Insecticide, Fungicide, and Rodenticide Act
<input type="checkbox"/>	MCBMA	Mercury-Containing And Rechargeable Battery Management Act
<input type="checkbox"/>	MPRSA	Marine Protection, Research and Sanctuaries Act (Ocean Dumping Act)
<input type="checkbox"/>	RCRA	Resource Conservation and Recovery Act
<input type="checkbox"/>	SDWA	Safe Drinking Water Act
<input type="checkbox"/>	TSCA	Toxic Substances Control Act

Note that EPA's eDisclosure User's Guide provides step-by-step instructions on making submission in CDX

# 60-Day Compliance Certification

- If correction requires issuance or modification of a permit, the entity may complete compliance certification in eDisclosure if it has filed a complete permit application and submission is pending



# Acknowledgment Letter

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Automated acknowledgment of receipt if all Audit Policy conditions are satisfied

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No routine EPA follow-up or official determination of eligibility for penalty mitigation

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If conditions are not met, EPA sends an automated email describing ineligibility for acknowledgment letter

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Should EPA decide an enforcement action is warranted for disclosures, EPA will verify *at that time* whether the penalty mitigation conditions have been met

If not, EPA will apply the relevant statute-specific penalty policies (which may recognize good faith efforts)

# What Happens After eDisclosure?



# To disclose or not disclose

- Weighing the risks and benefits—
  - Was the potential violation discovered through an environmental audit?
    - If no, does it constitute voluntary discovery?
  - Can corrective action be completed in 60 days?
  - Is this violation likely to be discovered through a future EPA or state agency audit?

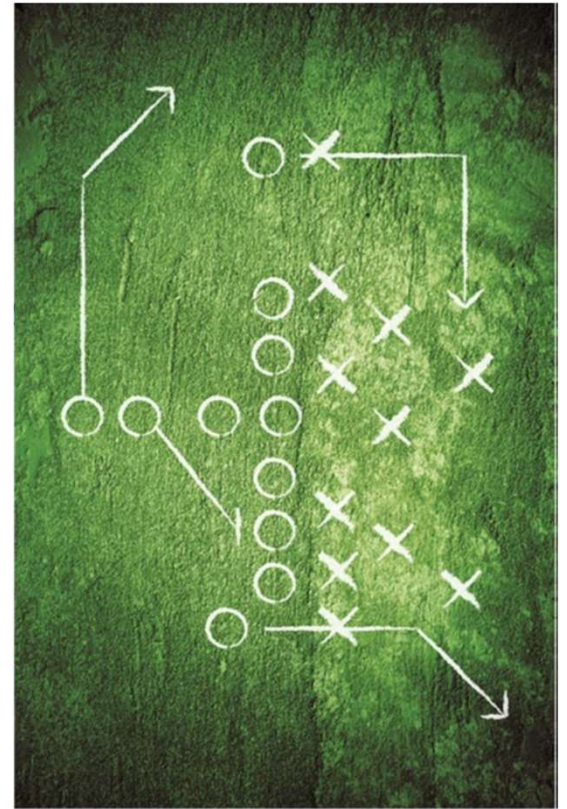


# eDisclosures for multiple facilities

- One disclosure to EPA can cover multiple facilities.
  - “The eDisclosure system was designed with flexibility to accept disclosures from one or multiple facilities, so long as each disclosure is made within 21 days after discovery of a violation.”  
See EPA Audit Policy FAQ, #35
- **Sequential disclosure of the same or closely related violations at different facilities does not trigger the repeat violation condition under the audit policy.**

# EPA Audit Policy Procedures

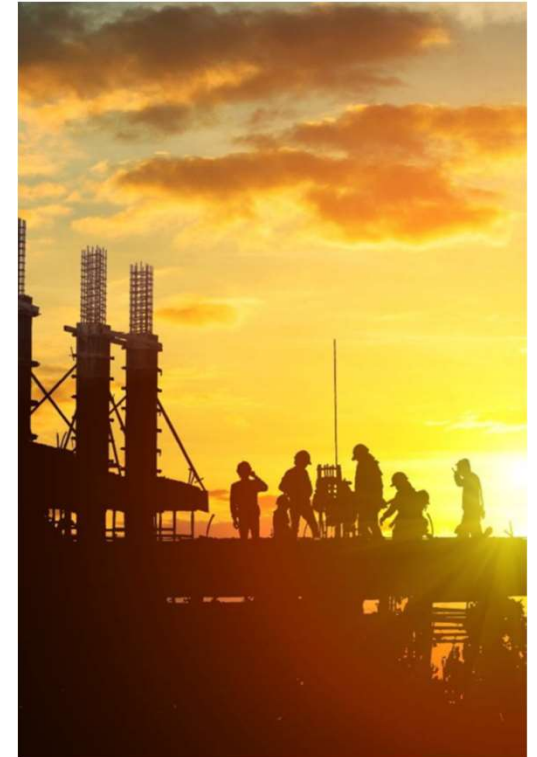
- New Owners
  - Start audit within 9 months of acquisition
  - Unique New Owner benefits
    - O&M costs
    - Capital costs
  - New Owner certification
    - Up front: unrelated to prior owner
    - At end: Measure results
  - Can enter Audit Agreements
    - Negotiate > 21 days for Disclosures
    - 60-day corrective action
    - 30-days TSCA 8(e)
    - Requesting more time for corrective action





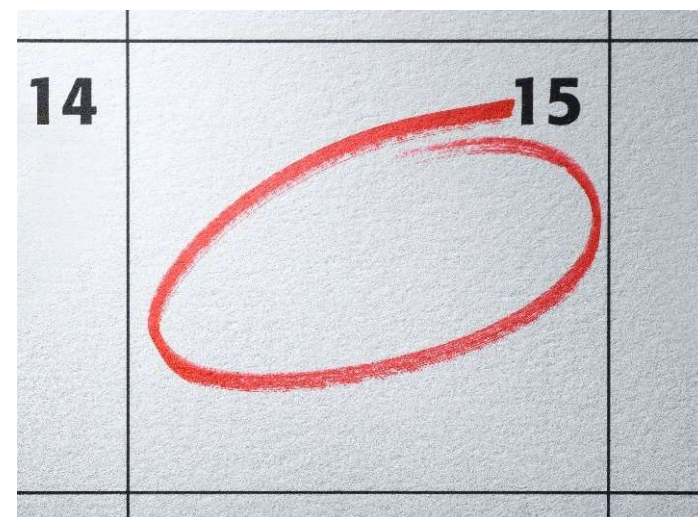
# EPA's New Owner Benefits

- Nine months after closing to start audits
- Waive economic benefit penalties for certain types of delayed expenditures that new owner inherited
- More flexible eligibility for certain reporting problems discovered before first post-acquisition report is due (e.g., some Title V and NPDES reports)



# State self-disclosure policies

- Several states have voluntary self-disclosure policies similar to EPA's
- Note that timing of deadlines vary.
  - In MA, for example, there is a 21 deadline for "prompt disclosure" of a violation and a 60 day deadline **from discovery** for correction and remediation.
  - In PA, however, there are no timelines.
    - Disclosure to DEP as well as corrective action must be made promptly, but no firm deadline in the policy.



# Takeaways

- Conducting an audit within a year when purchasing a new facility will allow you to take advantage of EPA's New Owner Policy.
- Ensure audit is done under privilege.
- Investigate quickly—time is of the essence!
  - 21 days is a quick timeframe
  - Be prepared to make disclosure and make corrective action
- Historically, EPA has only pursued a small number of enforcement actions following self-disclosures.

# Thank You!



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