

Self-Auditing For Environmental Compliance

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Robert Munroe, Deputy Counsel
Maryland Port Administration

What is An Environmental Audit?

- A review of the compliance of your facility with state and federal Environmental Laws and regulations
- May be limited in scope or encompass the entire facility
 - Doesn't usually include tenants

Why Look For Compliance Violations? Isn't Ignorance Bliss?



- Better for you to find the violation than the inspector
- Provides an opportunity to fix the problem; control expenses
- Enhances your Port's reputation with regulators
- If you disclose violation, you may receive 75% -100% penalty reductions.

When Should You Consider Performing An Environmental Audit?



1. If you suspect a violation may be present
 - New information discovered
 - Become aware that a facility should have been complying with a law but has not
2. As part of Environmental Management System, or part of a systematic compliance audit process

Audit Planning



- Obtain Management Commitment and Resources
- Define Audit scope and facilities to be audited
- Establish a protocol for communication, approvals, and document retention
- Assemble an Audit Team

Who Can Perform The Audit



- Likely options
 - In-house environmental professional
 - Environmental consultant
 - In-house or outside environmental lawyer
- Ultimately who is right for you depends on the type of audit and expertise needed

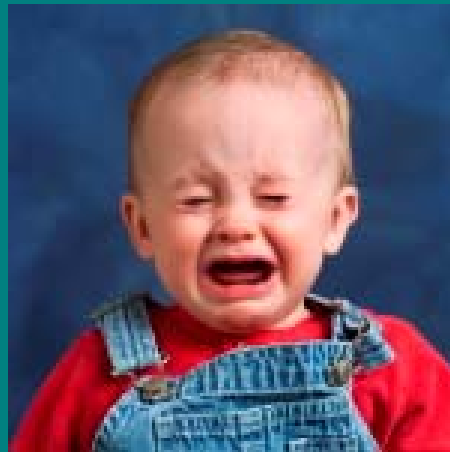
What Should Be The Scope Of Your Audit

- Either a regularly scheduled part of your facility to audit, or
- If suspect a violation, choose a broad scope to capture entire violation, including review of all years back through statute of limitations period
 - E.g., if the state or feds could review your records and assess violations for the year 2004, you want to make sure you cover that year in your audit

Confidentiality and Privilege

- Any Audit should be marked “Confidential” and should be kept separately from other records
- If you hire outside attorney, the Audit should be performed under Attorney-Client Privilege
- Protects you from providing it to the permitting authority, third-party litigants, EPA
 - Remember as a practical matter EPA (and many states) have broad subpoena powers

What If You Find A Violation?



Don't Despair: EPA and Many States Have a Self-Audit Privilege

- Finalize the Audit
- Identify the type(s) of violation(s)
- Identify which audit privilege you will avail yourself of (EPA or State)
- Mark your calendar to meet the initial reporting deadlines
- Identify other requirements that need to be met

EPA Self-Audit Privilege: Resources

- Audit Privilege Home:
http://www.epa.gov/compliance/incentives/auditing/audit_policy.html
- The Policy: "Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations", 65 FR 19,618 (04/11/00)
- Question and Answer Interpretative Documents (See web-site)



Two Components of Civil Penalties

1. **Economic Benefit** = economic gain derived by noncompliance
 - Delayed or avoided costs for public entities
2. **Gravity-based** = punitive part of penalty above and beyond economic benefit that reflect egregiousness of behavior and nature of violation

EPA Self-Audit Privilege: The 9-Step Plan

- **No gravity-based penalties 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 noncompliance.
- **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.**

9 Conditions of EPA Self-Audit Privilege

1. **Systematic discovery** of the violation through an environmental audit or the implementation of a compliance management system.
2. **Voluntary discovery** of the violation was not detected as a result of a legally required monitoring, sampling or auditing procedure.
3. **Prompt disclosure** in writing to EPA within 21 days of discovery or such shorter time as may be 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

9 Conditions of EPA Self-Audit Privilege

4. **Independent discovery and disclosure** before EPA or another regulator would likely have identified the violation through its own investigation or based on information provided by a third-party.
5. **Correction and remediation** within 60 calendar days, in most cases, from the date of discovery.
6. **Prevent recurrence** of the violation.

9 Conditions of EPA Self-Audit Privilege

7. Repeat violations are ineligible

- specific (or closely related) violations have occurred at the same facility within the past 3 years or
- those that have occurred as part of a pattern at multiple facilities owned or operated by the same entity within the past 5 years

8. Certain types of violations are ineligible

- those that result in serious actual harm;
- those that may have presented an imminent and substantial endangerment; and
- those that violate the specific terms of an administrative or judicial order or consent agreement.

9. Cooperation by the disclosing entity is required.

2 Important Deadlines To Meet (and Negotiate)

1. **Disclosure in writing to EPA within 21 days of discovery** or such shorter time as may be required by law.
2. **Correction and remediation within 60 calendar days**, in most cases, from the date of discovery.

Caution: What is a “Objectively Reasonable Basis” for Believing There Is a Violation

- Fact-based analysis that will depend on nature of violation and factual background
- Certainly no later than the date you finalize the Audit
 - **Caveat:** be mindful of your communications with the auditor because if EPA can prove you identified earlier, then likely problem

Nuts and Bolts of Conducting The Environmental Audit



Conducting The Environmental Audit (cont.)



Conducting The Environmental Audit (cont.)

Post-Audit Activities

Collate Information

Prepare Audit Report

Circulate Draft Audit Report For Comments

Final Reporting

Audit Follow-Up

1. Develop an Action Plan
2. Implement Action Plan
3. Checking and Monitoring
4. Review Action Plan

