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Environmental Auditing/ Self-Disclosures 101

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New Federal and State Policies on Environmental Justice

Regulatory Definition

“**Environmental justice** is the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income, with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.”



Recent EPA EJ Policy Actions

On January 26, 2022, EPA Administrator Michael Regan announced the first in a series of policy actions on environmental justice, including:

- committing EPA to **aggressively conduct unannounced inspections** of suspected non-compliant facilities and hold them accountable with all available tools
- deploying a new program to **expand air monitoring capacity** and additional air pollution inspectors to enhance enforcement
- mobilizing agency resources to invest in **community air monitoring**
- **pressing state and local elected officials to take urgent action** to better protect the most overburdened communities
- holding companies more accountable for their actions in overburdened communities with **increased monitoring and oversight**
- applying **best available science** to agency policymaking to safeguard public health and protect the environment

New Office of Environmental Justice

- On May 6, 2022, the Biden Administration announced the creation of a new environmental justice office, to be headed by DOJ attorney Cynthia Ferguson
- Will serve as “central hub” for efforts to advance comprehensive environmental justice enforcement strategy and work with a number of other agencies, including DOJ Civil Rights Division and U.S. Attorneys’ offices
- DOJ plans to publish an interim final rule to restore its ability to use supplemental environmental projects (SEPs), which allow companies to carry out EPA-approved projects in exchange for reduced penalties

EPA's 2022-2026 Strategic Plan

EPA has released its **FY2022-2026 Draft Strategic Plan** which includes a number of environmental justice goals:

- conduct 55% of annual inspections at facilities that affect communities with potential EJ concerns
- include commitments to address disproportionate impacts in affected communities in all written agreements between EPA and states and tribes implementing federally delegated programs
- include foundational civil rights programs as a requirement for all state recipients of EPA financial assistance and conduct 100 audits annually of such recipients
- publicly identify and implement at least 10 commitments for communities with EJ concerns



Environmental Audits



What is an Environmental Compliance Audit?

- EPA's definition – “Environmental Audit” is a systematic, documented, periodic and objective review by regulated entities of facility operations and practices related to meeting environmental requirements.
- “Regulated entity” means any entity, including a Federal, State or municipal agency or facility, regulated under Federal environmental laws.



What Drives Audits?

- Maintain certifications
- General house maintenance
- Preparation for sale
- Environmental Justice concerns
- Avoiding penalties



Environmental self-audits can be an effective tool to detect and correct potential non-compliance.

- Important to look at the federal and respective state audit policies in detail before implementing.
- Know the definitions, qualifications, triggers, etc.
- Some states have specific forms and confidentiality agreements that need to be used and signed in order to take advantage of some of the benefits of voluntary disclosures.
- Both the Federal and State audit programs have benefits and exceptions even when you don't think your facility will meet all of the conditions.



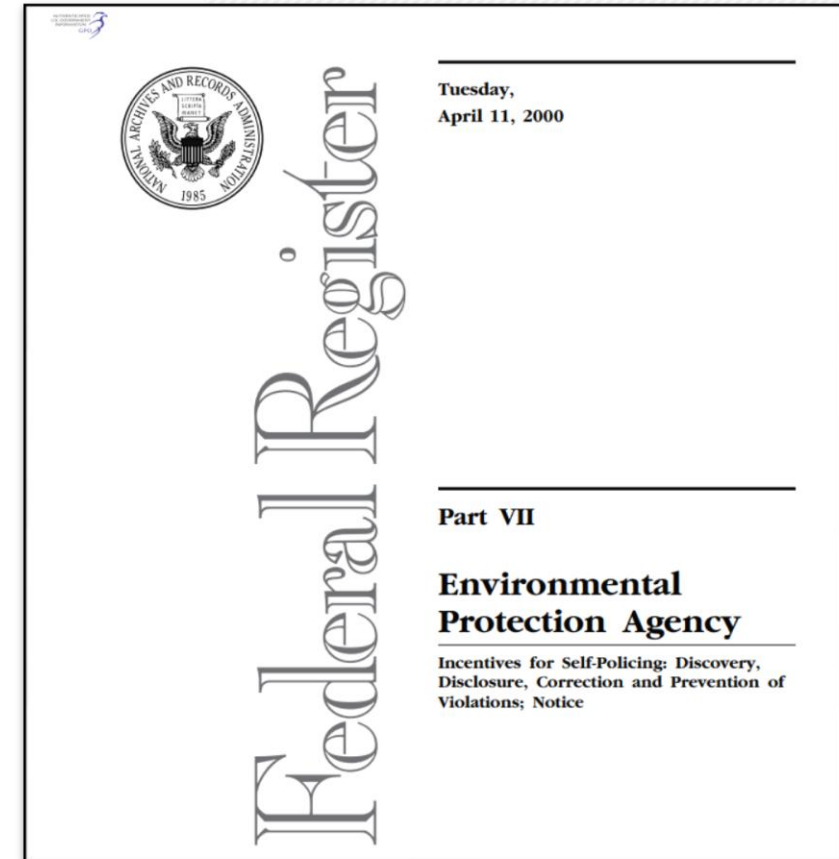
What if you find something?

- Is there a mandatory disclosure rule for the violation?
 - Example: CAA violations discovered during activities supporting Title V certification
- Should you voluntarily disclose? To whom?
 - Which program? Which state? Which circuit?
- How much time do you have to voluntarily disclose?



EPA

EPA's "Incentives for Self- Policing: Discovery, Disclosure, Correction and Prevention of Violations"




Conditions for Penalty Mitigation


1. 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.
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.
7. Repeat violations are ineligible
8. Certain types of violations are ineligible
9. Cooperation by the disclosing entity is required.




eDisclosure

 United States Environmental Protection Agency

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Welcome

Welcome to the Environmental Protection Agency (EPA) Central Data Exchange (CDX) - the Agency's electronic reporting site. The Central Data Exchange concept has been defined as a central point which supplements EPA reporting systems by performing new and existing functions for receiving legally acceptable data in various formats, including consolidated and integrated data.

Warning Notice and Privacy Policy

Warning Notice

By proceeding and accessing U.S. Government information and information systems, you acknowledge that you fully understand and consent to the following:

you are accessing U.S. Government information and information systems that are provided for official U.S. Government purposes only;

wish to attend the meeting must register, in advance, no later than Monday, December 28, 2015. Registration is required for all members of the public to ensure an expeditious security process.

DATES: The full board meeting will be held on Tuesday, January 12, 2016 from 1:00 p.m. to 5 p.m., EST and Wednesday, January 13, 2015 from 9:00 a.m. to 5 p.m., EST.

ADDRESSES: Hamilton Crowne Plaza Hotel, 1001 14th St. NW., Washington, DC 20005.

FOR FURTHER INFORMATION CONTACT: For information on access or services for individuals with disabilities, or to request accommodations for a person with a disability, please contact Sandra Williams at (202) 564-4999 or williams.sandra@epa.gov, at least 10 days prior to the meeting, to allow as much time as possible to process your request.

Dated: December 2, 2015.

Andrew D. Sawyers,
Director, Office of Wastewater Management,
Office of Water.

[FR Doc. 2015-31044 Filed 12-8-15; 8:45 am]

BILLING CODE 6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

[FRL-9939-69-OECA]

Notice of eDisclosure Portal Launch: Modernizing Implementation of EPA's Self-Policing Incentive Policies

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The Environmental Protection Agency (EPA) is modernizing implementation of its self-disclosure policies by creating a centralized web-based "eDisclosure" portal to receive and automatically process self-disclosed civil violations of environmental law. Under the automated eDisclosure system, large and small businesses will quickly be able to get some of their more routine types of disclosures resolved.

EPA is launching the eDisclosure system because it continues to believe strongly in the benefits of its self-disclosure policies: To provide penalty mitigation and other incentives for companies that self-police, disclose, correct and prevent violations. EPA believes that the implementation changes announced today will make the processing of disclosures faster and more efficient, and will save time and resources for regulated entities and EPA.

DATES: These modifications to the implementation of EPA's Audit Policy and Small Business Compliance Policy, and the launch of the eDisclosure portal, are effective immediately, December 9, 2015.

FOR FURTHER INFORMATION CONTACT: Philip Milton of EPA's Office of Enforcement and Compliance Assurance, Office of Civil Enforcement, at milton.philip@epa.gov or (202) 564-5029. For general information on the eDisclosure portal please visit <http://www2.epa.gov/compliance/epas-edisclosure>.

SUPPLEMENTARY INFORMATION: Over the past several years, EPA has been evaluating how best to realize the benefits of the self-disclosure policies. Most recently, EPA held two webinars in June 2015 to share its plan for eDisclosure and allow the nearly 350 people who participated to share their views and ask questions.

Companies have suggested that EPA could streamline implementation of the self-disclosure policies for more routine disclosures to make the process faster, more efficient, and to save time and resources for regulated entities and EPA, while still retaining the incentives to self-police environmental problems. The regulated community also emphasized that a key time to encourage self-auditing and self-disclosure is when companies are purchased or acquired, because that is a point in time when companies typically are assessing operations and management systems. EPA agrees with those suggestions from the regulated community and welcomes input, on an ongoing basis, as to how the eDisclosure system is working.

I. Explanation of Modification to the Implementation of the Policies

A. Introduction

On April 11, 2000, EPA issued its policy on "Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations" (Audit Policy). 65 FR 19618. The purpose of the Audit Policy is to enhance protection of human health and the environment by encouraging regulated entities to voluntarily discover, promptly disclose, expeditiously correct and prevent the recurrence of violations of federal environmental law. Benefits available to entities that make disclosures under the terms of the Audit Policy include reductions in, and in some cases the elimination of, civil penalties, and an EPA determination not to recommend criminal prosecution of disclosing entities. (Ultimate prosecutorial discretion resides with the U.S. Department of Justice.) More

information on the Audit Policy is available at <http://www2.epa.gov/compliance/epas-audit-policy>.

On August 1, 2008, EPA issued the "Interim Approach to Applying the Audit Policy to New Owners" (New Owner Policy). 73 FR 44991. The purpose of the New Owner Policy is to tailor Audit Policy incentives for new owners that want to make a "clean start" at recently acquired facilities by addressing environmental noncompliance that began prior to acquisition. The New Owner Policy is designed to motivate new owners to audit newly acquired facilities and to encourage self-disclosures of violations that will, once corrected, yield significant pollutant reductions and benefits to the environment. The incentives tailored for new owners include clearly defined penalty mitigation beyond what is offered by the Audit Policy, as well as the modification of certain Audit Policy conditions that will allow more violations to be eligible for penalty mitigation under the Audit Policy. More information on the New Owner Policy is available at <http://www2.epa.gov/compliance/epas-interim-approach-applying-audit-policy-new-owners>.

EPA's Small Business Compliance Policy (65 FR 19630, April 11, 2000) is an additional voluntary disclosure policy that provides incentives for small businesses (with 100 or fewer employees) that voluntarily discover, promptly disclose, and expeditiously correct environmental violations. More information on the Small Business Compliance Policy is available at <http://www2.epa.gov/compliance/small-business-compliance>.

B. Background on Today's Modifications

The penalty mitigation available under EPA's self-disclosure policies has provided an incentive for regulated entities to detect, promptly disclose, expeditiously correct and prevent violations of federal environmental requirements. Since 1995, the regulated community has increasingly adopted environmental auditing and environmental management practices as key components of sound business practices. Thousands of entities have disclosed violations to EPA pursuant to the Agency's voluntary disclosure policies, and EPA continues to receive hundreds of new disclosures every year. Enforcement also has contributed to the dramatic expansion of environmental auditing, as many regulated entities who conducted audits have told EPA that one of the primary reasons for doing so

Summary of Incentives

- Reduction of 100% of gravity-based* penalties if all of the Policy's conditions are met.
- 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.





Other Notes

- Regulated entities are not required to provide EPA with advance notice of their intent to undertake an audit.
- Any 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.
- Title V and NPDES permitting schemes self-disclosed violations policies do have exceptions where EPA may allow for penalty mitigation on a case-by-case basis.
- Regulated entities do not have to affirmatively admit that they have violated the law. They can disclose that they “may have” violated the law.
- Discoveries can occur during an audit that takes longer than 21 days - Violations would have to be disclosed within 21 days of discovery to be timely.*



State Environmental Audit Privilege and Immunity Laws

- Kansas
- Iowa

Kansas



Kansas Department of Health and Environment
Environmental Audit Policy

Policy Category: Agency Policy on Environmental Audits

Subject: Environmental Audits

Reference: K.S.A. 60-3332 *et seq.*, as amended by SB 453 (2006)



Kansas - Environmental Audit

- **60-3332. Definitions.** As used in K.S.A. 60-3332 through 60-3339:
 - (a) “Environmental audit” means a **voluntary**, internal **assessment, evaluation or review** of a facility or operation, **of an activity** at a facility or operation or of an environmental management system at a facility or operation when the facility, operation or activity is regulated by state or federal environmental laws that is **performed by the owner or operator, the owner’s or operator’s employees, or a qualified auditor retained by the owner or operator of the facility** or operation for the express and specific purpose of identifying historical or current noncompliance with environmental laws, **discovering environmental contamination or hazards**, remedying noncompliance or **improving** compliance with environmental laws or improving an environmental management system. Once initiated, an audit shall be **completed within a reasonable period of time not to exceed six months**, unless an extension is approved by the agency that regulates the facility or operation. Nothing in this section shall be construed to authorize uninterrupted or continuous auditing.



Kansas - Environmental Audit Report

- “Environmental audit report” means a set of documents, **each labeled “Audit Report: Privileged Document”** that is generated and developed for the primary purpose and in the course of or **as a result of an environmental audit** that is **conducted in good faith...**



Kansas Audit Policy

- Applies to Kansas environmental laws, including statutes and rules and regulations promulgated under Kansas statutes.
- Kansas environmental audit law has three components:
 1. An evidentiary privilege for audit reports;
 2. Immunity for voluntary disclosure of violations; and
 3. Mitigation of penalties for those violators who have implemented an environmental management system.



Evidentiary Privilege for Audit Reports

- Audit Reports are privileged and not admissible as evidence in any civil or administrative proceeding.
- Disclosure of the contents of the audit report waives the privilege unless the disclosure is made under the express terms of confidentiality agreements between the owner or operator of the facility audited and either a potential purchaser of the facility or KDHE officials.
- The preservation of the privilege also exempts the audit report from disclosure by KDHE in response to an open records act request.



Immunity for Voluntary Disclosure

Provides for immunity from administrative or civil penalties for violations voluntarily disclosed if certain conditions are met:

- A. The violation must have been found in the course of a self-audit.
- B. The disclosure must be made promptly after the person discovers the violation.
- C. The person must have initiated action in a reasonable and diligent manner to resolve the violation and the person must cooperate with KDHE in the investigation of the issues identified in the disclosure.



Mitigation of Penalties for Violators Who Have Implemented an Environmental Management System

- This is a system that regularly takes steps to prevent and remedy noncompliance. This management tool has the support of senior management and is implemented through policies, standards and procedures that are effectively communicated throughout the facility's operation to ensure compliance with environmental laws. K.S.A. 60-3334(d).
- Even if a facility doesn't meet all of the conditions, where appropriate, if a member of the regulated community has attempted in good faith to comply with the requirements of K.S.A. 60-3332 et seq., but has failed to do so, KDHE will take those good faith efforts into consideration when assessing the necessary response to violations of environmental laws.

Iowa

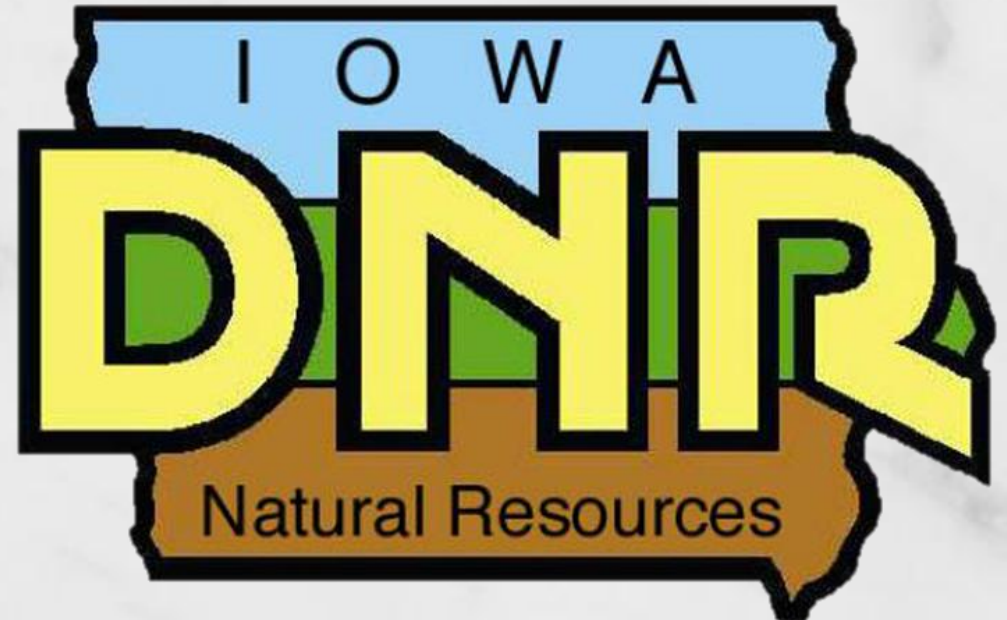
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ENVIRONMENTAL AUDIT PRIVILEGE AND IMMUNITY, §455K.2

CHAPTER 455K

ENVIRONMENTAL AUDIT PRIVILEGE AND IMMUNITY

455K.1	Title.	455K.8	Voluntary disclosure of environmental violation — immunity.
455K.2	Definitions.	455K.9	Other privileges not affected.
455K.3	Privilege.	455K.10	Environmental auditor training program.
455K.4	Waiver of privilege — disclosure.	455K.11	Summary.
455K.5	Required disclosure.	455K.12	Rulemaking.
455K.6	Materials not privileged.	455K.13	Costs.
455K.7	Review of privileged documents.		





Definitions

- “Environmental audit” means a voluntary evaluation of a facility or operation, of an activity at a facility or operation, or of an environmental management system at a facility or operation when the facility, operation, or activity is regulated under state or federal environmental laws, rules, or permit conditions, conducted by an owner or operator, an employee of the owner or operator, or an independent contractor retained by the owner or operator that is designed to identify historical or current noncompliance with environmental laws, rules, ordinances, or permit conditions, discover environmental contamination or hazards, remedy noncompliance or improve compliance with environmental laws, or improve an environmental management system. Once notification is given to the department, an environmental audit shall be completed within a reasonable time not to exceed six months unless an extension is approved by the department based on reasonable grounds.
- “Environmental audit report” means a document or set of documents generated and developed for the primary purpose and in the course of or as a result of conducting an environmental audit. An “environmental audit report” includes supporting information which may include, but is not limited to, the report document itself, observations, samples, analytical results, exhibits, findings, opinions, suggestions, recommendations, conclusions, drafts, memoranda, drawings, photographs, computer-generated or electronically recorded information, maps, charts, graphs, surveys, implementation plans, interviews, discussions, correspondence, and communications related to the environmental audit.



Privilege

Material included in an environmental audit report generated during an environmental audit conducted after July 1, 1998, is **privileged and confidential** and is not discoverable or admissible as evidence in any civil or administrative proceeding, except as otherwise provided in this chapter. The environmental audit report shall be labeled “ENVIRONMENTAL AUDIT REPORT: PRIVILEGED DOCUMENT”. **Failure to label each document within the report does not constitute a waiver of the environmental audit privilege or create a presumption that the privilege does or does not apply.**



Inspections

An employee of a state agency or other governmental employee shall not request, review, or otherwise use an environmental audit report during an agency inspection of a regulated facility or operation, or an activity of a regulated facility or operation.



Immunity

- An owner or operator is eligible for immunity under this section from the time the department receives official notification from the owner or operator of a scheduled environmental audit. An owner or operator is immune from any administrative or civil penalty associated with the information disclosed if the owner or operator makes a prompt voluntary disclosure to the department regarding an environmental violation which is discovered through the environmental audit.
- The owner or operator creates a rebuttable presumption that the disclosure is voluntary by meeting the criteria provided in subsection 2 at the time of disclosure.



Criteria for Immunity

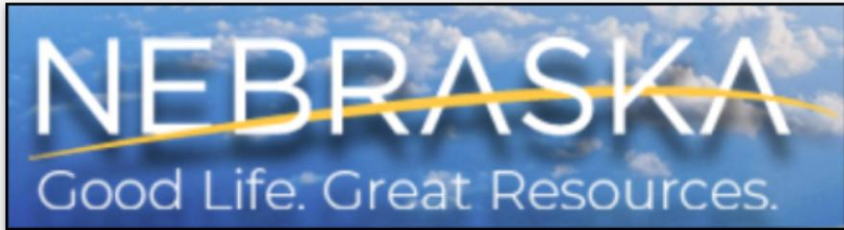
- a) The disclosure arises out of an environmental audit and relates to privileged information as provided in section 455.
- b) The person making the disclosure uses reasonable efforts to pursue compliance and to correct the noncompliance within a reasonable period of time after completion of the environmental audit in accordance with a remediation schedule submitted to and approved by the department.
- c) Environmental violations are identified in an environmental audit report and disclosed to the department before there is notice of a citizen suit or a legal complaint by a third party.
- d) Environmental violations are identified in an environmental audit report and disclosed to the department before the environmental violations are reported by any person not involved in conducting the environmental audit or to whom the environmental audit report was disclosed.



Additional Notes

- Exceptions:
 - If an owner or operator has been found in a civil or administrative proceeding to have committed serious violations that constitute a pattern of continuous or repeated violations of environmental laws, administrative rules, and permit conditions and that were due to separate and distinct events giving rise to the violations within the three-year period prior to the date of disclosure.
 - If the violation results in a substantial economic benefit which gives the violator a clear advantage over its business competitors.
- Even if you don't specially meet the criteria:
 - But a good faith effort was made to voluntarily disclose and resolve a violation detected in an environmental audit, the state regulatory authorities shall consider the nature and extent of any good faith effort in deciding the appropriate enforcement response and shall consider reducing any administrative or civil penalties based on mitigating factors showing that one or more of the conditions for voluntary disclosure have been met.
(Similar to EPA)

Nebraska



- Neb. Rev. Stat. Ann. § 25-21,254
- Similar to the Iowa and Kansas policies

Missouri



- No Statutory audit program
- Incorporated into enforcement penalty policies



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