

# ADDRESSING UNCERTAINTY: PROBLEM-SOLVING WITH ENVIRONMENTAL AUDITS

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# Scope of Discussion

- Environmental Compliance Audits
  - ▣ Reasons
  - ▣ Focus Areas
  - ▣ Process
  - ▣ Strategy (Legal Protections/Issues)
- Self-Disclosure
  - ▣ Reasons
  - ▣ Incentives
  - ▣ State and Federal Policies

# Audit Prompts

- Planned audit
- “Uh oh...”
- Enforcement against another facility
- Personnel changes
- Facility transfer

# Benefits of Planned Auditing

- Pre-emptive:
  - Determine compliance status
  - Minimize periods of noncompliance
  - Avoid repeat noncompliance
  - Minimize future risk
- Reduce or eliminate penalties (self-disclosure policy)
- Supply chain requirements (environmental responsibility)

# “Uh oh...”

- Management or environmental staff may become aware of a situation through walk-around or conversations (i.e., not planned review)
- Assess:
  - ▣ whether immediate remedy or reporting are required
  - ▣ whether self-disclosure is appropriate
- Voluntary? Consider Title V / FESOP requirements
- Prompt disclosure? Determine when discovery occurred (consider who knew and when entity is charged with discovery)
- Consider a planned audit to evaluate suspicion, find any other related issues

# Managing an “uh oh” through a planned audit

- Avoid “headless chicken” reactions
- Preliminary suspicion may not be a violation
- Principled way to gather & evaluate relevant info
  - ▣ Consider other operations – same problems elsewhere?
- Legal protections
- Self-disclosure

# Personnel Changes

- Relocations, retirements
  - ▣ Loss of people = loss of institutional knowledge
- New faces
  - ▣ “Why do we do it like this?”
- Not just in the Environmental Department
  - ▣ Engineers
  - ▣ Operators
  - ▣ Maintenance
  - ▣ Changes can result in lack of communication, new communication

# Facility Transfers

- Ahead of a sale
- New owners
  - ▣ Permit transfers, new permitting
- EPA self-disclosure policy allows more flexible conditions for new owners



# Focus Areas

- Common issues that prompt audits
  - ▣ May arise in the “uh oh,” personnel change, or facility transfer contexts
- Also just good areas to look at in planned audits

# Focus Areas – Air Permitting

- What does the permit say?
- How we monitor
- How we keep records
  - ▣ (don't forget response steps!)
- How we report
  - ▣ Quarterly reports
  - ▣ Deviations
  - ▣ Other (the ones everyone loves to forget)
    - NESHAP/NSPS notifications, submittals

# Focus Areas – Air Permitting

- Unit descriptions
  - ▣ Accuracy
  - ▣ Construction date
    - Subsequent repair/replacement/reconstruction?
  - ▣ Descriptions (don't forget control devices)
- Permit term history/accuracy
  - ▣ Has the requirement changed over time?
  - ▣ Should the requirement still be in the permit?

# Focus Areas – Air Permitting

## PTE

- Correct:
  - ▣ Emission factors?
  - ▣ Throughputs?
  - ▣ Control efficiencies?
- Previously unknown emissions?
- Changes? (ex. – surface coating materials, raw materials)

## The “other stuff”

- Not part of the main processes, commonly forgotten
  - ▣ Heaters
  - ▣ Generators
  - ▣ Material handling and storage
  - ▣ Cooling towers
  - ▣ Torches

# Focus Areas – Water Permitting

## NPDES and IWP permits

- Unlisted wastewater sources
- Unauthorized discharges
- Correct calculation of limits (throughput/changes)
- Discharge Monitoring Reports (DMRs)
- Proper handling of exceedances
- Water treatment additive approval
- Violation of local sewer ordinance

# Focus Areas – Water

## Stormwater

- Missed issuing NOI
- SWPPP issues
- Forgotten sampling
- Missed inspection
- Forgotten reporting

## Wetlands

# Focus Areas – Land

Waste disposal compliance

- Hazardous waste not handled appropriately
- Mysterious containers

Waste characterization issues

- Up-to-date?
- Correct point of generation?

Accumulation Requirements

Satellite Areas

New Definition of Solid Waste

# Focus Areas – Land

## RCRA notification requirements

- Correct generator level
- Used oil
- Secondary hazardous materials

## USTs

- Release prevention and reporting requirements
- Complicating factor of ELTF



# Focus Areas – EPCRA

- Tier I, Tier II
- TRI Reporting (Form R)
- Don't ignore – can be complicated, one of EPA's biggest self-disclosure issues

# Process

- Decide on purpose
  - ▣ Overview of compliance status
  - ▣ Certain focus areas
- Define scope: the Audit Checklist
- Decide whether to execute an audit agreement (usu. multiple facilities; complex issues)
- Plan audit assuming planning (if not full results) will be reviewed by agency
- Schedule follow up:
  - ▣ Day of audit
  - ▣ Audit followup (plan ahead)
    - Ensure executives, counsel, consultants all available
    - Can require significant time but require speedy decisions

# Strategies

## Protecting the Audit Process

- Indiana Audit Privilege (Ind. Code 13-28-4)
  - ▣ Environmental Audit Report privileged and not admissible as evidence in a civil or administrative legal action, including enforcement actions under Ind. Code 13-30-3.
- Kentucky Audit Privilege (KRS 224.01-040(3))
  - ▣ Environmental Audit Report privileged and not admissible as evidence in a civil or administrative legal action.
- Attorney-Client and Work Product Legal Privileges
- Agency promise not to routinely request audit report

# Strategies

- Consider benefits of disclosing versus addressing internally or through other process (permitting)
  - ▣ Not every audit leads to self-disclosure
  - ▣ But, where it makes sense...

# Why self-disclose violations?

- Achieve compliance with reduced or no civil penalty
- Resolve issues that might be identified in the future
- Avoid the fear of discovery of violations through inspections or employee whistle-blowers
- Resolve violations ahead of a facility sale

# Self-Disclosure Policies

- Benefits of policies
  - ▣ No recommendation for criminal prosecution
  - ▣ No routine request for environmental audits
  - ▣ Penalty mitigation
    - Indiana and EPA = 75%/100% of gravity
    - Kentucky = waiver of civil penalty for violations which do not result in a “significant economic benefit”
  - ▣ (Possibility for enforcement discretion even where criteria not met)
- Main Criteria
  - ▣ Attain compliance promptly
  - ▣ Report promptly
  - ▣ Report voluntarily

# Common Policy Criteria

1. Systematic Discovery (not in Kentucky)
2. Voluntary Discovery
3. Prompt Disclosure
4. Independent Discovery and Disclosure
5. Correction and Remediation
6. Prevent Recurrence
7. No Repeat Violations
8. Other Violations Excluded
9. Cooperation

# Policy Criteria

1. Systematic Discovery (EPA and IDEM only)  
Discovered through either:

## IDEM:

- Environmental audit
- Objective, documented, systematic procedure or practice
  - ▣ For small entities in Indiana, IDEM compliance assistance

## EPA:

- Environmental audit
- Compliance management system



# Policy Criteria

## “Environmental Audit”

Kentucky and Indiana – Voluntary, internal, and comprehensive evaluation of either:

- (1) A Facility or an activity at a Facility subject to environmental regulations (defined under the policy); or
- (2) Management systems related to a Facility or an activity designed to identify and prevent noncompliance, and improve compliance with laws.

Conducted by an owner or operator, employees, or independent contractor.

# Policy Criteria

## “Environmental Audit”

EPA – Systematic, documented, periodic and objective review by regulated entities of facility operations and practices related to meeting environmental requirements.

# Policy Criteria

## 2. Voluntary Discovery

- Not through legally mandated monitoring or sampling, such as:
  - ▣ Continuous emissions monitoring
  - ▣ Required NPDES sampling
  - ▣ Title V: Review of compliance through ACC
  - ▣ Indiana: violations required to be detected in accordance w/ Part 70 or FESOP permit
  
- EPA: Notes that “voluntary” applies to discovery only, not reporting
  - ▣ If issue discovered voluntarily, can still qualify regardless of whether reporting was required after it was found
    - But, still see ACC above
  
- Multiple Facilities

# Policy Criteria

## 3. Prompt Disclosure

Indiana:

- 45 days after discovery that the violation occurred or may likely have occurred

EPA:

- 21 days after discovery that the violation has, or may have, occurred (begins when any officer, director, employee or agent of the facility has an objectively reasonable basis for believing)

Kentucky:

- “prompt reporting”

# Policy Criteria

## 5. Correction and Remediation

### Indiana:

1. Correct within 60 days from date of disclosure;
2. Certify; and
3. Remedy harm.
  - If more time needed, request within 50 days. (For small entities, these deadlines are 90 and 80 days.)

### EPA:

1. Correct within 60 days from date of discovery;
2. Certify; and
3. Remedy harm.
  - If more time needed, notify within the 60-day period.

### Kentucky:

1. Correct within 60 days from date of voluntary discovery.
2. Cabinet can approve a longer time period
3. No remediation component

# Remaining Policy Criteria

4. Independent Discovery and Disclosure

\* \* \*

6. Prevent Recurrence

7. No Repeat Violations

8. Other Violations Excluded

9. Cooperation

# EPA Policy Criteria for New Owners

1. EPA will waive “periodic” requirements for discoveries made through due diligence
2. Violations subject to legally mandated monitoring/sampling are eligible (CAA Title V)
3. Extended reporting period: 45 days after closing
7. Repeat violations prior to new ownership or at other facilities do not invalidate self-disclosure
8. Serious violations are eligible under the policy (except fatalities and community evacuations)

# EPA e-Disclosure

- Web-based reporting
- Not modifying the substantive conditions in EPA audit policy
- CDX system: Sign up logistics
- Category 1
  - ▣ Most EPCRA violations, but not reportable releases or large economic benefit cases
  - ▣ Spot checked
  - ▣ EPA issues automatic eNOD
  - ▣ No penalties (contingent on accuracy and completeness of the disclosure)
- Category 2
  - ▣ Everything else (EXCEPT FOR: new owner or potential criminal violations)
  - ▣ EPA issues Acknowledgement Letter
  - ▣ Audit policy applicability if/when EPA considers bringing enforcement



# EPA e-Disclosure

- DO NOT submit Confidential Business Information through eDisclosure
  - ▣ System not set up to tag or process it
  - ▣ Must be submitted manually through normal EPA CBI procedures
- Don't forget: must still certify compliance within 60 days of disclosure submittal

# Strategies

- Disclose to EPA, State, or both?
  - ▣ Who enforces the law violated?
  - ▣ Multi-state?
  - ▣ What kind of relief sought?
  - ▣ Policy differences (significant in some states; some states have none)
  - ▣ With whom do you want to negotiate?
  - ▣ Even when disclosing to State, meet EPA 21-day deadline

# Strategies

- After reporting
  - ▣ If need more input from agency...
  - ▣ Update periodically
  - ▣ Watch deadlines, especially 50 (80) day IDEM deadlines for time extension
  - ▣ Educate employees to prevent recurrence
  - ▣ Negotiate economic benefit penalty
    - Negligible economic benefit
    - New owner

# What to Expect

- Follow up from EPA or State
  - ▣ Determine whether there is significant environmental harm to be addressed
  - ▣ Ensure that policy criteria are met
  - ▣ Establish cost of compliance (used for economic benefit calculation)
  - ▣ Might result in enforcement/settlement
  - ▣ Separate channel for criminal self-disclosures

# What to Expect

- Provide enough information to satisfy agency
  - ▣ Often not much information in original disclosure (especially with deadline from discovery that violation “may” have occurred)
  - ▣ Have audit checklist ready
- Plan for extension requests ahead of time
- Resolution of enforcement matter consistent with client’s goals

# Resources

- Indiana: Self Disclosure & Environmental Audit MP-004-R2-NPD (February 5, 2010)
- Kentucky: KRS 224.01-040
- EPA policy: Incentives for Self Policing, 65 Fed. Reg. 19618 (April 11, 2000)
- EPA and State penalty policies

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