EPA's Audit Policy Program:
Frequently Asked Questions

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Explanatory Note

This document was prepared by the U.S. Environmental Protection Agency's (EPA or the Agency) Office of Civil Enforcement (OCE) in conjunction with the national Audit Policy Coordination Team (ACT). The ACT is chaired by OCE and is charged with making fair and nationally consistent recommendations concerning the applicability of the policy on Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations, 65 Fed. Reg. 19618 (Apr. 11, 2000) (referred to in this document as the Audit Policy), the Small Business Compliance Policy, 65 Fed. Reg. 19630 (Apr. 11, 2000), and the Interim Approach to Applying the Audit Policy to New Owners, 73 Fed. Reg. 44991 (Aug. 1, 2008) (referred to in this document as the New Owner Audit Policy). In addition to these three self-disclosed violations policies, EPA's Audit Policy Program includes the eDisclosure system which is an online system for receiving and automatically processing violation disclosures under the Audit Policy and Small Business Compliance Policy.

This document uses a Question and Answer format to highlight key policy matters that are often asked about in the Audit Program and respond to requests for clarification by the regulated community. It supersedes the 1997 "Audit Policy Interpretive Guidance", 2007 "Frequently Asked Questions", and 2015 "eDisclosure FAQs" in part because some of the questions and answers in those three documents are no longer relevant, particularly those that were based on an implementation approach that involved an exchange of hard copy communications between the entity self-disclosing violations and EPA. Since EPA launched the eDisclosure system, all Audit Policy and Small Business Compliance Policy disclosures are automatically and electronically processed via that system. This document incorporates any issues discussed in the 1997 "Audit Policy Interpretive Guidance", 2007 "Frequently Asked Questions", and 2015 "eDisclosure FAQs" that remain relevant, and presents those issues in a user-friendly manner, including any updates. The questions and answers available on the eDisclosure Central Data Exchange (CDX) online portal remain in place as they are related to portal logistics and mechanics.

EPA welcomes comments on this document, and on additional interpretive issues that may be appropriate for resolution in future FAQs or in Agency guidance.

This document provides information about how the Agency exercises its enforcement discretion. It is not final agency action and it does not create any rights, duties, obligations, or defenses, implied or otherwise, in any third parties.

This document can be found on the Internet at https://www.epa.gov/compliance/epas-audit-policy. Revisions or additions to this document also will be made publicly available on the Internet.

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General Audit Policy Program Qs and As

This section generally describes what regulated entities should or should not do to satisfy a condition in one or more of the policies in the Audit Program. Any language suggesting what an entity "must" or "should" do refers to an entity wanting to obtain penalty mitigation under one of the self-disclosed violations policies. (Note, EPA uses the terms "regulated entity" and "entity" interchangeably throughout these FAQs.)

Relationship of These Frequently Asked Questions (FAQs) to Prior EPA Guidance and FAQs

1. Should one still consult EPA's 1997 "Audit Policy Interpretive Guidance", 2007 "Audit Policy: Frequently Asked Questions", and 2015 "eDisclosure FAQs" on Audit Policy Program issues?

No. This document supersedes the 1997 "Audit Policy Interpretive Guidance", 2007 "Frequently Asked Questions", and 2015 "eDisclosure FAQs" in part because some of the Qs and As in those documents are no longer relevant, particularly those that were based on an implementation approach that involved an exchange of hard copy communications between the entity self-disclosing violations and EPA, prior to the adoption of the eDisclosure system. This document includes those issues from the 1997 "Audit Policy Interpretive Guidance", 2007 "Frequently Asked Questions", and 2015 "eDisclosure FAQs" that remain relevant.

Systematic Discovery

2. Are regulated entities required to give EPA advance notice of their intent to undertake an audit?

No, regulated entities are not required to provide EPA with advance notice of their intent to undertake an audit.

3. Are regulated entities required to complete their audit within a specific time frame and, if so, what timeframe?

No, for existing owners, there is no specific time frame within which regulated entities must complete their audit as a condition of obtaining penalty mitigation. Where new owners and EPA enter into an audit agreement, however, they will need to agree to a timeframe in which to complete an audit. *See e.g.,* New Owner Audit Policy, 73 Fed. Reg. at 44996-97. See Q & A #9 for information about prompt disclosures during extended audits, including compliance with the 21-day prompt disclosure condition.

Voluntary Discovery

4. A regulated entity discovered noncompliance that is required to be reported to the regulatory agency pursuant to the applicable statute, regulations, and/or permit. Does this mean the regulated entity does not meet the voluntary discovery condition?

No, the voluntary requirement applies to discovery only, not reporting. That is, 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.

5. Under what circumstances, if any, can discovery of Clean Air Act (CAA) Title V violations be "voluntary" under the various self-disclosed violations policies?

Generally, CAA violations discovered during activities supporting Title V certification requirements are not considered to be "voluntarily discovered." The regulations implementing Title V require a comprehensive inquiry as to a permit applicant's compliance with "all applicable requirements," 40 C.F.R. § 70.5, and a periodic (at least annually) compliance certification with the terms and conditions of a Title V permit for permit holders, 40 C.F.R. § 70.6(c). Thus, discovery of any violations as part of these processes is not voluntary and, therefore, generally is not eligible for penalty mitigation under these policies. *See* New Owner Audit Policy, 73 Fed. Reg. at 44993. There are, however, the following possible exceptions where EPA may allow for penalty mitigation in the Title V context on a case-by-case-basis:

For existing owners:

> (1) violations that the regulated entity discovers and discloses well in advance of, and that are not prompted by, the Title V application process;
>
> (2) violations that the regulated entity discovers and discloses after it has submitted a complete Title V permit application, but prior to any compliance certification requirement in an issued Title V permit that would require certification as to the violated underlying requirement, provided such violations were new or unforeseeable at the time of the permit application (for example, where a source's Title V permit is missing an applicable requirement because the regulating agency – through no omission of required information or fault on the part of the regulated entity – issued the permit without including that standard, thus allowing the source to voluntarily discover violations of such standard because the annual certification regulations at 40 C.F.R. § 70.6(c)(5) only require sources to determine their compliance with "the terms and conditions *contained in the permit*");

For new owners:

> (3) violations a new owner discloses either (i) in writing to EPA before the due date of any required Title V compliance certification, monitoring, sampling, or auditing or (ii) pursuant to an auditing and disclosure schedule established in an audit agreement that EPA and the new

owner entered into before the due date of any required Title V compliance certification, monitoring, sampling, or auditing. New Owner Audit Policy, 73 Fed. Reg. at 44993, 45000.

6. Under what circumstances, if any, can disclosure of Clean Water Act National Pollution Discharge Elimination System (NPDES) permit violations meet the voluntary discovery condition under the various self-disclosed violations policies?

Because NPDES regulations and permits require facilities discharging pollutants to waters of the United States to periodically evaluate their compliance status with applicable effluent limitations and other permit requirements, 40 C.F.R § 122.44 and 40 C.F.R. § 122.48, discovery of NPDES permit violations through such prescribed monitoring is not voluntary and, therefore, such violations generally are not eligible for penalty mitigation under the self-disclosed violations policies. *See* Audit Policy, 65 Fed. Reg. at 19621, 19625; New Owner Audit Policy, 73 Fed. Reg. at 45000. The EPA has identified one exception to this rule, which is under the New Owner Audit Policy where new owners:

> "correct violations found, and upgrade deficient equipment and practices, as soon as possible … and either disclose violations or enter into an audit agreement with an auditing and disclosure schedule, before the first instance when the monitoring, sampling or auditing is required … For example, an entity [a new owner] could perform its Annual Comprehensive Site Compliance Evaluation required by the NPDES General Industrial Stormwater Permits and Stormwater Pollution Prevention Plans (SWPPP) prior to its due date, and discover and disclose violations for Audit Policy consideration."

New Owner Audit Policy, 73 Fed. Reg. at 45000.

7. Can an entity be deemed to have voluntarily discovered its violations where the violations are discovered during the conduct of a compliance audit that is required as part of a binding settlement?

Generally, no. The Audit Policy defines voluntariness to exclude situations where the violations are "discovered through a compliance audit required to be performed by the terms of a consent order or settlement agreement." Audit Policy, 65 Fed. Reg. at 19621, 19625. The settlement agreement itself should address how such violations will be resolved, via terms of the binding settlement (*e.g.*, whether and how penalty mitigation may be available for violations discovered as part of a compliance audit required by the settlement). Thus, resolution of any violations discovered through a compliance audit required by a settlement must be resolved outside the eDisclosure system, through the settlement case team.

However, there is an exception to this general rule, when discovery of a violation that results from actions pursuant to a settlement may be able to meet the "voluntary discovery" condition. If the violations are discovered pursuant to an audit which is "a component of agreement terms to implement a comprehensive environmental management system" they could meet the voluntary discovery condition. Audit Policy, 65 Fed. Reg. at 19621, 19625. As noted in the Audit Policy:

> "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."

Id. at 19621.

Prompt Disclosure

8. Are regulated entities required to affirmatively admit that they have violated the law?

No, regulated entities can disclose that they "may have" violated the law. *See* Audit Policy, 65 Fed. Reg. at 19626; Small Business Compliance Policy, 65 Fed. Reg. at 19633; New Owner Audit Policy, 73 Fed. Reg. at 45001.

9. If an audit will take some time to complete (e.g., perhaps several months), when does the regulated entity have to disclose violations to meet the 21-day prompt disclosure condition?

Although the Audit Policy itself does not establish a firm time limit for completing audits, regulated entities meet the Audit Policy's prompt disclosure condition only if they disclose potential violations within 21 days of when they obtain an "objectively reasonable factual basis" for concluding that specific violations may have occurred. Discovery may occur prior to completion of the audit or audit report, or at their completion. If discovery occurs at different times for different violations, each violation would have to disclosed within 21 days of discovery to be timely. See also Q & A #34, explaining that there may also be some value in a late disclosure after 21 days as part of an effort to demonstrate "good faith" for later consideration if there is an EPA enforcement action.

As EPA explained in the Audit Policy, a violation is discovered 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." Audit Policy, 65 Fed. Reg. at 19621

EPA's longstanding interpretation of when a specific violation may have occurred (triggering the beginning of the 21-day period in which to disclose violations) may provide some flexibility. As EPA explained as early as the 1997 Audit Policy Interpretive Guidance, absolute factual and legal certainty is not necessary in order to trigger the beginning of the 21-day period in which to promptly disclose violations. This is particularly true where there is a reasonable certainty as to the facts underlying potential violations. For example, where an entity discovers that specific violations occurred at one location or facility and has the same equipment and operations elsewhere, an inference can be drawn that other violations may have occurred and the company should disclose these other possible violations to the Agency at the same time it discloses the initial violation. If, however, equipment and

operations elsewhere are not identical or where it is unknown whether they are substantially similar, discovery may not have occurred for other locations or facilities. In such circumstances the entity can audit or otherwise take steps to voluntarily discover other potential violations and timely disclose those in the eDisclosure system all at once or piecemeal. The timing for each such disclosure is determined by when sufficient information becomes available to conclude that specific violations may have occurred.

Independent Discovery and Disclosure

10. In a discussion, EPA suggested that an entity audit for violations or suggested expanding existing audit efforts to additional facilities or locations. Does that disqualify the entity from the self-disclosed violations policies?

Not necessarily, but it depends on the facts. Unless the EPA is about to discover the discussed violations, or is already investigating the additional facilities or locations, a mere suggestion from the EPA that an entity consider auditing will not necessarily disqualify the entity under the independent discovery and disclosure condition. If the regulated entity is unsure as to whether the EPA will consider any violations discovered via such audits to be independently discovered and disclosed, it can ask the EPA to clarify its position prior to conducting the audits.

The Audit Policy requires that regulated entities discover and disclose violations independent of discovery or likely discovery by a government or third-party plaintiff:

> "[t]hat 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."

65 Fed. Reg. at 19622.

The EPA also stated in the Audit Policy that "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." *Id*. Moreover, EPA noted that:

> "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."

Id.

Similarly, the Small Business Compliance Policy states that the policy does not apply when the violation was discovered through "an information request, inspections, field citations, … or through an investigation unless the facility can demonstrate that it did not know that the agency had initiated the investigation and disclosed in good faith." Small Business Compliance Policy 65 Fed. Reg. at 19633.

Correction and Remediation

11. What happens when it is not possible to correct a violation?

The EPA recognizes that certain violations that involve parties, facilities, or wastes over which an entity no longer has control (*e.g.*, the transport of hazardous waste without a RCRA manifest) may not in fact be physically correctable by the entity disclosing the violation. Similarly, an entity may not be able to correct a violation when the violation involved an activity that should have occurred within a certain time window which has closed (*e.g.,* within a certain number of days after start-up, or before sale or rental of property). In such circumstances, it is the EPA's practice to not necessarily preclude a regulated entity from penalty mitigation under the self-disclosed violations policies based on the correction and remediation condition provided the regulated entity can demonstrate that it has taken appropriate measures to prevent recurrence of the disclosed violation(s) and has complied with any other steps necessary to remedy the violation(s) (*e.g.*, by performing the activity late, or by completing any removal or remedial actions required by law).

No Repeat Violations

12. Are violations identified in a non-penalty enforcement response such as a notice of violation considered to have "occurred previously" for purposes of the No Repeat Violations condition?

It depends.

a. The Audit Policy states that for purposes of the "No Repeat Violations" condition

"a violation is:

(a) Any violation of a 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."

65 Fed. Reg. at 19626.

The non-penalty enforcement responses included in the above definition (*e.g.*, notice of violation) typically include, or occur after, an opportunity for the recipient to confer and contest any findings of violation. Thus, violations identified in the documents included in the above definition would be considered to have "occurred previously" for purposes of the No Repeat Violations condition if the

document has not been withdrawn or successfully challenged by the regulated entity. However, violations identified in documents where the recipient has not had an opportunity to confer are not considered to have "occurred previously" for the No Repeat Violations condition in the Audit Policy.

Since the implementation of the eDisclosure system, the EPA also considers an electronic Notice of Determination (eNOD) to be a document like those in section (b) of the above definition for which an entity has received penalty mitigation. However, Acknowledgment Letters or Ineligibility Letters do not result in penalty mitigation themselves, and otherwise do not identify a violation for purposes of the No Repeat Violations condition.

b. The Small Business Compliance Policy, however, has a slightly different provision for repeat violations. The Small Business Compliance Policy does not appy if:

"a. The facility has the following noncompliance history:

i. It has previously received a warning letter, notice of violation, or field citation, or been subject to a citizen suit or any other enforcement action by a government agency for a violation *of the same requirement* within the past three years.

ii. It has been granted penalty reduction under this Policy (or a similar State or Tribal policy) for a violation *of the same or a similar requirement* within the past three years.

iii. It has been subject to two or more enforcement actions for violations of environmental requirements in the past five years, *even if this is the first violation of this particular requirement*."

65 Fed. Reg. at 19633 (emphasis added).

13. When does the 3- or 5-year period begin for the purposes of the No Repeat Violations condition?

The Audit Policy "No Repeat Violations" condition requires that "[t]he specific violation (or a closely related violation) [disclosed] 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." Audit Policy, 65 Fed. Reg. at 19626. As noted above, the Small Business Compliance Policy has a slightly different, but similar, provision for repeat violations. Small Business Compliance Policy, 65 Fed. Reg. 19633. Question 12 answered what violations are counted as prior violations for purposes of the No Repeat Violations condition. This Question addresses when the 3- or 5- year period commences for prior violations that count for purposes of the No Repeat Violations condition.

The 3- or 5-year period begins to run when the government has given the violator notice of the violation per the applicable self-disclosed violations policy definition (see Q & A #12), not when the

violation actually took place. Thus, for example, an entity may have failed to provide a report on January 1, 2020; received a notice of violation on June 1, 2020, and settled the violation in an administrative order on December 1, 2020. The 3- or 5-year period for the "No Repeat Violations" condition runs from June 1, 2020, not December 1, 2020, forward.

Note that the Audit Policy preamble at 65 Fed. Reg. at 19622-23 has a list of examples of "notice" of prior violations that is inconsistent with the Audit Policy at 65 Fed. Reg. at 19626. To clarify, as stated in the Audit Policy, the EPA does not consider inspection reports and citizen suits to be documents which give notice for purposes of the "No Repeat Violations" conditions of the self-disclosed violation policies; however, these documents could impact the ability of the violator to meet the Independent Discovery and Disclosure condition.

14. How, and how often, does EPA determine that there is a corporate pattern of violations for purposes of determining whether an entity has satisfied the No Repeat Violations condition?

Where the disclosed violation is the same as or closely related to violations that occurred "within the past five years as part of a pattern at multiple facilities owned or operated by the same entity" the disclosing entity has not satisfied the "No Repeat Violations" condition. Audit Policy, 65 Fed. Reg. at 19623, 19626.

Between 1995 and 2020, EPA found that an entity had not satisfied the no repeat violations condition due to a "corporate pattern" in less than one percent of all cases. As explained as early as the 2007 Audit Policy FAQs, there is no specific number of prior violations that comprise a corporate pattern for purposes of determining whether a disclosing entity has failed to satisfy this condition. The concept of a corporate pattern of violations focuses on when the violations occurred, not on the number of violations disclosed at any one time. Thus, for example, an entity could conduct an audit that yields the discovery and disclosure of dozens or hundreds of violations of the same or a closely related type at multiple facilities. If those violations are discovered as part of one effort and disclosed together, EPA views those violations as one disclosure for purposes of evaluating subsequent disclosures for corporate pattern. Similarly, if an entity discovers violations at one facility and has reason to believe that the same or closely related violations exist at other facilities, the No Repeat Violations condition would not preclude an entity from disclosing the additional violations sequentially if the disclosures are part of a single, comprehensive review of similar requirements across all of an entity's facilities, are disclosed promptly as defined under the applicable self-disclosed violations policy, and any disclosed violations did not occur after the entity received noticed that it was in violation. See Q & A #12 for more on notice.

Other Violations Excluded

15. How does EPA interpret the condition that excludes violations resulting in serious actual harm to the environment or which may have presented an imminent and substantial endangerment to public health or the environment?

Although many environmental violations involve the release of pollutants, such violations do not necessarily result in serious actual harm or present an imminent and substantial endangerment. In the context of EPA's self-disclosed violations program, EPA takes a case-by-case approach and has rarely excluded disclosures on this basis. Of the nearly 28,000 facilities disclosing to EPA between 1995 and 2020, EPA denied Audit Policy Program penalty mitigation based on serious actual harm or an imminent and substantial endangerment condition less than a dozen times. One of those instances involved a release that required community evacuation of the surrounding area, and another involved the death of an employee.

Enforcement Policy and Practice

16. How does EPA decide whether to seek to recover the economic benefit of noncompliance where a disclosure meets all the conditions for 100% gravity-based penalty mitigation?

The EPA's self-disclosed violation policies preserve the EPA's ability to recover any economic benefit of noncompliance. However, since the issuance of the Audit Policy in 1995, the EPA has stated that it may waive such recovery where it determines that the economic benefit is insignificant. While EPA still reserves the right to recover any economic benefit – particularly where not doing so would put a law-abiding competitor at a clear competitive disadvantage – EPA generally defers to the relevant program penalty policies governing the statutory or regulatory requirement at issue. Many of EPA's penalty policies establish *de minimus* penalty amounts under which collection is not routinely sought.

17. In cases where a 75% gravity-based penalty reduction is appropriate under the Audit Policy, may the penalty be further reduced in consideration of good faith, or "other factors as justice may require" as long as any economic benefit of noncompliance is recovered?

It depends. Where a 75% gravity-based penalty reduction is appropriate under the final Audit Policy, further penalty reductions may be obtained for activities that go beyond the specific conditions required under the final Audit Policy. Thus, additional penalty reductions for good faith and "other factors as justice may require" may be provided only where the specific activities justifying those reductions are not required in order to receive a 75% penalty reduction under the Audit Policy. For example, the prompt disclosure of a violation ordinarily would not qualify a company for additional good faith penalty reductions since the disclosure clearly is required by the Audit Policy. On the other hand, a violator that takes steps to correct and remediate a violation in a manner that is above and beyond the steps normally expected in order to qualify for mitigation under the Audit Policy (*e.g.*, quicker or more extensive correction) may qualify for a good faith reduction.

As to economic benefit of noncompliance (EBN), the Audit Policy restates the Agency's longstanding position that recovery of any significant EBN is important in order to preserve a level playing field for the regulated community. The Audit Policy does not revise or modify any other Agency policies concerning recovery of EBN. See Q & A #16 for more on economic benefit.

18. Where statute-specific penalty policies provide for different penalty reductions in self-disclosed violation cases, which policy takes precedence?

The Audit Policy states clearly that it "supersedes any *inconsistent* provisions in media-specific penalty or enforcement policies" but that such policies continue to apply where they are not inconsistent. Audit Policy, 65 Fed. Reg. at 19626 (emphasis added). If not inconsistent, the Audit Policy states that such existing EPA enforcement policies continue to apply in conjunction with the Audit Policy provided that the regulated entity has not already received penalty mitigation for similar self-policing or voluntary disclosure activities. *Id.* In most circumstances, the Audit Policy takes precedence on the issue of penalty mitigation, as it will result in a greater penalty mitigation than under any media-specific penalty or enforcement policy.

In some circumstances, the Audit Policy may provide for less penalty mitigation (*e.g.*, 75% penalty reductions where the violations are not discovered through a systematic discovery, as opposed to potential 80% or greater reductions for such cases under another penalty policy) but will generally take precedence. This is because the Audit Policy is a more detailed statement as to the precise national strategy for providing incentives for self-policing, prompt disclosure, and expeditious correction and remediation.

19. Why is use of the Audit Policy limited to settlement proceedings rather than being applicable also to adjudicatory proceedings?

The Audit Policy expressly limits its applicability to settlement contexts, and states that "[i]t is not intended for use in pleading, at hearing, or trial," Audit Policy, 65 Fed. Reg. at 19627, because the Agency wanted to create these incentives for self-policing, prompt disclosure, and expeditious correction in a manner that most effectively allocates scarce Agency resources and reduces transaction costs for the regulated community. Subjecting the policy to litigation and judicial review is inconsistent with this carefully considered approach to streamlining the enforcement process. As noted in the Audit Policy, EPA intends to apply the policy uniformly in settlements involving self-disclosed violations across all of the Agency's enforcement programs. However, where enforcement matters are not resolved through settlement, but instead proceed to litigation, the Audit Policy is not applicable, and any attempt to apply the policy in such contexts is inappropriate.

20. Does an entity have to meet all of the conditions of the applicable self-disclosed violations policy to qualify for penalty reductions?

A disclosing entity must meet all the conditions of the applicable self-disclosed violations policy in order to be eligible to receive penalty mitigation under the policy. Disclosing entities are required to certify whether they met the specific conditions of the applicable self-disclosed violations policy when

submitting the compliance certification in the eDisclosure system or a disclosure and/or final audit report pursuant to the New Owner Audit Policy. *See*, *e.g.*, Notice of eDisclosure Portal Launch, 80 Fed. Reg. at 76477 ("[C]ompliance certifications must identify the specific violations, and certify that the violations have been corrected and that the [applicable self-disclosed violations policy] conditions have been met."). Should EPA decide an enforcement action is warranted for disclosures submitted via the eDisclosure system or pursuant to the New Owner Audit Policy, EPA will verify at that time whether the specific conditions have been met in order for the entity to be eligible for penalty mitigation under the applicable self-disclosed violations policy. In the event the entity does not meet all applicable self-disclosed violations policy's conditions, EPA will apply the relevant statute-specific penalty policies to the violations, which may recognize good faith efforts.

Miscellaneous Issues

21. If an entity wants to disclose violations should it do so to state officials, EPA, or both?

An entity wanting to self-disclose violations may want to consider the following when deciding whether to make a disclosure to EPA, the State, or both: the type of regulation violated, availability of a state audit program, and the scope of legal relief sought. Only EPA can resolve violations of federal laws for which no state-authorized program exists (*e.g.,* EPCRA). For violations of federal statutes for which a state-authorized program exists (*e.g.,* the Clean Water Act), an entity may choose to disclose to either regulator or both. Note, however, that if resolution of the federal claim is desired, disclosure to EPA is the only means to secure it. Similarly, if resolution of the state claim is desired, disclosure to the state is required. For states with audit programs that reflect the incentives and conditions contained in EPA's Audit Policy, EPA in some cases has developed a memorandum of agreement that establishes an understanding that, although each agency maintains its sovereign legal authorities, each generally intends to defer to the other's resolution of disclosed violations. *See* Audit Policy, 65 Fed. Reg. at 19624. Entities not seeking a federal resolution of their self-disclosed violations may find that this arrangement provides enough assurance that they determine a separate disclosure to EPA unnecessary.

New Owner Audit Policy Qs and As

Benefits of the New Owner Audit Policy

22. What additional incentives are available to new owners under EPA's New Owner Audit Policy compared to the Audit Policy?

New owners meeting the conditions of the New Owner Audit Policy potentially can receive:

(1) additional penalty reductions beyond what is provided in the Audit Policy (*see* 73 Fed. Reg. at 44998-44999), such as:

a. waiver of the economic benefit penalty component for the period before the new owner acquired the facility; and/or

b. waiver of the economic benefit penalty component associated with delayed capital expenditures or with unfair competitive advantage after the new owner acquired the facility, if the violations are corrected in accordance with the Audit Policy (*i.e.,* within 60 days of the date of discovery or another reasonable timeframe to which EPA has agreed);

(2) penalty mitigation for a greater range of environmental violations than would be eligible under the Audit Policy (*see* 73 Fed. Reg. at 44993, 45000-45001, 45003), such as:

a. Clean Air Act violations that a new owner discloses either (i) in writing to EPA before the due date of any required Title V compliance certification, monitoring, sampling, or auditing, or (ii) pursuant to an auditing and disclosure schedule established in an audit agreement that EPA and the new owner entered into before any required Title V compliance certification, monitoring, sampling, or auditing.

b. Clean Water Act NPDES effluent discharge violations that new owners discover and disclose to EPA *prior to* the new owner's first required instance of monitoring, sampling, or auditing; and,

c. Violations that began *before* the new owner acquired the facility and which gave rise to serious actual harm or imminent and substantial endangerment, provided there is no fatality, community evacuation, or other seriously injurious or catastrophic event.

Eligibility Requirements

23. How does EPA determine when an entity is a "new owner"?

As stated in the New Owner Audit Policy:

"an entity will be considered a 'new owner' where it certifies to the following criteria:

a. Prior to the transaction, the new owner was not responsible for environmental compliance at the facility which is the subject of the disclosure, did not cause the violations being disclosed and could not have prevented their occurrence [*i.e.,* it did not control operations at the facility];

b. The violation which is the subject of the disclosure originated with the prior owner; and

c. Prior to the transaction, neither the buyer nor the seller had the largest ownership share of the other entity, and they did not have a common corporate parent."

73 Fed. Reg. at 44995.

24. Can a company qualify for New Owner Audit Policy penalty mitigation if the company had a corporate or financial relationship with the prior owner?

It depends on the prior relationship. As stated in the New Owner Audit Policy, such penalty mitigation is possible for:

(1) a "new owner which, prior to the transaction, was a silent or inactive partner in a joint venture, and then purchased the rest of the business and became the active owner, so long as its prior share was less than the largest, and the new owner can certify to the first criterion" regarding lack of operational control at the facility, 73 Fed. Reg. at 44996; and

(2) "a new owner which is the product of a merger, so long as neither party had previously held the greatest ownership share of the entity with which it merged." *Id.*

For stock transactions, EPA also stated in the New Owner Audit Policy that penalty mitigation is not envisioned for situations where the buyer and seller previously had a common corporate parent:

"EPA assumes, for purposes of interpreting this criterion, that the corporate parent was in control of the prior owner, the 'new' owner, and facility operations. Accordingly, where two companies have a common corporate parent and one subsidiary buys another, the acquiring entity is not sufficiently 'new' to warrant this tailored application of the Audit Policy."

73 Fed. Reg. at 44996.

25. If Company A buys all the stock of Company B, making Company B a wholly-owned subsidiary of Company A, can Company A enter into a new owner audit agreement for the newly acquired Company B facilities?

Yes, provided that as the new owner, Company A meets all conditions of the New Owner Audit Policy and certifies to the following criteria set forth in 73 Fed. Reg. at 44995-96:

a. "Prior to the transaction, [Company A] was not responsible for environmental compliance at the facility which is the subject of the disclosure, did not cause the violations being disclosed and could not have prevented their occurrence [*i.e.,* it did not control operations at the facility];

b. The violation which is the subject of the disclosure originated with [Company B]; and

c. Prior to the transaction, neither [Company A] nor [Company B] had the largest ownership share of the other entity, and they did not have a common corporate parent."

In such a case, even though Company B was responsible for the violations and has a continued corporate existence, Company A may be able to qualify as a "new owner" if it meets the new owner criteria.

Relationship to eDisclosure System

26. Can entities that qualify as new owners under EPA's New Owner Audit Policy use the eDisclosure system?

Yes, however the additional incentives available under the New Owner Audit Policy (*e.g.,* waiver of certain economic benefit penalties) are not available to disclosures made via the eDisclosure system. Thus, regulated entities that meet the definition of "new owner" can choose whether to disclose potential violations pursuant to either the New Owner Audit Policy or EPA's eDisclosure system. While disclosures in the eDisclosure system are automatically processed electronically and provide an immediate response (Notice of Determination, Acknowledgement Letter, or Ineligibility Letter) once the disclosing entity submits its Compliance Certification, the eDisclosure system applies the condition of the Audit Policy or Small Business Compliance Policy (whichever the disclosing entity selects), not the New Owner Audit Policy. New owner disclosures are processed manually through a series of communications with EPA staff, which result in final resolution of the violation(s) and in appropriate circumstances may allow for additional flexibility beyond what the eDisclosure system provides regarding the dates for disclosing and correcting specific violations.

Enforcement Policy and Practice

27. What is EPA's policy and practice regarding investigating or enforcing against previous owners whose violative conduct is revealed through the new owner's disclosure?

Although EPA's New Owner Audit Policy states that EPA "reserves its rights to pursue sellers where the circumstances and equities warrant" (73 Fed. Reg. at 45004), the overarching goal of the policy is to encourage new owners to discover, disclose, and correct violations, resulting in significant environmental protection and benefit. "Resolving the violations with the new owners should provide the appropriate environmental controls and improvements necessary to reduce pollution and ensure ongoing compliance at the facility." *Id*. In evaluating its options, EPA focuses on ensuring compliance and protection of human health and the environment. In situations where the violations demonstrate potentially widespread or recurring noncompliance, or a potential endangerment to human health or the environment, EPA may decide to bring an enforcement action against the prior owner. Should EPA decide to pursue the previous owner for violations disclosed by the new owner, the previous owner would not be eligible for New Owner Audit Policy penalty mitigation.

28. What is EPA's policy and practice regarding assessing a civil penalty to recover the economic benefit of noncompliance from new owners?

EPA's New Owner Audit Policy aims "to increase the number of disclosures of significant violations" in part "[b]y providing certainty to the economic benefit assessment." 73 Fed. Reg. at 44998. It provides such certainty by:

> (1) stating that, except as noted immediately below, EPA "will not seek penalties for economic benefit associated with capital expenditures, assuming the violations are promptly corrected";
>
> (2) adding that "because the new owner does clearly benefit from not having to operate and maintain controls and equipment before they are installed and functioning, the Agency will assess penalties for economic benefit associated with those savings, starting from the date the facility was acquired until the corrections are complete"; and
>
> (3) emphasizing that "EPA may provide additional flexibility in assessing economic benefit on a case-by-case basis, if the Agency believes it is warranted and appropriate given the facts in a particular situation" and that "fairness is the central guiding principle underlying Agency decisions regarding the assessment of economic benefit."

73 Fed. Reg. at 44999.

See Q & A #16 for more on recovery of economic benefit.

29. What is EPA's practice regarding conducting inspections at facilities that are covered by a New Owner Audit Agreement when the audit is not yet complete?

The Agency's authority to inspect is provided for in its authorizing statutes and is not limited in any way by a New Owner Audit Agreement. The EPA's inspection authorities are a critical component of the Agency's ability to respond to citizen complaints or site conditions posing a potentially serious threat to human health or the environment, and its ability to assure the public as to the compliance status of a given facility. An audit does not shield an entity from inspection.

If an EPA inspection occurred and revealed violations at a facility that is covered by a New Owner Audit Agreement, the entity would not be precluded from satisfying the independent discovery condition, provided such violations fell within the scope of the New Owner Audit Agreement with EPA and the inspection commenced after the date of the Audit Agreement. However, if there is no New Owner Audit Agreement or prior notification to EPA, then any violations discovered by EPA during an inspection would not be eligible for Audit Policy penalty mitigation, even if the facility had an on-going audit at the time of the inspection.

30. Are the benefits of the New Owner Audit Policy available to new owners who have a corporate pattern of violations at facilities other than the newly acquired facility?

As noted in the New Owner Audit Policy, "new owners that undertake examinations of newly acquired facilities generally will be eligible under the No Repeat Violations condition of the Audit Policy irrespective of the new owner's history of violations at other facilities that were not recently acquired." 73 Fed. Reg. at 45003. This is because a primary intent of the New Owner Audit Policy is to encourage owners of newly acquired facilities to undertake a comprehensive examination of and improvements to its environmental compliance and management systems. Therefore, notwithstanding a new owner's history of violations at their other facilities, if its efforts to examine and improve upon an acquired facility's environmental operations are thorough and likely to result in improved compliance, EPA may extend the New Owner Audit Policy's benefits to such entities assuming they meet all the conditions of the New Owner Audit Policy.

eDisclosure Qs and As

Submitting Confidential Business Information (CBI)

31. Why can't an eDisclosure submittal contain CBI?

The eDisclosure system is not designed to receive or process any information claimed as confidential business information (CBI), so entities should submit only sanitized (non-CBI) information through the online system. *See* Notice of eDisclosure Portal Launch, 80 Fed. Reg. at 76477. EPA will directly contact the disclosing entity if it needs more information, and in such circumstances EPA will provide direction on the process for submitting such CBI. Any follow-up information claimed to be CBI must be submitted manually according to EPA procedures and the requirements of 40 CFR Part 2.

32. Because the eDisclosure system is not designed to receive and process CBI, how can an entity sanitize the CBI for a chemical for its eDisclosure submission?

Entities should submit only sanitized (non-CBI) information for chemicals through the online eDisclosure system. Therefore EPA recommends the following options for sanitizing CBI for a chemical in an eDisclosure submission. Entities may select a generic chemical category (*e.g.,* by typing "organic" or "inorganic" [without quotes] in the "Chemical Name" Search box and then choosing one of the broad chemical categories to which the chemical belongs). If the entity is unable to identify an appropriate sanitized/generic category, designating the chemical as a trade secret is an acceptable option. In such circumstances, note that disclosing entities must specify the quantity of the chemical, which can be either a number greater than zero or listed as "CBI" [without quotes]. EPA will directly contact the disclosing entity if it needs more information, and in such circumstances EPA will provide direction on the process for submitting such CBI.

Prompt Disclosure via eDisclosure

33. Does eDisclosure offer any flexibility to the 21-day deadline for disclosing potential violations?

No. EPA's automated eDisclosure online system is programmed to provide regulated entities with a certain and objective time period within which to disclose violations in order to be potentially eligible for penalty mitigation under the Audit Policy and Small Business Compliance Policy (*i.e.,* 21 days from when the entity "discovers" that a "specific" violation "may have occurred"). The 21-day violation disclosure period cannot be extended in eDisclosure. See Q & A #9 for additional information the 21-day prompt disclosure condition.

34. What happens if a regulated entity discloses potential violations in the eDisclosure system more than 21 days after discovering them?

The prompt disclosure condition of the self-disclosed violations policies require disclosure within 21 days of discovery (see Q & A #9). Nonetheless, regulated entities can disclose violations or potential violations in the eDisclosure system beyond the 21-day deadline; the eDisclosure system is programmed to automatically issue an Ineligibility Letter if violations are disclosed more than 21 days after discovery. In such situations, the regulated entity may upload additional information to explain the reason for the late disclosure and how the entity believes it met the other conditions of the Audit Policy or Small Business Compliance Policy. If EPA subsequently considers taking an enforcement action, it will consider all relevant facts and circumstances in determining an appropriate penalty, including the fact that the entity had previously self-disclosed violations. By disclosing such violations and uploading an explanation, the disclosing entity creates an electronic record that may demonstrate good faith, and EPA personnel reviewing this disclosure will have information in a centralized location to better understand the circumstances surrounding the disclosure.

No Repeat Violations

35. Since EPA is no longer entering into audit agreements with entities that are not new owners, how can companies self-disclose violations involving multiple facilities in eDisclosure?

The eDisclosure system was designed with flexibility to accept disclosures from one or multiple facilities, provided each disclosure is made within 21 days after discovery of a violation. In general, sequential disclosure of the same or closely related violations at different facilities would not trigger the repeat violation condition under the Audit Policy. See Q & A #36 for additional information on disclosures at multiple facilities.

36. If an entity's audit covers multiple facilities starting at different times and the entity gets an eDisclosure response, will that make subsequent disclosures arising from the audit ineligible for Audit Policy penalty mitigation based on the No Repeat Violations condition?

Possibly, but not likely in most circumstances. The purpose of the No Repeat Violations condition is to preclude penalty mitigation where the same or similar violations occurred after the regulated entity received certain types of notice that it was in violation, and not where such subsequent violations are merely disclosed after receiving such notice. Acknowledgement Letters or Ineligibility Letters issued in eDisclosure do not provide notice of violation for purposes of the No Repeat Violations condition because they neither contain a statement that the Agency has determined that a violation occurred, nor provide a penalty mitigation for the disclosed violation. Electronic Notices of Determination (eNODs) issued by eDisclosure both contain an agency determination that a violation occurred based on the information provided by the disclosing entity and "resolve" the disclosed violation with penalty mitigation, and thus, violations identified in eNODs have "previously occurred" for purposes of the No Repeat Violations condition. For more information on the No Repeat Violations condition, see Qs & As #12 & #13. See Q & A #14 for more on corporate pattern at multiple facilities.

Expeditious Correction Condition

37. Can an entity request an extension on the deadline for correcting potential violations and certifying compliance in eDisclosure?

It depends. EPA's automated eDisclosure online system is programmed to provide a certain and objective time period for correction of violations, *i.e.,* 60 days from when the entity discovers that a violation may have occurred under the Audit Policy and 90 days under the Small Business Compliance Policy, with limited extensions available under each policy (*i.e.,* not exceeding 180 days after violation discovery for Audit Policy disclosures and not exceeding 360 days after violation discovery for Small Business Compliance Policy disclosures). *See* Notice of eDisclosure Portal Launch, 80 Fed. Reg. at 76478-79. If the submitter of a Category 1 disclosure requests an extension to correct, the disclosure will automatically become a Category 2 disclosure, and will no longer be eligible to receive an electronic Notice of Determination. For Category 2 violations, the initial correction extension periods of 30 days for Category 2 Audit Policy disclosures and 90 days for Category 2 Small Business Compliance Policy disclosures do not require an explanation and are considered granted at the time the disclosing entity makes the request in the eDisclosure system. Any further extension requests require a justification and are not considered granted or denied at the time of the request. See Q & A #43 for more information about how to request violation correction extensions in the eDisclosure system.

38. What should an entity do if it needs more time to obtain a required permit (or permit modification) beyond the maximum time periods provided for in eDisclosure?

Regulated entities should make every effort to ensure their violations are corrected as expeditiously as practicable, within the maximum time periods provided for in the eDisclosure system. Where the correction of a violation requires the issuance or a modification of a permit, the disclosing entity may

complete its compliance certification in eDisclosure if it has filed a complete permit application with the relevant regulatory agency, and permit issuance/modification is pending.

39. What happens if an entity does not certify compliance at all in eDisclosure?

When an entity fails to make a timely and accurate certification of compliance, the eDisclosure system will notify the regulated entity that its disclosure is ineligible to be processed in eDisclosure and that EPA will retain a record of the disclosure. EPA will determine how to handle such violations if and when it considers taking an enforcement action, taking into account all relevant facts and circumstances surrounding the disclosure and failure to timely correct noncompliance, including any good faith efforts to comply.

Online Portal Mechanics and Implementation

40. Can an entity inform EPA outside of eDisclosure (e.g., in a letter or meeting or online submission) of potential compliance concerns and still qualify for the Audit Policy or the Small Business Compliance Policy?

No. As noted when EPA launched the eDisclosure system on December 9, 2015, all Audit Policy and Small Business Compliance Policy disclosures after that date (except for New Owner or criminal violation disclosures) must be submitted, and are processed, through the automated eDisclosure system. Such automated disclosures also must specify the precise legal provisions that may have been violated. *See* Notice of eDisclosure Portal Launch, 80 Fed. Reg. 76476 (Dec. 9, 2015).

Regulated entities sometimes inform EPA of potential compliance concerns outside of eDisclosure. EPA does not discourage any such contacts, and timely notice is particularly important when circumstances may present a threat to human health or the environment. This type of notice to EPA, however, is not considered an Audit Policy or Small Business Compliance Policy disclosure. If an existing owner wants to submit a disclosure under the Audit Policy or the Small Business Compliance Policy, it must do so via eDisclosure.

41. If an entity erroneously entered data in the system (for example, the entity intended to disclose EPCRA reporting violations for several years but accidentally omitted one or more years) and received a response (Ineligibility Letter, Acknowledgement Letter, or electronic Notice of Determination) that the entity did not expect or believe was appropriate, can the entity revise the submitted disclosure or compliance certification?

The automated eDisclosure system is not designed to revise responses which have already been issued, even when issuance is due to user error. Similarly, submitted compliance certifications can not be revised nor rescinded by the user, even if the submission was erroneous. If the system has not yet processed the disclosure and the violations were discovered in the last 21 days, the regulated entity can revise its disclosure or submit a new disclosure to correct any inaccuracies. Once the system has processed the disclosure or more than 21 days have passed since discovery of the potential violations, regulated entities can upload documentation to explain the omission or other error and correct the

facts. Any Ineligibility or Acknowledgement Letters that may be issued are not decisions on the merits as to whether such a self-disclosure meets the Audit Policy or Small Business Compliance Policy conditions. If EPA subsequently considers taking an enforcement action, it will consider all relevant facts and circumstances in determining an appropriate penalty, including the fact that the entity had previously self-disclosed violations. By disclosing such violations and uploading an explanation into eDisclosure, the entity creates an electronic record that may demonstrate good faith, and EPA personnel reviewing this disclosure will have information in a centralized location to better understand the circumstances surrounding the disclosure.

42. If an entity was unable to access the eDisclosure system or get it to work properly due to no fault of their own, will EPA accept submission(s) manually or modify a record in the eDisclosure system to accept a late submission?

EPA aims to ensure that the eDisclosure system is always operating properly, and the system has proved reliable thus far. Outages, however, can occur and the system can take some time to navigate. Thus, EPA recommends that users plan ahead and not wait until the last minute to disclose potential violations or certify compliance. If a late submission occurs, users can supplement the record for their disclosures by uploading documents in eDisclosure to explain any relevant facts and circumstances, which will be made available to EPA reviewers who are screening or spot-checking disclosures.

43. If an entity has multiple facilities or violations and needs to request a correction extension, does it need to request those separately or is there a way to make one global correction extension request?

The eDisclosure system allows users to make violation correction extension requests either separately for each violation, facility, or disclosure group, or globally for all of a disclosure's violations. This provides the flexibility needed to accommodate different factual circumstances. The violation correction date requested must be one single date for all selected violations. Moreover, such date must meet the requirement to correct the violations as expeditiously as possible, not to exceed 180 days after violation discovery for Audit Policy disclosures and not to exceed 360 days after violation discovery for Small Business Compliance Policy disclosures). *See* Notice of eDisclosure Portal Launch, 80 Fed. Reg. at 76478-79.

44. Does the eDisclosure system tell a disclosing entity the reasons why it received an Ineligibility Letter?

The eDisclosure system notifies the disclosing entity via e-mail as to whether an Ineligibility Letter was issued due to failure to meet a deadline for disclosing violations or submitting a Compliance Certification. If lack of timeliness is not the basis for issuance of the Ineligibility Letter, the automated e-mails do not specify which substantive voluntary disclosure policy condition/criteria is not met. However, prior to submitting the final Compliance Certification, users are given an opportunity to review their draft Compliance Certification responses along with the expected disposition based on the draft responses. Finally, users can review their disclosure record in the system to see which conditions were not satisfied.

Enforcement Practice and Policy

45. What is the likelihood that EPA will initiate an enforcement action against an entity disclosing violations and the eDisclosure system issues an Ineligibility Letter or Acknowledgement Letter?

As noted when EPA launched the eDisclosure system, a major reason that EPA developed the automated system is that "[t]he large number of violations self-disclosed to EPA has taxed the Agency's ability to promptly resolve all pending disclosures." Notice of eDisclosure Portal Launch, 80 Fed. Reg. at 76477. Efficiency and resource savings for both the regulated community and EPA were key goals. Consistent with those goals, EPA stated in the eDisclosure launch notice that it is focusing its review of disclosures on "significant concerns such as criminal conduct and potential imminent hazards." *Id.*

46. If an entity withdraws a disclosure prior to certifying compliance, can the entity expect EPA to investigate?

EPA does not intend to routinely use withdrawn disclosures to trigger enforcement investigations. In the event that EPA is otherwise considering taking action to enforce environmental requirements, records of withdrawn disclosures can be beneficial to regulated entities and/or EPA. In such cases, previous submissions through the eDisclosure portal may be considered in determining the appropriate EPA response.

47. ***If, during its spot checking, EPA finds inaccuracies in a Category 1 disclosure, how would the Agency revoke an electronic Notice of Determination (eNOD)? Would such revocation be processed through the eDisclosure system?***

The EPA spot checking process for Category 1 disclosures is manual and not automated by the eDisclosure system. Any follow-up from EPA to ask for clarification, revoke an eNOD, or confirm the validity of the eNOD would be done manually, outside of the eDisclosure system.

48. What is the value of receiving an Acknowledgement Letter given that it does not provide final resolution?

EPA recognizes that an Acknowledgement Letter does not provide the same level of finality as a Notice of Determination (which is available only for certain eligible EPCRA violations); however, EPA maintains that there is significant value in obtaining an Acknowledgement Letter. Such letters are effectively an electronic receipt of a disclosure that may demonstrate good faith. If EPA subsequently considers taking an enforcement action, it will consider all relevant facts and circumstances in determining an appropriate penalty, including whether the entity satisfied all the conditions of the self-disclosed violations policy under which it previously self-disclosed the violation.

49. Are employees who work outside the U.S. included when calculating the size of a business for purposes of the Small Business Compliance Policy?

Yes. The Small Business Compliance Policy states that "[t]his Policy applies to facilities owned by small businesses as defined here. A small business is a person, corporation, partnership, or other entity that employees 100 or fewer individuals (across *all* facilities and operations owned by the small business)." Small Business Compliance Policy, 65 Fed. Reg. at 19632 (emphasis added). The Small Business Compliance Policy does not restrict the number of employees in this calculation to those located within the United States.