



EPA Clarifies its Audit Policy on Voluntarily Disclosed Violations

Manufacturing facilities, industrial operations, and other businesses subject to environmental statutes and regulations will want to evaluate a new EPA document when considering whether and how to voluntarily disclose environmental violations to the federal government. EPA recently published a 22-page [guidance document](#), dated January 2021, clarifying EPA's Audit Policy. EPA's Audit Policy consists of incentives the agency offers to companies that voluntarily discover their own violations of environmental laws and regulations and disclose the violations to EPA. When all of the nine eligibility conditions in the Audit Policy are met, the Audit Policy allows for up to complete elimination of the gravity-based portion of civil penalties for environmental non-compliance, and a recommendation of no criminal prosecution. (EPA penalties may also include amounts to address the economic benefit of non-compliance, which the Audit Policy does not address.) The Audit Policy itself is memorialized in [Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations](#), 65 Fed. Reg. 19618 (Apr. 11, 2000) (an update to the original 1995 document establishing the Audit Policy).

EPA's new guidance document is a strong indication of Biden Administration intent to support the Audit Policy and encourage companies to voluntarily disclose environmental violations. The guidance purports to describe how EPA exercises its enforcement discretion, without creating any rights, duties, obligations, or defenses of any third parties. Nevertheless, the Audit Policy can dramatically impact enforcement outcomes, thus, businesses subject to environmental regulations issued by EPA are wise to carefully consider the Audit Policy and the new guidance.

The new guidance supersedes past EPA guidance materials regarding the Audit Policy. The guidance does, however, carry forward much of the discussion that

remains technologically current from those superseded documents.

The new guidance addresses numerous aspects of EPA's Audit Policy, sometimes touching on broad policy-based considerations underlying the policy, but primarily addressing various practical aspects of the policy's workings. Technical clarifications provided in the guidance include:

- **Scope of Voluntary Disclosure** – If a regulated entity discovers noncompliance, but the noncompliance is required to be reported to the regulatory agency pursuant to applicable statute, regulation, and/or permit, this does not mean that the regulated entity fails to satisfy the “voluntary discovery” condition for application of the Audit Policy. EPA states, “[a]ny violation voluntarily discovered may be still eligible for penalty mitigation, regardless of whether the regulated entity was required to report the violation after finding it.”
- **Admission of Liability** – Regulated entities are not required to affirmatively admit that they violated the law; it is sufficient for a regulated entity to disclose that it “may have” violated the law.
- **Compliance Audits** – Regulated entities generally cannot be deemed to have voluntarily discovered a violation where the violation is discovered during the conduct of a compliance audit that is required as part of a binding settlement. An exception sometimes applies where the violation is discovered pursuant to an audit which is “a component of agreement terms to implement a comprehensive environmental management system.”
- **Clean Water Act Monitoring Violations** – NPDES permit violations through monitoring required by a permit is not voluntary and, therefore, such violations generally are not eligible for penalty mitigation under the self-disclosed violations policies.

The guidance clarifies numerous additional aspects of the Audit Policy. The Audit Policy may offer many facilities a tool to reduce their regulatory liability (especially relevant as the Biden Administration alters EPA's enforcement priorities) and to further their own environmental stewardship.

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