

## Introduction to EPA's Audit Policies



Wesley S. Hardegree, EPA – Region 4  
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## What's this I hear about EPA Audit Policies?



Wesley S.  
Hardegree  
EPA – Region 4  
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## EPA Compliance Assurance

- The EPA Office of Enforcement and Compliance Assurance (OECA) is responsible for maximizing compliance to a universe of over 40 million regulated entities using:
  - 10 federal environmental statutes dealing with prevention and control of pollution, and
  - 28 distinct federal programs under those statutes.
- To conduct the work necessary for the 28 programs, OECA utilizes 4 primary tools to pursue compliance, thereby achieving cleaner air, purer water and better-protected lands.
  - Compliance Assistance
  - *Compliance Incentives*
  - Compliance Monitoring
  - Enforcement

## EPA's Audit Policies: Purpose

- The purpose of EPA's Audit Policy is to encourage regulated entities to...
    - *voluntarily discover,*
    - *disclose,*
    - *correct, and*
    - *prevent violations*
- ...of federal environmental requirements.

## EPA's Audit Policies: History

- The Audit Policy is technically known as "*Incentives for Self Policing: Discovery, Disclosure, Correction, and Prevention of Violations*"
  - Original Policy - 60 FR 66706 - Effective January 22, 1996
  - Revised Policy - 65 FR 19,617 - Effective May 11, 2000
  - [www.epa.gov/compliance/incentives/auditing/auditpolicy.html](http://www.epa.gov/compliance/incentives/auditing/auditpolicy.html)
- The Small Business Compliance Policy is technically known as "*Policy on Compliance Incentives for Small Businesses*"
  - Original Policy - 61 FR 27984 - Issued June 3, 1996, implements the Small Business Regulatory Enforcement Fairness Act (SBREFA)
  - Revised Policy - 65 FR 19,629 - Effective May 11, 2000
  - [www.epa.gov/compliance/incentives/smallbusiness/index.html](http://www.epa.gov/compliance/incentives/smallbusiness/index.html)

## What is a Small Business?

- A small business is a person, corporation, partnership or other entity that employs 100 or fewer individuals (across all facility and operations owned by the small business).
- The number of employees should be considered as full-time-equivalents on an annual basis, including contract employees.
  - Full-time-equivalents (FTE) means 2,000 hours per year of employment.

### Summary of Incentives under EPA's Audit Policies

- No routine requests for audit reports
- No recommendation for criminal prosecution
- Penalty mitigation

### Audit Policies: Penalty Mitigation

- Civil penalties under the environmental laws generally have 2 components:
  - an amount assessed based upon the severity or "gravity" of the violation, and
  - the amount of *economic benefit* a violator received from failing to comply with the law.

### Audit Policy: Penalty Mitigation

- Under the Audit Policy
  - No gravity-based penalties (i.e., *100% gravity-based mitigation*) if all nine of the Policy's conditions are met.
    - EPA retains its discretion to collect any economic benefit that may have been realized as a result of non-compliance.
  - Under the Audit Policy, a *reduction of gravity-based penalties by 75%* where the disclosing entity meets all of the Policy's conditions except detection of the violation through a systematic discovery process.

### Small Business Compliance Policy (SBCP): Penalty Mitigation

- Under the Small Business Compliance:
  - No gravity-based penalties (i.e., *100% gravity-based mitigation*) if all of the Policy's conditions are met.
    - EPA retains its discretion to collect any economic benefit that may have been realized as a result of non-compliance.

Condition Number	Short-Hand Summary of Audit Policy Conditions
1	<b>Systematic Discovery</b> of the violation through an environmental audit or a compliance management system.
2	<b>Voluntary Discovery</b> , in other words it is not through a legally required monitoring, sampling or auditing procedure.
3	<b>Prompt Disclosure</b> in writing to EPA within 21 days of discovery or any shorter time required by law.
4	<b>Independent Discovery and Disclosure.</b>
5	<b>Correction and Remediation</b> within 60 days, in most cases, from date of discovery.
6	<b>Prevent recurrence</b> of a violation.
7	<b>Repeat violations</b> are not eligible for mitigation under the Audit Policy.
8	<b>Certain violations are not eligible.</b>
9	<b>Cooperation</b> by the disclosing entity is required.

Condition Number	Short-Hand Summary of EPA Small Business Compliance Policy (SBCP)
1	Was the Violation <b>Voluntarily Discovered</b> ?
2	Was <b>Prompt Disclosure Made</b> ?
3	Was the Violation <b>Corrected and Remediated</b> ?
4A	Does the Facility have a " <b>Good</b> " <b>Compliance Record</b> ?
4B	Does this Violation meet any of the <b>Ineligible Conditions</b> Under the Small Business Compliance Policy?

## What are the Four Conditions of the Small Business Compliance Policy (SBCP)?

### 1. Was the Violation Voluntarily Discovered?

- To answer this question, determine whether the violation was discovered through a monitoring or sampling requirement prescribed by statute, regulation, permit, judicial or administrative order or consent agreement.
- If the violations was discovered through monitoring or sampling requirement prescribed by statute, regulation, permit, judicial or administrative order or consent agreement, then the violation was not voluntarily discovered.

## Conditions of Policy - *continued*

### 2. Was Prompt Disclosure Made?

- To answer this question in the affirmative, disclosure of the violation should have occurred within 21 days of discovery (or any shorter time required by law).
- Discovery occurs when any officer, director, employee or agent of the facility has an objectively reasonable basis for believing that a violation has or may have occurred.

## Conditions of Policy - *continued*

### 3. Was the Violation Corrected and Remediated?

- To answer this question, determine whether the violation was corrected within 180 days from date of discovery.
  - Note: The small business must submit a written schedule for any violation that cannot be corrected within 90 calendar days of its discovery (i.e., corrections which will be made from 91 to 180 days after discovery require that the business submit a written schedule to the Agency.
- If the small business intends to correct the violation by putting into place pollution prevention measures, the business may take an additional 180 calendar days (i.e., up to a period of 360 calendar days from the date the violation is discovered).

**IF NO, the business is INELIGIBLE for coverage under the SBCP**

## Conditions of Policy - *continued*

### 4.A Does the Facility have a "Good" Compliance Record?

- A regulated entity has a "good" compliance record if that business:
  - has not previously received a warning letter, notice of violation, field citation or has not been subject to a citizen suit or any other enforcement action by a government agency for a violation of the same requirement within the past 3 years;
  - has not been subject to two or more enforcement actions for any environmental violation in the past 5 years; and
  - the business has not used the Small Business Compliance Policy for a violation of the same or similar requirement within the past 3 years.

**IF YES, the business is INELIGIBLE for coverage under the SBCP**

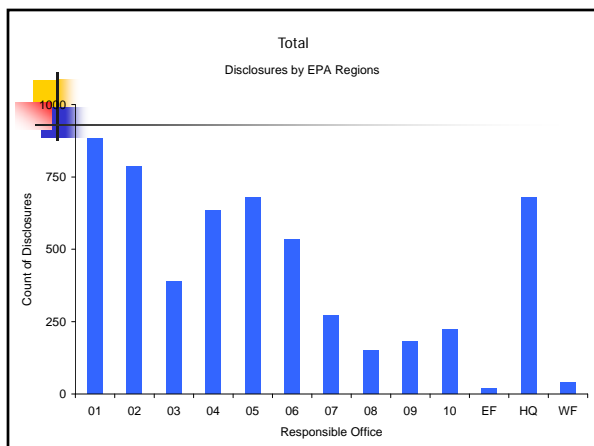
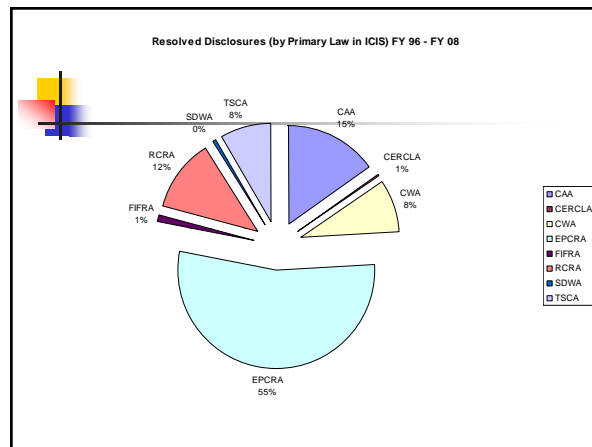
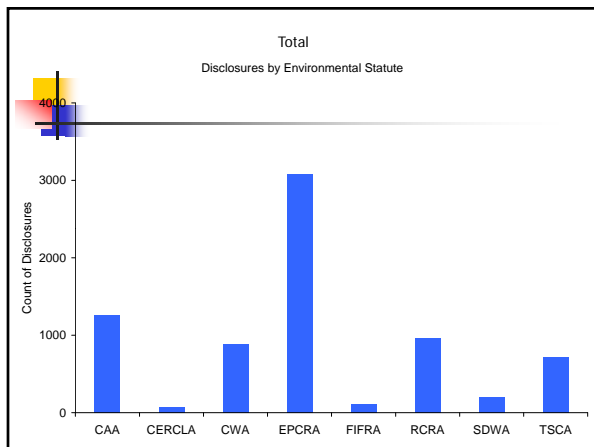
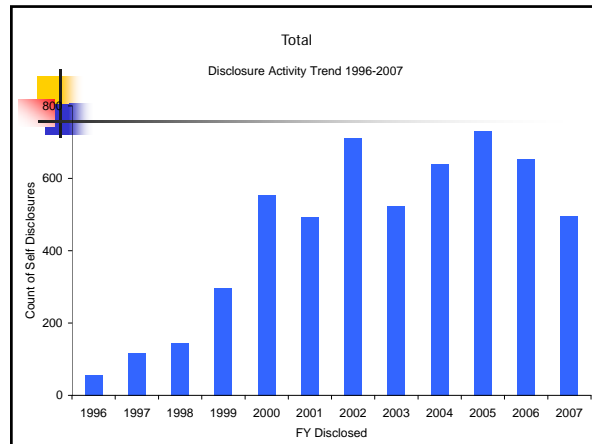
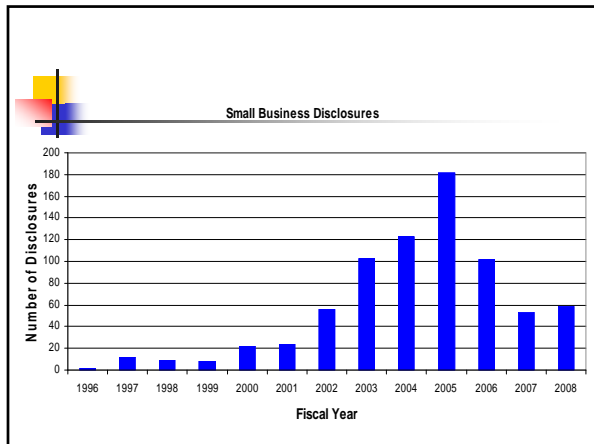
## Conditions of Policy - *continued*

### 4.B Does this Violation meet any of the Ineligible Conditions Under the Small Business Compliance Policy?

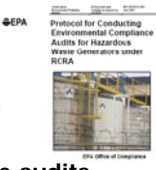
- Certain violations are not eligible for the Small Business Compliance Policy. For example, a violation that:
  - was discovered through an information request, inspections, field citations, reported to a federal, state or local agency;
  - was discovered by a member of the public, whistleblower, civil suit;
  - resulted in serious actual harm;
  - presented an imminent and substantial endangerment; or
  - violated specific terms of an Administrative or Judicial Order or Consent Agreement, and
  - involves criminal conduct.

Be Careful





## Audit Tool – Audit Protocols



- Developed by EPA to assist entities in developing compliance audits.
- Provide detailed regulatory checklists in easy to understand question format.
- Protocols cover: CERCLA, CWA, EPCRA, FIFRA, RCRA, TSCA, SDWA.
  - <http://cfpub.epa.gov/compliance/resources/policies/incentives/auditing/>

## How to Make a Disclosure Under EPA's Audit Policy:

- Contact EPA Region where entity or facility is located.
  - Region 4: <http://www.epa.gov/Region4/ead/legal/auditproc.html>
- Where multiple Regions are involved, contact EPA HQ.
  - Phillip Milton, EPA HQ  
(202) 564 - 5029
- For criminal violations, contact: Regional Criminal Investigation Division, EPA HQ, or U.S. Department of Justice.
  - James T. Morgan, EPA HQ  
Criminal Investigations Division  
(202) 564 - 7684

## EPA Region 4 Process for Audit Disclosures

- Letter acknowledging receipt of disclosure within 30 days of submitting disclosure.
- EPA review includes:
  - > Determine if disclosure meets nine criteria of Policy.
  - > Request additional information, if needed.
  - > Determine whether penalty mitigation is appropriate.

## FYI: eDisclosure EPCRA Pilot

- National web-based pilot for EPCRA disclosures (about one-half of all disclosures received) submitted pursuant to the Audit Policy.
- Benefits
  - Makes self-disclosing easier
  - Speeds EPA processing times and reduces transaction costs by ensuring that each disclosure contains complete information
    - Can help in meeting key management measure
  - Assures consistency in how the disclosures are processed and reviewed by using a comprehensive "smart" form and SOPs

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## For More Information - Contacts

- Kelly Sisario, EPA Region 4
  - Branch Chief, Enforcement and Compliance Planning Branch
  - (404) 562 - 9054
- Wesley Hardegree, EPA Region 4
  - Compliance Assistance Coordinator
  - (404) 562 - 9629
- Kevin Smith, EPA Region 4,
  - Lead Attorney on Audit Policy
  - (404) 562 - 9525

## New Directions for EPA's Audit Policy

Interim Approach to Applying the Audit Policy to New Owners

## Tailored Incentives for New Owners



- Over the past few years, EPA has explored the idea of offering tailored incentives to new owners to encourage them to self-audit and disclose violations at their recently acquired facilities
- This approach should present an opportunity to achieve significant environmental benefits more quickly than might otherwise happen

## Why New Owners?

- New owners may be well-situated and motivated to focus on, and invest in, making a clean start, by addressing environmental issues
  - Not responsible for facility when violation arose
  - May already be auditing and assessing new facilities
  - Funding to fix problems may be available or budget commitments still relatively flexible
  - Opportunity to manage and reduce risk by addressing and disclosing noncompliance
  - May have equitable argument that economic benefit shouldn't be assessed

## New Owner - INVISTA Makes "Clean Start" to the Benefit of the Environment

- INVISTA is making a clean start, and we encourage other new owners to do the same.
  - EPA's experience with INVISTA guided the development of the Interim Approach.
  - Largest settlement under the Audit Policy.
  - INVISTA conducted 45 separate audits of environmental practices and compliance at facilities.
  - Settlement will reduce nearly 20 million pounds. Between FY05 & FY08 only 8.55 million pounds of pollutants were reduced, treated, or eliminated as a result of audits.

## Why Might New Owners Want to Use the Audit Policy?

New owners may already be well-situated and motivated to use the Audit Policy because they:

- were not responsible for the facility when the noncompliance began
- may already be assessing and auditing new facilities to manage and reduce risk
- may have funding available to fix problems, or have budget commitments which are still relatively flexible

## Why Might New Owners Not Want to Use the Audit Policy? *(Continued)*

- Possible disincentives to use the Audit Policy
  - Significant penalties for economic benefit
  - Ineligibility for certain violations
  - Uncertainty about treatment by EPA

## What Are the Tailored Incentives?

- Incentives include:
  - Penalty mitigation beyond what the Audit Policy offers - clear statement about mitigating some portion of penalty for economic benefit
  - Expanded range of violations that may be eligible for Audit Policy consideration

## Who Is a New Owner?

An eligible new owner must certify that:

- Prior to the transaction, it was not responsible for environmental compliance at the facility which is the subject of the disclosure, did not cause the violations being disclosed and could not have prevented their occurrence;
- The violation which is the subject of the disclosure originated with the prior owner; and
- Prior to the transaction, neither the buyer nor the seller had the largest ownership share of the other entity, and they did not have a common corporate parent.

## What Must a New Owner Do to Qualify for These Tailored Incentives?

- Within 9 months of the transaction closing, a new owner must:
  - Promptly disclose violations to EPA OR
  - Enter into an audit agreement with EPA AND
  - Meet all of the Conditions of the Audit Policy, as modified for new owners.

## Tailored Incentives: Enhanced Penalty Mitigation

- If a new owner meets all the conditions of the Audit Policy, as modified for new owners:
  - No penalties for the period before the date of acquisition;
  - No penalties for economic benefit associated with delayed capital expenditures, one-time non-depreciable costs or unfair competitive advantage, if the violations are properly corrected; and
  - Penalties for economic benefit associated with avoided operation and maintenance costs only assessed from the date of acquisition

## Tailored Incentives: Modifications to Audit Policy Conditions

- EPA is modifying 5 of the 9 Audit Policy conditions, in the context of new owners and the Interim Approach
- This will make more violations eligible for Audit Policy consideration and enhanced penalty mitigation

## Modifications to Audit Policy Conditions:

### *Voluntary Discovery – Condition 2*

- Some violations are already required to be identified through a legally mandated monitoring, sampling or auditing protocol and. Therefore, would usually not be eligible for Audit Policy consideration because their discovery is *not* “voluntary”.
- New owners have a one-time opportunity to disclose these violations under the Audit Policy and get penalty mitigation.
- Must come in, and enter into an audit agreement or disclose violations, before the first instance when the monitoring, sampling or auditing is required.

## Modifications to Audit Policy Conditions:

### *Systematic Discovery - Condition 1 and Prompt Disclosure – Condition 3*

For violations found during pre-closing due diligence:

- “Periodic review” requirement is waived for what is, by its nature, a one-time event - and new owners can get full penalty mitigation
- New owners will have 45 days after closing to disclose violations they find before acquisition

## Modifications to Audit Policy Conditions:

### *Other Violations Excluded - Condition 8*

- Violations that resulted in serious actual harm or may have presented an imminent and substantial endangerment are usually ineligible.
- For new owners, violations that began before the new owner acquired the facility will not be excluded under the Interim Approach, even if they gave rise to serious actual harm or an imminent and substantial endangerment.
  - *Unless* there was a fatality, community evacuation or other seriously injurious or catastrophic event.
- This should encourage new owners to come forward and correct significant violations, which is one of the goals of this approach.

## Other Audit Policy

### Conditions: *Slight Modification*

- **Cooperation – Condition 9**
  - Modified only to clarify that new owners must give EPA any information relevant to analyzing whether disclosure meets Interim Approach.

## Other Audit Policy Conditions:

### *No Change to Current Interpretations*

- **Independent Discovery and Disclosure – Condition 4**
  - Must still find and disclose violations before EPA or government agency would likely have found them.
- **Correction and Remediation – Condition 5**
  - Must still correct within 60 days of discovery (or within reasonable time EPA which allows).
- **Prevent Recurrence – Condition 6**
  - Must still agree in writing to take steps to stay in compliance.
- **No Repeat Violations – Condition 7**
  - For newly acquired facilities, neither previous violations at the facility, nor the new owner's history of violations at other facilities, triggers this exclusion.

## For More Information

- **New Owner Information on EPA's website:**
  - <http://www.epa.gov/compliance/incentives/auditing/newowners-incentives.html>
- **Questions about Interim Approach, contact Caroline Makepeace at:**
  - [makepeace.caroline@epa.gov](mailto:makepeace.caroline@epa.gov)
- **Questions about the Audit Policy, contact Phil Milton, National Audit Policy Coordinator, at:**
  - [milton.philip@epa.gov](mailto:milton.philip@epa.gov)
- **Disclosures Under Interim Approach need to be made to EPA Headquarters**

## Key Documents and Information at EPA Headquarters Website

- **Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations (Original Audit Policy): 60 Fed. Reg. 66706 (1995)**
- **Audit Policy Interpretive Guidance (1997)**
- **Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations (Revised Audit Policy): 65 FR 19,618 (2000)**
- **The Small Business Compliance Policy (2000)**
- **Use of Corporate Auditing Agreements for Audit Policy Disclosures - Correction (2001)**
- **Audit Policy: Frequently Asked Questions (2007)**
- **EPCRA eDisclosure -- EPA's Electronic Audit Policy Self-Disclosure System Pilot (2008)**