ENVIRONMENTAL PROTECTION AGENCY

[FRL 6576-3]

Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations

AGENCY: Environmental Protection Agency (EPA, or Agency).

ACTION: Final Policy Statement.

SUMMARY: EPA today issues its revised final policy on "Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations," commonly referred to as the "Audit Policy." The purpose of this Policy is to enhance protection of human health and the environment by encouraging regulated entities to voluntarily discover, promptly disclose and expeditiously correct violations of Federal environmental requirements. Incentives that EPA makes available for those who meet the terms of the Audit Policy include the elimination or substantial reduction of the gravity component of civil penalties and a determination not to recommend criminal prosecution of the disclosing entity. The Policy also restates EPA's long-standing practice of not requesting copies of regulated entities' voluntary audit reports to trigger Federal enforcement investigations. Today's revised Audit Policy replaces the 1995 Audit Policy (60 FR 66,706), which was issued on December 22, 1995, and took effect on January 22, 1996. Today's revisions maintain the basic structure and terms of the 1995 Audit Policy while clarifying some of its language, broadening its availability, and conforming the provisions of the Policy to actual Agency practice. The revisions being released today lengthen the prompt disclosure period to 21 days, clarify that the independent discovery condition does not automatically preclude penalty mitigation for multi-facility entities, and clarify how the prompt disclosure and repeat

violation conditions apply to newly acquired companies. The revised Policy was developed in close consultation with the U.S. Department of Justice (DOJ), States, public interest groups and the regulated community. The revisions also reflect EPA's experience implementing the Policy over the past five years.

DATES: This revised Policy is effective May 11, 2000.

FOR FURTHER INFORMATION CONTACT: Catherine Malinin Dunn (202)564-2629 or Leslie Jones (202)564-5123. Documentation relating to the development of this Policy is contained in the environmental auditing public docket (#C-94-01). An index to the docket may be obtained by contacting the Enforcement and Compliance Docket and Information Center (ECDIC) by telephone at (202) 564-2614 or (202)564-2119, by fax at (202)501-1011, or by email at docket.oeca@epa.gov. ECDIC office hours are 8:00 AM to 4:00 PM Monday through Friday except for Federal holidays. An index to the docket is available on the Internet at www.epa.gov/oeca/polguid/enfdock.html. Additional guidance regarding interpretation and application of the Policy is also available on the Internet at www.epa.gov/oeca/ore/apolguid.html.

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I. Explanation of Policy

A. Introduction

On December 22, 1995, EPA issued its final policy on "Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations" (60 FR 66,706) (Audit Policy, or Policy). The purpose of the Policy is to enhance protection of human health and the environment by encouraging regulated entities to voluntarily discover, disclose, correct and prevent violations of Federal

environmental law. Benefits available to entities that make disclosures under the terms of the Policy include reductions in the amount of civil penalties and a determination not to recommend criminal prosecution of disclosing entities.

Today, EPA issues revisions to the1995 Audit Policy. The revised Policy reflects EPA's continuing commitment to encouraging voluntary self-policing while preserving fair and effective enforcement. It lengthens the prompt disclosure period to 21 days, clarifies that the independent discovery condition does not automatically preclude Audit Policy credit in the multi-facility context, and clarifies how the prompt disclosure and repeat violations conditions apply in the acquisitions context. The revised final Policy takes effect May 11, 2000.

B. Background and History

The Audit Policy provides incentives for regulated entities to detect, promptly disclose, and expeditiously correct violations of Federal environmental requirements. The Policy contains nine conditions, and entities that meet all of them are eligible for 100% mitigation of any gravity-based penalties that otherwise could be assessed. ("Gravity-based" refers to that portion of the penalty over and above the portion that represents the entity's economic gain from noncompliance, known as the "economic benefit.") Regulated entities that do not meet the first condition – systematic discovery of violations – but meet the other eight conditions are eligible for 75% mitigation of any gravity-based civil

penalties. On the criminal side, EPA will generally elect not to recommend criminal prosecution by DOJ or any other prosecuting authority for a disclosing entity that meets at least conditions two through nine -- regardless of whether it meets the systematic discovery requirement – as long as its self-policing, discovery and disclosure were conducted in good faith and the entity adopts a systematic approach to preventing recurrence of the violation.

The Policy includes important safeguards to deter violations and protect public health and the environment. For example, the Policy requires entities to act to prevent recurrence of violations and to remedy any environmental harm that may have occurred. Repeat violations, those that result in actual harm to the environment, and those that may present an imminent and substantial endangerment are not eligible for relief under this Policy. Companies will not be allowed to gain an economic advantage over their competitors by delaying their investment in compliance. And entities remain criminally liable for violations that result from conscious disregard of or willful blindness to their obligations under the law, and individuals remain liable for their criminal misconduct.

When EPA issued the 1995 Audit Policy, the Agency committed to evaluate the Policy after three years. The Agency initiated this evaluation in the Spring of 1998 and published its preliminary results in the *Federal Register* on May 17, 1999 (64 FR 26,745). The evaluation consisted of the following components:

- An internal survey of EPA staff who process disclosures and handle enforcement cases under the 1995 Audit Policy;
- A survey of regulated entities that used the 1995 Policy to disclose violations;
- A series of meetings and conference calls with representatives from industry, environmental organizations, and States;
- Focused stakeholder discussions on the Audit Policy at two public conferences co-sponsored by EPA's Office of Enforcement and Compliance Assurance (OECA) and the Vice President's National Partnership for Reinventing Government, entitled "Protecting Public Health and the Environment through Innovative Approaches to Compliance";
- A *Federal Register* notice on March 2, 1999, soliciting comments on how EPA can further protect and improve public health and the environment through new compliance and enforcement approaches (64 FR 10,144); and
- An analysis of data on Audit Policy usage to date and discussions amongst EPA officials who handle Audit Policy disclosures.

The same May 17, 1999, *Federal Register* notice that published the evaluation's preliminary results also proposed revisions to the 1995 Policy and requested public comment. During the 60-day public comment period, the Agency received 29 comment letters, copies of which are available through the Enforcement and Compliance Docket and Information Center. (See contact information at the beginning of this notice.) Analysis of these comment letters together with additional data on Audit

Policy usage has constituted the final stage of the Audit Policy evaluation. EPA has prepared a detailed response to the comments received; a copy of that document will also be available through the Docket and Information Center as well on the Internet at www.epa.gov/oeca/ore/apolguid.html.

Overall, the Audit Policy evaluation revealed very positive results. The Policy has encouraged voluntary self-policing while preserving fair and effective enforcement. Thus, the revisions issued today do not signal any intention to shift course regarding the Agency's position on self-policing and voluntary disclosures but instead represent an attempt to fine-tune a Policy that is already working well.

Use of the Audit Policy has been widespread. As of October 1, 1999, approximately 670 organizations had disclosed actual or potential violations at more than 2700 facilities. The number of disclosures has increased each of the four years the Policy has been in effect.

Results of the Audit Policy User's Survey revealed very high satisfaction rates among users, with 88% of respondents stating that they would use the Policy again and 84% stating that they would recommend the Policy to clients and/or their counterparts. No respondents stated an unwillingness to use the Policy again or to recommend its use to others.

The Audit Policy and related documents, including Agency interpretive guidance and general interest newsletters, are available on the Internet at www.epa.gov/oeca/ore/apolguid. Additional guidance for

implementing the Policy in the context of criminal violations can be found at www.epa.gov/oeca/oceft/audpol2.html.

In addition to the Audit Policy, the Agency's revised Small Business Compliance Policy ("Small Business Policy") is also available for small entities that employ 100 or fewer individuals. The Small Business Policy provides penalty mitigation, subject to certain conditions, for small businesses that make a good faith effort to comply with environmental requirements by discovering, disclosing and correcting violations. EPA has revised the Small Business Policy at the same time it revised the Audit Policy. The revised Small Business Policy will be available on the Internet at www.epa.gov/oeca/smbusi.html.

C. Purpose

The revised Policy being announced today is designed to encourage greater compliance with Federal 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 systematically -- that is, through voluntary audits or compliance management systems. To provide an incentive for entities to disclose and correct violations regardless of how they were detected, the Policy reduces gravity-based penalties by 75% for violations that are voluntarily discovered and promptly disclosed and corrected, even if not discovered systematically.

EPA's enforcement program provides a strong incentive for compliance by imposing stiff sanctions for noncompliance. Enforcement has contributed to the dramatic expansion of environmental auditing as measured in numerous recent surveys. For example, in a 1995 survey by Price Waterhouse LLP, more than 90% of corporate respondents who conduct audits identified one of the reasons for doing so as the desire to find and correct violations before government inspectors discover them. (A copy of the survey is contained in the Docket as document VIII-A-76.)

At the same time, because government resources are limited, universal 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 in place, EPA believes that the incentives offered in this Policy will improve the frequency and quality of these self-policing efforts.

D. Incentives for Self-Policing

Section C of the Audit Policy identifies the major incentives that EPA provides to encourage self-policing, self-disclosure, and prompt self-correction. For entities that meet the conditions of the Policy, the available incentives include waiving or reducing gravity-based civil penalties, 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

In general, civil penalties that EPA assesses are comprised of two elements: the economic benefit component and the gravity-based component. The economic benefit component reflects the economic gain derived from a violator's illegal competitive advantage. Gravity-based penalties are that portion of the penalty over and above the economic benefit. They reflect the egregiousness of the violator's behavior and constitute the punitive portion of the penalty. For further discussion of these issues, see "Calculation of the Economic Benefit of Noncompliance in EPA's Civil Penalty Enforcement Cases," 64 FR 32,948 (June 18, 1999) and "A Framework for Statute-Specific Approaches to Penalty Assessments," #GM-22 (1984), U.S. EPA General Enforcement Policy Compendium.

Under the Audit Policy, EPA will not seek gravity-based penalties for disclosing entities that meet all nine Policy conditions, including systematic discovery. ("Systematic discovery" means the detection of a potential violation through an environmental audit or a compliance management system that reflects the entity's due diligence in preventing, detecting and correcting violations.) EPA has elected to waive gravity-based penalties for violations discovered systematically, recognizing that environmental auditing and compliance management systems play a critical role in protecting human health and the environment

by identifying, correcting and ultimately preventing violations.

However, EPA reserves the right to collect any economic benefit that may have been realized as a result of noncompliance, even where the entity meets all other Policy conditions. Where the Agency determines that the economic benefit is insignificant, the Agency also may waive this component of the penalty.

EPA's decision to retain its discretion to recover economic benefit is based on two reasons. First, facing the risk that the Agency will recoup economic benefit provides an incentive for regulated entities to comply on time. Taxpayers whose payments are late expect to pay interest or a penalty; the same principle should apply to corporations and other regulated entities that have delayed their investment in compliance. Second, collecting economic benefit is fair because it protects law-abiding companies from being undercut by their noncomplying competitors, thereby preserving a level playing field.

2. 75% Reduction of Gravity-based Penalties

Gravity-based penalties will be reduced by 75% where the disclosing entity does not detect the violation through systematic discovery but otherwise meets all other Policy conditions. The Policy appropriately limits the complete waiver of gravity-based civil penalties to companies that conduct environmental auditing or have in place a compliance management system. However, to encourage

disclosure and correction of violations even in the absence of systematic discovery, EPA will reduce gravity-based penalties by 75% for entities that meet conditions D(2) through D(9) of the Policy. EPA expects that a disclosure under this provision will encourage the entity to work with the Agency to resolve environmental problems and begin to develop an effective auditing program or compliance management system.

3. No Recommendations for Criminal Prosecution

In accordance with EPA's Investigative Discretion Memo dated January 12, 1994, EPA generally does not focus its criminal enforcement resources on entities that voluntarily discover, promptly disclose and expeditiously correct violations, unless there is potentially culpable behavior that merits criminal investigation. When a disclosure that meets the terms and conditions of this Policy results in a criminal investigation, EPA will generally not recommend criminal prosecution for the disclosing entity, although the Agency may recommend prosecution for culpable individuals and other entities. The 1994 Investigative Discretion Memo is available on the Internet at http://www.epa.gov/oeca/ore/aed/comp/acomp/a11.html.

The "no recommendation for criminal prosecution" incentive is available for entities that meet conditions D(2) through D(9) of the Policy. Condition D(1) – systematic discovery – is not required to be eligible for this incentive, although the entity must be acting in good faith and must adopt a systematic approach

to preventing recurring violations. Important limitations to the incentive apply. It will not be available, 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 conditions D(2) through D(9) of the Policy, violations that cause serious harm or which may pose imminent and substantial endangerment to human health or the environment are not eligible. Finally, EPA reserves the right to recommend prosecution for the criminal conduct of any culpable individual or subsidiary organization.

While EPA may decide not to recommend criminal prosecution for disclosing entities, ultimate prosecutorial discretion resides with the U.S. Department of Justice, which will be guided by its own policy on voluntary disclosures ("Factors in Decisions on Criminal Prosecutions for Environmental Violations in the Context of Significant Voluntary Compliance or Disclosure Efforts by the Violator," July 1, 1991) and by its 1999 Guidance on Federal Prosecutions of Corporations. In addition, where a disclosing entity has met the conditions for avoiding a recommendation for criminal prosecution under this Policy, it will also be eligible for either 75% or 100% mitigation of gravity-based civil penalties, depending on whether the systematic discovery condition was met.

4. No Routine Requests for Audit Reports

EPA reaffirms its Policy, in effect since 1986, to refrain from routine requests for audit reports. That is, EPA has not and will not routinely request copies of audit reports to trigger enforcement

investigations. Implementation of the 1995 Policy has produced no evidence that the Agency has deviated, or should deviate, from this Policy. In general, an audit that results in expeditious correction will reduce liability, not expand it. However, if the Agency has independent evidence of a violation, it may seek the information it needs to establish the extent and nature of the violation and the degree of culpability.

For discussion of the circumstances in which EPA might request an audit report to determine Policy eligibility, see the explanatory text on cooperation, section I.E.9.

E. Conditions

Section D describes the nine conditions that a regulated entity must meet in order for the Agency to decline to seek (or to reduce) gravity-based penalties under the Policy. As explained in section I.D.1 above, regulated entities that meet all nine conditions will not face gravity-based civil penalties. If the regulated entity meets all of the conditions except for D(1) -- systematic discovery -- EPA will reduce gravity-based penalties by 75%. In general, EPA will not recommend criminal prosecution for disclosing entities that meet at least conditions D(2) through D(9).

1. Systematic Discovery of the Violation Through an Environmental Audit or a Compliance Management System

Under Section D(1), the violation must have been discovered through either (a) an environmental audit, or (b) a compliance management system that reflects due diligence in preventing, detecting and correcting violations. Both "environmental audit" and "compliance management system" are defined in Section B of the Policy.

The revised Policy uses the term “compliance management system” instead of “due diligence,” which was used in the 1995 Policy. This change in nomenclature is intended solely to conform the Policy language to terminology more commonly in use by industry and by regulators to refer to a systematic management plan or systematic efforts to achieve and maintain compliance. No substantive difference is intended by substituting the term “compliance management system” for “due diligence,” as the Policy clearly indicates that the compliance management system must reflect the regulated entity’s due diligence in preventing, detecting and correcting violations.

Compliance management programs that train and motivate employees to prevent, detect and correct violations on a daily basis are a valuable complement to periodic auditing. Where the violation is discovered through a compliance management system and not through an audit, the disclosing entity should be prepared to document how its program reflects the due diligence criteria defined in Section B of the Policy statement. These criteria, which are adapted from existing codes of practice -- such as Chapter Eight of the U.S. Sentencing Guidelines for organizational defendants, effective since 1991 -- are flexible enough to accommodate different types and sizes of businesses and other regulated entities.

The Agency recognizes that a variety of compliance management programs are feasible, and it will determine whether basic due diligence criteria have been met in deciding whether to grant Audit Policy credit.

As a condition of penalty mitigation, EPA may require that a description of the regulated entity's compliance management system be made publicly available. The Agency 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

Under Section D(2), 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. The Policy provides 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 exclusion does not apply to violations that are discovered pursuant to audits that are conducted as part of a comprehensive environmental

management system (EMS) required under a settlement agreement. In general, EPA supports the implementation of EMSs that promote compliance, prevent pollution and improve overall environmental performance. Precluding the availability of the Audit Policy for discoveries made through a comprehensive EMS that has been implemented pursuant to a settlement agreement might discourage entities from agreeing to implement such a system.

In some instances, certain Clean Air Act violations discovered, disclosed and corrected by a company prior to issuance of a Title V permit are eligible for penalty mitigation under the Policy.
For further guidance in this area, see "Reduced Penalties for Disclosures of Certain Clean Air Act Violations," Memorandum from Eric Schaeffer, Director of the EPA Office of Regulatory Enforcement, dated September 30, 1999. This document is available on the Internet at www.epa.gov/oeca/ore/apolguid.html.

The voluntary requirement applies to discovery only, not reporting. That is, any violation that is voluntarily discovered is generally eligible for Audit Policy credit, regardless of whether reporting of the violation was required after it was found.

3. Prompt Disclosure

Section D(3) requires that the entity disclose the violation in writing to EPA within 21 calendar days

after discovery. If the 21st day after discovery falls on a weekend or Federal holiday, the disclosure period will be extended to the first business day following the 21st day after discovery. If a statute or regulation requires the entity to report the violation in fewer than 21 days, disclosure must be made within the time limit established by law. (For example, unpermitted releases of hazardous substances must be reported immediately under 42 U.S.C. § 9603.) Disclosures under this Policy should be made to the appropriate EPA Regional office or, where multiple Regions are involved, to EPA Headquarters. The Agency will work closely with States as needed to ensure fair and efficient implementation of the Policy. For additional guidance on making disclosures, contact the Audit Policy National Coordinator at EPA Headquarters at 202-564-5123.

The 21-day disclosure period begins when the entity discovers that a violation has, or may have, occurred. The trigger for discovery is 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. The "objectively reasonable basis" standard is measured against what a prudent person, having the same information as was available to the individual in question, would have believed. It is not measured against what the individual in question thought was reasonable at the time the situation was encountered. If an entity has some doubt as to the existence of a violation, the recommended course is for the entity to proceed with the disclosure and allow the regulatory authorities to make a definitive determination. Contract personnel who provide on-site services at the facility may be treated as employees or agents for purposes of the Policy.

If the 21-day period has not yet expired and an entity suspects that it will be unable to meet the deadline, the entity should contact the appropriate EPA office in advance to develop disclosure terms acceptable to EPA. For situations in which the 21-day period already has expired, the Agency may accept a late disclosure in the exceptional case, such as where there are complex circumstances, including where EPA determines the violation could not be identified and disclosed within 21 calendar days after discovery.

EPA also may extend the disclosure period when multiple facilities or acquisitions are involved. In the multi-facility context, EPA will ordinarily extend the 21-day period to allow reasonable time for completion and review of multi-facility audits where: (a) EPA and the entity agree on the timing and scope of the audits prior to their commencement; and (b) the facilities to be audited are identified in advance. In the acquisitions context, EPA will consider extending the prompt disclosure period on a case-by-case basis. The 21-day disclosure period will begin on the date of discovery by the acquiring entity, but in no case will the period begin earlier than the date of acquisition.

In summary, Section D(3) recognizes that it is critical for EPA to receive timely reporting of violations in order to have clear notice of the violations and the opportunity to respond if necessary. Prompt disclosure is also evidence of the regulated entity's good faith in wanting to achieve or return to compliance as soon as possible. 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 does not intend that it justify delayed reporting. When violations of reporting requirements are voluntarily discovered, they must be promptly reported. When a failure to report results in imminent and substantial endangerment or serious harm to the environment, Audit Policy credit is precluded under condition D(8).

4. Discovery and Disclosure Independent of Government or Third Party Plaintiff

Under Section D(4), the entity must discover the violation independently. That is, the violation must be discovered and identified before EPA or another government agency likely would have identified the problem either through its own investigative work or from information received through a third party. This condition requires regulated entities to take the initiative to find violations on their own and disclose them promptly instead of waiting for an indication of a pending enforcement action or third-party complaint.

Section D(4)(a) lists the circumstances under which discovery and disclosure will not be considered independent. For example, a disclosure will not be independent where EPA is already investigating the facility in question. However, under subsection (a), where the entity does not know that EPA has commenced a civil investigation and proceeds in good faith to make a disclosure under the Audit

Policy, EPA may, in its discretion, provide penalty mitigation under the Audit Policy. The subsection (a) exception applies only to civil investigations; it does not apply in the criminal context. Other examples of situations in which a discovery is not considered independent are where a citizens' group has provided notice of its intent to sue, where a third party has already filed a complaint, where a whistleblower has reported the potential violation to government authorities, or where discovery of the violation by the government was imminent. Condition D(4)(c) – "the filing of a complaint by a third party" – covers formal judicial and administrative complaints as well as informal complaints, such as a letter from a citizens' group alerting EPA to a potential environmental violation.

Regulated entities that own or operate multiple facilities are subject to section D(4)(b) in addition to D(4)(a). EPA encourages multi-facility auditing and does not intend for the "independent discovery" condition to preclude availability of the Audit Policy when multiple facilities are involved. Thus, if a regulated entity owns or operates multiple facilities, the fact that one of its facilities is the subject of an investigation, inspection, information request or third-party complaint does not automatically preclude the Agency from granting Audit Policy credit for disclosures of violations self-discovered at the other facilities, assuming all other Audit Policy conditions are met. However, just as in the single-facility context, where a facility is already the subject of a government inspection, investigation or information request (including a broad information request that covers multiple facilities), it will generally not be eligible for Audit Policy credit. The Audit Policy is designed to encourage regulated entities to disclose violations before any of their facilities are under investigation, not after EPA discovers violations at one

facility. Nevertheless, the Agency retains its full discretion under the Audit Policy to grant penalty waivers or reductions for good-faith disclosures made in the multi-facility context. EPA has worked closely with a number of entities that have received Audit Policy credit for multi-facility disclosures, and entities contemplating multi-facility auditing are encouraged to contact the Agency with any questions concerning Audit Policy availability.

5. Correction and Remediation

Under Section D(5), the entity must remedy any harm caused by the violation and expeditiously certify in writing to appropriate Federal, State, and local authorities that it has corrected the violation. Correction and remediation in this context include responding to spills and carrying out any removal or remedial actions required by law. The certification requirement 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.

Under the Policy, the entity must correct the violation within 60 calendar days from the date of discovery, or as expeditiously as possible. EPA recognizes that some violations can and should be corrected immediately, while others may take longer than 60 days to correct. For example, more time may be required if capital expenditures are involved or if technological issues are a factor. If more than 60 days will be required, the disclosing entity must so notify the Agency in writing prior to the

conclusion of the 60-day period. In all cases, the regulated entity will be expected to do its utmost to achieve or return to compliance as expeditiously as possible.

If correction of the violation depends upon issuance of a permit that has been applied for but not issued by Federal or State authorities, the Agency will, where appropriate, make reasonable efforts to secure timely review of the permit.

6. Prevent Recurrence

Under Section D(6), the regulated entity must agree to take steps to prevent a recurrence of the violation after it has been disclosed. Preventive steps may include, but are not limited to, improvements to the entity's environmental auditing efforts or compliance management system.

7. No Repeat Violations

Condition D(7) bars repeat offenders from receiving Audit Policy credit. Under the repeat violations exclusion, the same or a closely-related violation must not have occurred at the same facility within the past 3 years. The 3-year period begins to run when the government or a third party has given the violator notice of a specific violation, without regard to when the original violation cited in the notice actually occurred. Examples of notice include a complaint, consent order, notice of violation, receipt

of an inspection report, citizen suit, or receipt of penalty mitigation through a compliance assistance or incentive project.

When the facility is part of a multi-facility organization, Audit Policy relief is not available if the same or a closely-related violation occurred as part of a pattern of violations at one or more of these facilities within the past 5 years. If a facility has been newly acquired, the existence of a violation prior to acquisition does not trigger the repeat violations exclusion.

The term "violation" includes any violation subject to a Federal, State or local civil judicial or administrative order, consent agreement, conviction or plea agreement. Recognizing that minor violations sometimes are settled without a formal action in court, the term also covers any act or omission for which the regulated entity has received a penalty reduction in the past. This condition covers situations in which the regulated entity has had clear notice of its noncompliance and an opportunity to correct the problem.

The repeat violation exclusion benefits both the public and law-abiding entities by ensuring that penalties are not waived for those entities that have previously been notified of violations and fail to prevent repeat violations. The 3-year and 5-year “bright lines” in the exclusion are designed to provide regulated entities with clear notice about when the Policy will be available.

8. Other Violations Excluded

Section D(8) provides that Policy benefits are not available for certain types of violations. Subsection D(8)(a) excludes violations that result in serious actual harm to the environment or which may have presented an imminent and substantial endangerment to public health or the environment. When events of such a consequential nature occur, violators are ineligible for penalty relief and other incentives under the Audit Policy. However, this condition does not bar an entity from qualifying for Audit Policy relief solely because the violation involves release of a pollutant to the environment, as such releases do not necessarily result in serious actual harm or an imminent and substantial endangerment. To date, EPA has not invoked the serious actual harm or the imminent and substantial endangerment clauses to deny Audit Policy credit for any disclosure.

Subsection D(8)(b) excludes violations of the specific terms of any order, consent agreement, or plea agreement. 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 also applies to violations of the terms of any response, removal or remedial action covered by a written agreement.

9. Cooperation

Under Section D(9), the regulated entity must cooperate as required by EPA and provide the Agency

with the information it needs to determine Policy applicability. The entity must not hide, destroy or tamper with possible evidence following discovery of potential environmental violations. In order for the Agency to apply the Policy fairly, it must have sufficient information to determine whether its conditions are satisfied in each individual case. In general, EPA requests audit reports to determine the applicability of this Policy only where the information contained in the audit report is not readily available elsewhere and where EPA decides that the information is necessary to determine whether the terms and conditions of the Policy have been met. In the rare instance where an EPA Regional office seeks to obtain an audit report because it is otherwise unable to determine whether Policy conditions have been met, the Regional office will notify the Office of Regulatory Enforcement at EPA headquarters.

Entities that disclose potential criminal violations may expect a more thorough review by the Agency. In criminal cases, entities will be expected to provide, at a minimum, the following: access to all requested documents; access to all employees of the disclosing entity; assistance in investigating the violation, any noncompliance problems related to the disclosure, and any environmental consequences related to the violations; access to all information relevant to the violations disclosed, including that portion of the environmental audit report or documentation from the compliance management system that revealed the violation; and access to the individuals who conducted the audit or review.

F. Opposition to Audit Privilege and Immunity

The Agency believes that the Audit Policy provides effective incentives for self-policing without impairing law enforcement, putting the environment at risk or hiding environmental compliance information from the public. Although EPA encourages environmental auditing, it must do so without compromising the integrity and enforceability of environmental laws. It is important to distinguish between EPA's Audit Policy and the audit privilege and immunity laws that exist in some States. The Agency remains firmly opposed to statutory and regulatory audit privileges and immunity. Privilege laws shield evidence of wrongdoing and prevent States from investigating even the most serious environmental violations. Immunity laws prevent States from obtaining penalties that are appropriate to the seriousness of the violation, as they are required to do under Federal law. Audit privilege and immunity laws are unnecessary, undermine law enforcement, impair protection of human health and the environment, and interfere with the public's right to know of potential and existing environmental hazards.

Statutory audit privilege and immunity run counter to encouraging the kind of openness that builds trust between regulators, the regulated community and the public. For example, privileged information on compliance contained in an audit report may include information on the cause of violations, the extent of environmental harm, and what is necessary to correct the violations and prevent their recurrence. Privileged information is unavailable to law enforcers and to members of the public who have suffered harm as a result of environmental violations. The Agency opposes statutory immunity because it

diminishes law enforcement's ability to discourage wrongful behavior and interferes with a regulator's ability to punish individuals who disregard the law and place others in danger. The Agency believes that its Audit Policy provides adequate incentives for self-policing but without secrecy and without abdicating its discretion to act in cases of serious environmental violations.

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, 710 (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 Corp.*, 132 F.R.D. 8, 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.") *Cf. In re Grand Jury Proceedings*, 861 F. Supp. 386 (D. Md. 1994) (company must comply with a subpoena under Food, Drug and Cosmetics Act for self-evaluative documents).

G. Effect on States

The revised final Policy reflects EPA's desire to provide fair and effective incentives for self-policing

that have practical value to States. To that end, the Agency has consulted closely with State officials in developing this Policy. As a result, EPA believes its revised final Policy is grounded in commonsense principles that should prove useful in the development and implementation of State programs and policies.

EPA recognizes that States are partners in implementing the enforcement and compliance assurance program. When consistent with EPA's policies on protecting confidential and sensitive information, the Agency will share with State agencies information on disclosures of violations of Federally-authorized, approved or delegated programs. In addition, for States that have adopted their own audit policies in Federally-authorized, approved or delegated programs, EPA will generally defer to State penalty mitigation for self-disclosures as long as the State policy meets minimum requirements for Federal delegation. Whenever a State provides a penalty waiver or mitigation for a violation of a requirement contained in a Federally-authorized, approved or delegated program to an entity that discloses those violations in conformity with a State audit policy, the State should notify the EPA Region in which it is located. This notification will ensure that Federal and State enforcement responses are coordinated properly.

For further information about minimum delegation requirements and the effect of State audit privilege and immunity laws on enforcement authority, see "Statement of Principles: Effect of State Audit / Immunity Privilege Laws on Enforcement Authority for Federal Programs," Memorandum from Steven

A. Herman et al, dated February 14, 1997, to be posted on the Internet under www.epa.gov/oeca/oppa.

As always, States are encouraged to experiment with different approaches to assuring compliance as long as such approaches do not jeopardize public health or the environment, or make it profitable not to comply with Federal environmental requirements. 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 profit at the expense of its law-abiding competitors.

H. Scope of Policy

EPA has developed this Policy to guide settlement actions. It is the Agency's practice to make public all compliance agreements reached under this Policy in order to provide the regulated community with fair notice of decisions and to provide affected communities and the public with information regarding Agency action. Some in the regulated community have suggested that the Agency should convert the Policy into a regulation because they feel doing so would ensure greater consistency and predictability. Following its three-year evaluation of the Policy, however, the Agency believes that there is ample evidence that the Policy has worked well and that there is no need for a formal rulemaking.

Furthermore, as the Agency seeks to respond to lessons learned from its increasing experience handling self-disclosures, a policy is much easier to amend than a regulation. Nothing in today's release of the revised final Policy is intended to change the status of the Policy as guidance.

I. Implementation of Policy

1. Civil Violations

Pursuant to the Audit Policy, disclosures of civil environmental violations should be made to the EPA Region in which the entity or facility is located or, where the violations to be disclosed involve more than one EPA Region, to EPA Headquarters. The Regional or Headquarters offices decide whether application of the Audit Policy in a specific case is appropriate. Obviously, once a matter has been referred for civil judicial prosecution, DOJ becomes involved as well. Where there is evidence of a potential criminal violation, the civil offices coordinate with criminal enforcement offices at EPA and DOJ.

To resolve issues of national significance and ensure that the Policy is applied fairly and consistently across EPA Regions and at Headquarters, the Agency in 1995 created the Audit Policy Quick Response Team (QRT). The QRT is comprised of representatives from the Regions, Headquarters, and DOJ. It meets on a regular basis to address issues of interpretation and to coordinate self-

disclosure initiatives. In addition, in 1999 EPA established a National Coordinator position to handle Audit Policy issues and implementation. The National Coordinator chairs the QRT and, along with the Regional Audit Policy coordinators, serves as a point of contact on Audit Policy issues in the civil context.

2. Criminal Violations

Criminal disclosures are handled by the Voluntary Disclosure Board (VDB), which was established by EPA in 1997. The VDB ensures consistent application of the Audit Policy in the criminal context by centralizing Policy interpretation and application within the Agency.

Disclosures of potential criminal violations may be made directly to the VDB, to an EPA regional criminal investigation division or to DOJ. In all cases, the VDB coordinates with the investigative team and the appropriate prosecuting authority. During the course of the investigation, the VDB routinely monitors the progress of the investigation as necessary to ensure that sufficient facts have been established to determine whether to recommend that relief under the Policy be granted.

At the conclusion of the criminal investigation, the Board makes a recommendation to the Director of EPA's Office of Criminal Enforcement, Forensics, and Training, who serves as the Deciding Official. Upon receiving the Board's recommendation, the Deciding Official makes his or her final

recommendation to the appropriate United States Attorney's Office and/or DOJ. The recommendation of the Deciding Official, however, is only that -- a recommendation. The United States Attorney's Office and/or DOJ retain full authority to exercise prosecutorial discretion.

3. Release of Information to the Public

Upon formal settlement, EPA places copies of settlements in the Audit Policy Docket. EPA also makes other documents related to self-disclosures publicly available, unless the disclosing entity claims them as Confidential Business Information (and that claim is validated by U.S. EPA), unless another exemption under the Freedom of Information Act is asserted and/or applies, or the Privacy Act or any other law would preclude such release. Presumptively releasable documents include compliance agreements reached under the Policy (see Section H) and descriptions of compliance management systems submitted under Section D(1). Any material claimed to be Confidential Business Information will be treated in accordance with EPA regulations at 40 C.F.R. Part 2. In determining what documents to release, EPA is guided by the Memorandum from Assistant Administrator Steven A. Herman entitled "Confidentiality of Information Received Under Agency's Self-Disclosure Policy," available on the Internet at www.epa.gov/oeca/sahmemo.html.

II. Statement of Policy – Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations

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" is a systematic, documented, periodic and objective review by regulated entities of facility operations and practices related to meeting environmental requirements.

"Compliance Management System" encompasses the regulated entity's documented 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, enforceable agreements 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 compliance management system to prevent future violations.

"Environmental audit report" means the documented 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 than that portion representing a defendant's economic gain from noncompliance.

"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

If a regulated entity establishes that it satisfies all of the conditions of Section D of this Policy, EPA will not seek gravity-based penalties for violations of Federal environmental requirements discovered and disclosed by the entity.

2. Reduction of Gravity-Based Penalties by 75%

If a regulated entity establishes that it satisfies all of the conditions of Section D of this Policy except for D(1) -- systematic discovery -- EPA will reduce by 75% gravity-based penalties for violations of Federal environmental requirements discovered and disclosed by the entity.

3. No Recommendation for Criminal Prosecution

(a) If a regulated entity establishes that it satisfies at least conditions D(2) through D(9) of this Policy, EPA will not recommend to the U.S. Department of Justice or other prosecuting authority that criminal charges be brought against the disclosing entity, as long as EPA determines that the violation is not part of a pattern or practice that demonstrates or involves:

(i) a prevalent management philosophy or practice that conceals or condones environmental violations; or

(ii) high-level corporate officials' or managers' conscious involvement in, or willful blindness to, violations of Federal environmental law;

(b) Whether or not EPA recommends the regulated entity for criminal prosecution under this section, the Agency may recommend for prosecution the criminal acts of individual managers or employees under existing policies guiding the exercise of enforcement discretion.

4. No Routine Request for Environmental Audit Reports

EPA will neither request nor use an environmental audit report to initiate a civil or criminal investigation of an 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) a compliance management system 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 its compliance management system meets the criteria for due diligence outlined in Section B and how the regulated entity discovered the violation through its compliance management system. EPA may require the regulated entity to make publicly available a description of its compliance management system.

2. Voluntary Discovery

The violation was discovered 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 required sampling or monitoring; or

(c) violations discovered through a compliance audit required to be performed by the terms of a consent order or settlement agreement, unless the audit is a component of agreement terms to

implement a comprehensive environmental management system.

3. Prompt Disclosure

The regulated entity fully discloses the specific violation in writing to EPA within 21 days (or within such shorter time as may be required by law) after the entity discovered that the violation has, or may have, occurred. The time at which the entity discovers that a violation has, or may have, occurred begins when any officer, director, employee or agent of the facility has an objectively reasonable basis for believing that a violation has, or may have, occurred.

4. Discovery and Disclosure Independent of Government or Third-Party Plaintiff

(a) The regulated entity discovers and discloses the potential violation to EPA prior to:

(i) 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 (where EPA determines that the facility did not know that it was under civil investigation, and EPA determines that the entity is otherwise acting in good faith, the Agency may exercise its discretion to reduce or waive civil penalties in accordance with this Policy);

(ii) notice of a citizen suit;

(iii) the filing of a complaint by a third party;

(iv) 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

(v) imminent discovery of the violation by a regulatory agency.

(b) For entities that own or operate multiple facilities, the fact that one facility is already the subject of an investigation, inspection, information request or third-party complaint does not preclude the Agency from exercising its discretion to make the Audit Policy available for violations self-discovered at other facilities owned or operated by the same regulated entity.

5. Correction and Remediation

The regulated entity corrects the violation within 60 calendar days from the date of discovery, certifies in writing that the violation has been corrected, and takes appropriate measures as determined by EPA to remedy any environmental or human harm due to the violation. EPA retains the authority to order an entity to correct a violation within a specific time period shorter than 60 days whenever correction in such shorter period of time is feasible and necessary to protect public health and the environment adequately. If more than 60 days will be needed to correct the violation, the regulated entity must so notify EPA in writing before the 60-day period has passed. Where appropriate, to satisfy conditions D(5) and D(6), EPA may require a regulated entity to enter into a publicly available written agreement,

administrative consent order or judicial consent decree as a condition of obtaining relief under the Audit Policy, 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. Such steps may include improvements to its environmental auditing or compliance management system.

7. No Repeat Violations

The specific violation (or a closely related violation) has not occurred previously within the past three years at the same facility, and has not occurred within the past five years as part of a pattern at multiple facilities owned or operated by the same entity. 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 (a) resulted in serious actual harm, or may have presented an imminent and substantial endangerment, to human health or the environment, or (b) 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.

E. Economic Benefit

EPA retains 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 that meet conditions D(1) through D(9) 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 and implementation 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, as well as to blanket immunities, particularly immunities for violations that reflect 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 that 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 settlement of claims for civil 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 1995 Policy on "Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations."

(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, nor will this Policy apply to any violation that has received penalty mitigation under other policies. Where an entity has failed to meet any of conditions D(2) through D(9) and is therefore not eligible for penalty relief under this Policy, it may still be eligible for penalty relief under other EPA media-specific enforcement policies in recognition of good faith efforts, even where, for example, the violation may have presented an imminent and substantial endangerment or resulted in serious actual harm.

(3) This Policy sets forth factors for consideration that will guide the Agency in the exercise of its enforcement 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. This Policy is not intended, nor can it be relied upon, to create any rights enforceable by any party in litigation with the United States. As with the 1995 Audit Policy, EPA may decide to follow guidance provided in this document or to act at variance with it based on its analysis of the specific facts presented. This Policy may be revised without public notice to reflect changes in EPA's approach to providing incentives for self-policing by regulated entities, or to clarify and update text.

(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 may be 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.

(5) For purposes of this Policy, violations discovered pursuant to an environmental audit or compliance management system may be considered voluntary even if required under an Agency "partnership" program in which the entity participates, such as regulatory flexibility pilot projects like Project XL. EPA will consider application of the Audit Policy to such partnership program projects on a project-by-project basis.

(6) EPA has issued interpretive guidance addressing several applicability issues pertaining to the Audit Policy. Entities considering whether to take advantage of the Audit Policy should review that guidance to see if it addresses any relevant questions. The guidance can be found on the Internet at www.epa.gov/oeca/ore/apolguid.html.

H. Public Accountability

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 revised Policy is effective May 11, 2000.

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Steven A. Herman,

Assistant Administrator for Enforcement and Compliance Assurance

Date: _____