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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.

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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

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List of Audit Policy "Quick Response Team" (QRT) Members ..... Attachment 4

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.

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[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.

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[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.*

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[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.

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[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.

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[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.

Attachment 1

Federal Register

Friday
December 22, 1995

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 received 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 regulated 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.

Under Section D(4), disclosure of the violation should be made within 10 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 bylaw), end 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 achieveor 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 tosecure 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&c 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 ID(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 orstate civil judicial or administrative order, consent agreement, confliction orplea agreement Recognizing that minor violations are sometimes settled without a formal action in court, the termalso covers any act or omission forwhich 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 coveredby 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.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.")

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., Dockets 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-C-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 consistency in application. For example, the Agency will make public any 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. While 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. 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" has the definition given to it 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, 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 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 not 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 re uired sampling or monitoring;

?): vio ations 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, aswell as to blanket immunities for violations thatreflect 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 Doc. 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 identification 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[illegible] 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): 303-294-7580
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 violations and
* to remedy any environmental harm

The Policy excludes:

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

Corporations remain criminally liable for violations resulting from conscious disregard of their legal [illegible] and individuals remain liable [illegible] wrongdoing. EPA retains discretion to recover the economic benefit gained as a result of non-compliance, so that companies will not be able to obtain an economic advantage over their competitors by delaying [illegible] in compliance. Companies [illegible] not discover [illegible] 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) and took effect on January 22, 1997. 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.

Attachment 3

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.*

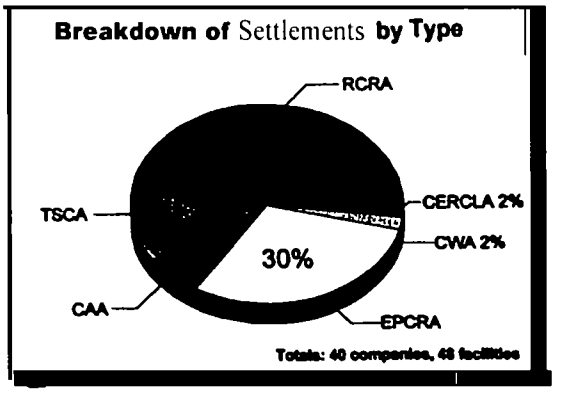
Steve Herman, Assistant Administrate
Office of Enforcement and Compliance Assuranc

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
Sulbeam-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



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 Divisio
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 IUR 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.

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 arising 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 Redel

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)