

EPA Audit Policy Options: What do you think?

Environmental practitioners and their clients have benefitted greatly from the EPA's historic implementation of the EPA Audit Policy. Thus, the level of concern that has been expressed by environmental practitioners in response to EPA's statements that the Audit Policy may not live through 2013 is not surprising. For background, see Linda Bochert's posting, "[Dear EPA: please don't abandon your Audit Policy!](#)", and [FY2013 OECA National Program Manager Guidance](#).

EPA has discussed the basis for its proposal to abandon the Audit Policy in terms of perceived decreasing utility, which creates difficulty in justifying the expense of implementation. The explanation goes something like this: with the maturity of the environmental programs, regulated industry knows that it needs to comply by now, thus the incentives provided by the Audit Policy are no longer necessary. Also, along with industry outgrowing the original purpose of the Policy, the cost of implementing the policy does not justify its continued implementation in this era of shrinking budgets, particularly given the relatively minor noncompliance events reported pursuant to the Audit Policy.

Has EPA really considered the entire calculus? And, assuming one buys into the external benefits provided by the continued implementation of the Audit Policy, given what's at stake, isn't it worth developing options for implementation that don't impose the same level of staff investment?

Many believe that the Audit Policy has served a purpose far greater than the mere forgiveness of the gravity component of the reported noncompliance events. For many years, the EPA Audit Policy has provided regulated entities with a mechanism to conduct compliance audits with confidence that noncompliance issues can be corrected without fear of punitive enforcement action. The Audit Policy continues to serve this purpose, despite the maturity of the environmental programs, because the nature of regulated entities and industry sectors is so dynamic. Regulated entities are in a constant state of change, as are many EPA programs at any one time. EPA's assertion that the EPA's Audit Policy is no longer needed contemplates regulated entities and applicable regulations as static and monolithic bodies and does not recognize the constant state of change across industry sectors and within individual entities, particularly in response to new and modified regulations. Industry sectors also vary in their inherent levels of sophistication and adaptability to changing regulatory requirements, depending in large part upon the degree to which the industry has been pervasively regulated in the past. New regulations across an industry sector upset the equilibrium and demand new management models and compliance approaches, requiring a period of education, acquisition of staff, operational and cultural adaptation to the new requirements. Adaptation within industry sectors can be slowed when immediate demands are placed on sector resources for all entities in that sector simultaneously such as occurs with new industry sector-wide regulation, prioritizing rapid reaction to new regulation over comprehensive proactive compliance. In this regulatory environment, the Audit Policy continues to serve the same purpose as it always has, to encourage a culture of compliance in the dynamic landscape in which regulated entities operate.

Second, in focusing merely on the type and severity of noncompliance actually disclosed pursuant to the Audit Policy, EPA fails to recognize the innumerable compliance benefits achieved that are not included in this calculus, such as the noncompliance events that are not reported but that are simply corrected in the compliance process initiated with the assurance of the Audit Policy. Also not included is the Audit Policy's critical role in encouraging a culture of proactive compliance, where compliance audits are freely available as a compliance tool. And, more, EPA fails to recognize the significance of the Audit Policy as guidance to states in implementing delegated programs. Many states have incorporated the thoughtful concepts supporting the use of the Audit Policy into [their own audit policies](#). Without EPA's Audit Policy, would states continue to implement theirs? And while EPA may believe an entity gains all the assurance it needs from disclosing to a delegated state pursuant to its state policy, EPA retains overfilling authority rendering this assurance less than complete.

Should EPA abandon its Audit Policy, the fundamental impact of the loss of the EPA Audit Policy may contribute to an overly punitive enforcement dynamic functioning as a disincentive for entities to freely adopt and consistently implement compliance audits. Fewer audits may result in lower overall compliance rates and consequently, higher penalties for noncompliance that may ultimately be discovered by EPA and state inspectors. This result is not consistent with [EPA's stated goals](#) in its [Next Generation Enforcement proposal](#).

Certainly, there are options that would require far less staff investment than required for the current method of implementation. Currently, EPA's Audit Policy involves review of an electronic or paper submittal of a self-disclosure within a 21 day period from the date of discovery. The submittal discloses the noncompliance and demonstrates the satisfaction of the nine elements required by the Audit Policy for penalty mitigation. EPA then tracks the compliance achieved, and in some instances, meets and negotiates with the disclosing entity the length of time for completing the audit and achieving compliance. The process culminates with EPA's determination of the disclosing entity's satisfaction of the elements of the Audit Policy and issuance of a Notice of Determination. EPA also calculates and tracks the penalties mitigated through implementation of the Audit Policy.

The staff time invested in implementing the Audit Policy could be reduced and participation, and thus compliance gains, achieved with modifications to the current implementation approach. Some ideas include the following:

- (1) Require electronic self-disclosures, as [currently available for EPCRA self-disclosures](#), contemplating several entries and entry periods as discussed below in the completion of the audit process;
- (2) Allow disclosing entity to select standard 60 day or alternative time period for correcting issue of noncompliance and achieving compliance, with justification, in electronic self-disclosure. EPA's staff time in approving alternative time periods could be minimized with the adoption of standard time periods for different types of corrective measures required for addressing noncompliance (i.e., standard period for permit modifications, etc.)
- (3) At culmination of 60 day or alternate time period compliance period, allow disclosing entity to self-certify correction of noncompliance with assurance of 100% penalty mitigation assuming EPA agrees with satisfaction of the remaining elements of the Audit Policy, i.e., correction and remediation, preventing recurrence, no repeat violations and confirmation of eligibility of violation.
- (4) Provide alternative pathway for third-party verification of Audit Policy elements of correction and remediation, preventing recurrence, no repeat violations and confirmation of eligibility of violation, resulting in automatic 100 % penalty mitigation for entities choosing this pathway.
- (5) Accept satisfaction of relevant state audit program and self-disclosure elements for disclosures regarding delegated programs as satisfaction of EPA's Audit Policy and count these as Audit Policy compliance gains. This approach is consistent with the recognition of EPA's role in state audit policy development and adoption.
- (6) At culmination of process, satisfaction of EPA Audit Policy can be demonstrated with electronic report of process completion.

What are your thoughts? Does "life after EPA's Audit Policy" create concern for you in your practice? Please provide your comments and suggestions for more efficient implementation of the Audit Policy. EPA may be read them!

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