



House Resolution 231 Regular Session of the Legislature 2019

Stakeholders Session
Wednesday August 7, 2019

LOUISIANA DEPARTMENT OF ENVIRONMENTAL QUALITY

LAW DIVISION



Directive

Therefore, be it resolved that the House of Representatives of the Legislature of Louisiana does hereby urge and request the Department of Environmental Quality to study the establishment of a voluntary compliance audit program for industries regulated by the department and, no later than February 1, 2020, to submit to the House Committee on Natural Resources and Environment a written report containing the elements of a proposed program, recommendations for necessary legislation, whether or not a program is needed, and other information developed through the study process that would provide insight into the program.”

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Voluntary Compliance Audit Program (EPA)

Originally published in the Federal Register on April 11, 2000.

- Established Incentives for Self Policing, Disclosure, Correction, and Prevention of Violations.
- Benefits available to entities that make disclosures under the terms of the policy include reductions in the amount of penalties and a determination not to recommend criminal prosecution of disclosing entities.

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Nine Conditions

Systemic discovery of violations through an environmental Audit or a Compliance management System;

- Voluntary Discovery;
- Prompt Disclosure;

Discovery and disclosure independent of government or third party plaintiff;



Nine Conditions (cont.)

- Correction and remediation;
- Prevention of recurrence;
- No repeat violations;
- Some violations are excluded; and,
- Cooperation with EPA.



Definitions

“Environmental Audit” is a systematic, documented, periodic, and objective review by regulated entities of facility operations and practices related to meeting environmental requirements”

- “Compliance Management System” is one that encompasses the regulated entity’s documented systematic efforts, appropriate to the size and nature of its business, to prevent, detect, and correct violations.”
- “Environmental Audit Report” is a report of the documented analysis, conclusions, and recommendations resulting from an environmental audit, but does not include data obtained in, or testimonial evidence concerning the environmental audit.



Benefits

No Gravity-Based penalties if all nine conditions are met;

- 75% reduction in Gravity-Based penalties if eight of the nine conditions are met; all other than the first, regular systemic discovery system;
- A “no recommendation” for criminal prosecution (though the decision is made by the Justice Department) if the audit meets conditions two through nine and the entity adopts systemic corrective measures); and
- No routine requests for the Environmental Audit Reports.



Considerations

“...designed to encourage greater compliance with the Federal laws and regulations that protect human health and the environment. It promotes a higher standard of self-policing by waiving gravity-based penalties for violations that are promptly disclosed and corrected, and which were discovered systemically—that is, through voluntary audits or compliance management systems. To provide an incentive for entities to disclose and correct violations regardless of how they were detected, the policy reduces gravity based penalties by 75% for violations that are voluntarily discovered and promptly disclosed and corrected, even if not discovered systemically.”

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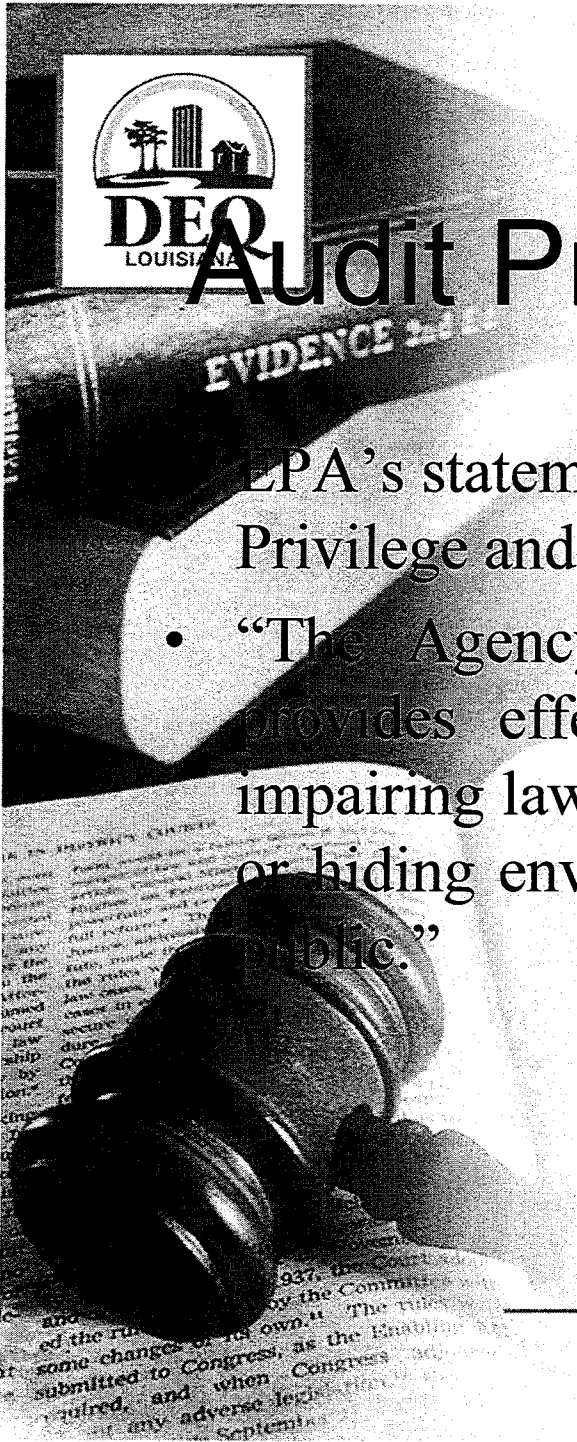


Benefits

Because government resources are limited, universal compliance cannot be achieved without active efforts by the regulated community to police themselves.

- In 1995, a survey by Price Waterhouse LLP found that 90% of corporate respondents who conducted audits identified that one of the reasons for doing so was the desire to find and correct violations before government inspectors found them.

More than half of the respondents to the survey said that they would expand environmental auditing in exchange for reduced penalties for violations discovered and corrected.



Audit Privilege and Immunity

EPA's statement in the Federal Register disapproves of Privilege and Immunity Statutes

- “The Agency believes that the Audit Policy (EPA’s) provides effective incentives for self policing without impairing law enforcement, putting the environment at risk or hiding environmental compliance information from the public.”

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Audit Privilege and Immunity (cont.)

The agency remains firmly opposed to statutory and regulatory audit privileges and immunity. Privilege laws shield evidence of wrongdoing and prevent States from investigating even the most serious environmental violations. Immunity laws prevent States from obtaining penalties that are appropriate to the seriousness of the violation, as they are required to do under Federal law. Audit privilege and immunity laws are unnecessary, undermine law enforcement, impair protection of human health and the environment, and interfere with the public's right to know of potential and existing environmental hazards.

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EPA's View of Privilege

in the Federal Register at Vol. 65 No. 70 at page 19623

“Privilege, but definition, invites secrecy, instead of openness needed to build public trust in industry’s ability to self-police. American law reflects the high value the public places on fair access to the facts. The Supreme Court, for example, has said of privileges that, “[w]hatever their origins, these exceptions to the demand for every man’s evidence are not lightly created nor expansively construed, for they are in derogation of the search for the truth.” *United States v. Nixon*, 418 U.S. 683, 710 (1974).

Federal courts have unanimously refused to recognize privilege for environmental audits in the context of government investigations. See *United States v. Dexter Corp.*, 132 F.R.D. 8, 10 (D.Conn.1990).”

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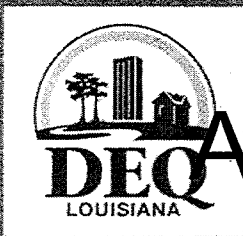
EPA's View of Immunities

in the Federal Register at Vol. 65 No. 70 at page 19623

“Immunity laws prevent States from obtaining penalties that are appropriate to the seriousness of the violation, as they are required to do under Federal law.”

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New Developments in EPA's Application of Audit Policy to New Owners

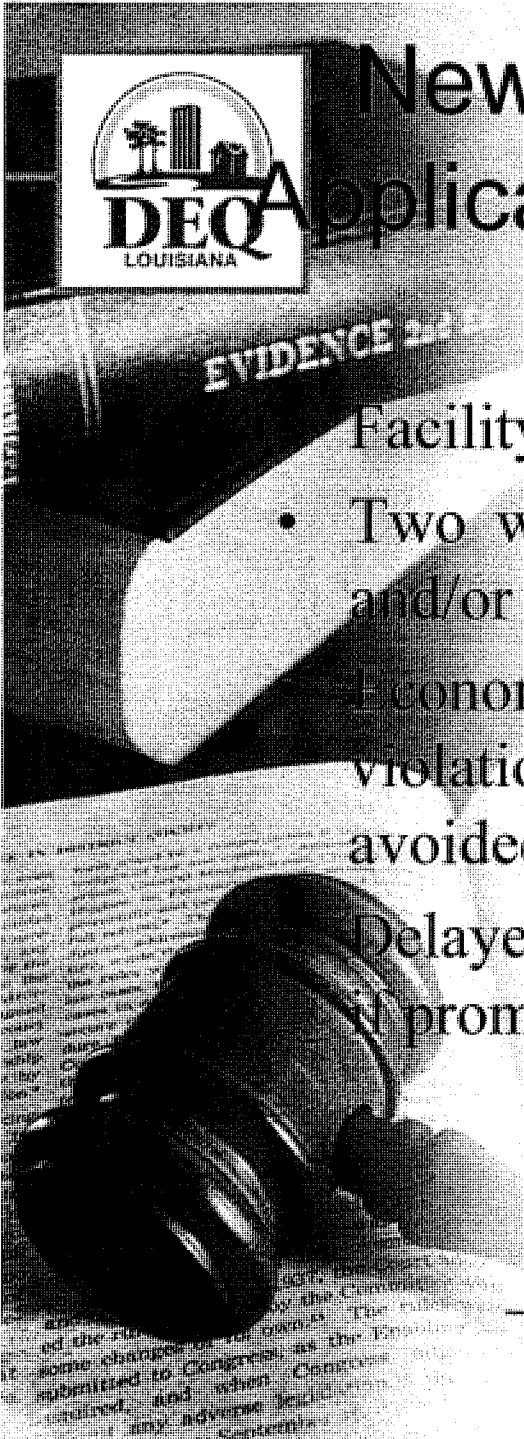
New Interim Approach to Applying the Audit Policy to New Owners Announcement in the Federal Register

- Contained in FR Vol. 73, No. 149/Friday August 1, 2008
- Announces how the policy will be applied to new owners of regulated facilities wanting to make a “clean start” after purchasing a regulated facility.
- Requires addressing environmental non-compliance that began prior to purchase of the facility.
- Employs greater incentives than found in the existing audit policy to encourage significant pollutant reductions and benefits to the environment.



New Developments in EPA's Application of Audit Policy to New Owners (cont.)

New owners are defined. A new owner could not have been responsible for compliance at the facility, did not cause the non-compliance, and could not have prevented it. In addition, the violations discovered originated with the prior owner, prior to the sale transferring the facility, neither the buyer or the seller had the largest ownership interest in the other company, and did not have a common corporate parent.



New Developments in EPA's Application of Audit Policy to New Owners (cont.)

Facility is eligible for nine months after purchase.

- Two ways of reporting are allowed; an audit agreement and/or a individual reporting as violations are discovered.

Economic benefit penalty amount will not apply to violations before the acquisition, but will be applied on avoided maintenance costs after acquisition.

Delayed Capital Expenditures penalties will not be applied if promptly corrected after acquisition.



New Developments in EPA's Application of Audit Policy to New Owners (cont.)

- Changes five conditions in the original Audit Policy
 - Systemic Discovery;
 - Voluntary Discovery;
 - Prompt Disclosure;
 - Other violations excluded; and
 - Cooperation.



Five Condition Changes

- Allows for the use of “due diligence” as a replacement for “periodic” in the original Audit policy.
- Expands the provision of voluntary discovery to violations which were required to be reported (example, Title V reports) for new owners.
- Expands the time frame for “prompt disclosure” as 45 days from acquisition for violations discovered pre acquisition and 21 days for violations discovered after acquisition (unless an audit agreement is in place).
- Protects the new owner in cases that would be excluded for the prior owner (such as violations that cause serious harm).
- Expands cooperation to the new owner providing information necessary to show it is a “new owner.”



New Oil and Gas Facilities

Applies only to newly acquired downstream oil and gas production facilities (wells, tanks, pipelines, etc.)

- Expands the reduction in penalties provided in the existing programs.
- Implemented through the use of a Final Agreement Template.
- No civil penalties if all obligations in the agreement are fulfilled.
- Flexible deadlines based upon number of facilities.
- Nine months after acquisition is the deadline.
- Provides for State Audit programs dual authority.
- Requires engineering data on Appendix D (emissions from vapor control systems).
- Allows flexibility in proposals to control emissions.

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Useful Weblinks

EPA Audit Policy: <https://www.epa.gov/compliance/epas-audit-policy>

EPA Interim Approach to Applying the Audit Policy to New Owners:
<https://www.epa.gov/compliance/epas-interim-approach-applying-audit-policy-new-owners>

- Federal Register, Incentives for Self-Policing: Discovery, Disclosure, Correction, and Prevention of Violations:
<https://www.govinfo.gov/content/pkg/FR-2000-04-11/pdf/FR-2000-04-11.pdf>
- Federal Register, Interim Approach to Applying the Audit Policy to New Owners: <https://www.govinfo.gov/content/pkg/FR-2008-08-01/pdf/E8-17715.pdf>
- Oil and Gas Facilities Self Audit Provisions:
<https://www.epa.gov/sites/production/files/2019-03/documents/oilandgasnewownerauditprogrampolicydevelopmentdocuments032919.pdf>

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LOUISIANA DEPARTMENT OF ENVIRONMENTAL QUALITY

LDEQ Current/Existing Mechanism

- LDEQ does not have an official Self-Audit Policy as EPA and some other states.
- However, the Louisiana Environmental Quality Act (La. R.S. 30:2001, et. seq.), particularly:
 - La. R.S. 30:2011(D)(6) empowers the Secretary (or his designee) “To issue orders or determinations as may be necessary to effectuate the purpose of this Subtitle..”
 - La. R.S. 30:2011(D)(14) empowers the Secretary “To exercise all incidental powers necessary or proper to carry out the purposes of this Subtitle.”

Current Mechanism

Administrative Order on Consent (AOC)

- ▶ Utilizing powers under the Environmental Quality Act, the Department issues various types of orders.
- ▶ As it relates to House Resolution 231, the Department entered into Administrative Orders on Consent (AOCs) with companies to conduct Environmental Audits (Self-Audits).
- ▶ The next three (3) slides are applicable to New Owners.

Process-New Owners

- Company/Respondent requests a meeting with the Department.
- During the meeting, the potential or proposed new owner verbally informs the Department of an intent to purchase a facility and/or facilities and discuss circumstances which warrant authority/approval from the Department to conduct an Audit (can be self or third-party):
 - Based on preliminary information, facility/facilities might not be in compliance with applicable rules, regulations and/or requirements.
- The parties discuss a mechanism which allows the Company/Respondent to conduct a Self-Audit, identify deficiencies, identify corrective measures, develop and submit a compliance schedule, report the findings to the Department and a reasonable timeframe to correct the findings (Compliance Schedule/Schedule of Compliance).

Process-New Owners

- After the meeting, Company/Respondent submits a written request for an Administrative Order on Consent (AOC) to the Department.
- Written Request contains:
 - Media/program to be audited (can be single media/program or multi-media/program)
 - Timeframe to conduct Audit (initiation and completion dates)
 - The timeframe to conduct audit varies, depending on the number of facilities and scope of the audit.
 - Requirement to submit Findings to the Department with a Schedule of Compliance (if necessary);
 - Usually findings and schedule will be submitted to the Department 60 days of completion of the audit.
- Written request is reviewed and if acceptable, the Department prepares a Draft AOC.
 - If not acceptable, the Department will meet or communicate with the Company to develop an acceptable schedule.
- When Compliance Schedule is acceptable, the Department drafts an AOC, which is shared with the Company/Respondent for review and concurrence (since it's an enforceable consent document/agreement).

Process-New Owners

- Once agreed to, both parties sign the document, which becomes effective upon signature of both entities.
- AOC is the document approving the terms and conditions of the audit.
- After the audit is complete, the audit findings, corrective measures and a Schedule of Compliance/Compliance Schedule is submitted to the Department.
- The submittal is reviewed and if measures and timeframe are acceptable to correct the findings, the measures and timeframe (i.e., Compliance Schedule) is incorporated into an Amended AOC or into a new order.
 - Corrective measures can include submitting permit applications, installing equipment, etc.
- The amended or new action will contain a requirement to submit periodic reports to the Department and a final report (with a certification of completion).
- Periodic reports are reviewed to determine if the Respondent is on schedule to achieve compliance.
 - Throughout process, the AOC can/may be amended to extend deadlines/completion dates due to delays encountered beyond the Respondent's control.
 - Request for extension has to be submitted to the Department and the Department has to approve the request.

Process-New Owners

- Upon reviewing the Final Report, inspections are requested (if necessary) and file reviews are performed.
- If goals/commitments are met, a Memo-to-File is prepared administratively closing the AOC.
- Civil penalties/fines are not assessed if schedule is fully implemented and further enforcement action isn't pursued for violations discovered during the Audit.
- The Department does not have authority to allow audits of programs that are not within its jurisdiction (i.e., drinking water).
- The AOC/Audit does not protect the Company/Respondent from any Notice of Intent to Sue (NOI) or other third-party litigation.
- All correspondence/documents submitted to the Department are filed in the Department's Electronic Management Data System (EDMS).
- The Department utilize(s) current/existing staff to process requests and prepare AOCs.

Process-Existing Owners

- As a Settlement Agreement component, third-party environmental audits are allowed/approved as a Beneficial Environmental Project (BEP).
 - Can be single media/program or multi-media/program.
- The Department has to approve the Scope of the Audit and the Auditor.
- After the audit is complete, the audit findings, corrective measures and a Schedule of Compliance/Compliance Schedule is submitted to the Department.
 - Corrective measures can include submitting permit applications, installing equipment, etc.
- Periodic reports are reviewed to determine if the Respondent is on schedule to achieve compliance.
 - If additional time is warranted, an extension can/may be granted.

Process-Existing Owners

- Upon reviewing the Final Report, inspections are requested (if necessary) and file reviews are performed.
- If goals/commitments are met, a Memo-to-File is prepared administratively closing the Settlement Agreement.
- Civil penalties/fines are not assessed if schedule is fully implemented and further enforcement action isn't pursued for violations discovered during the Audit.
- The Department does not have authority to allow audits of programs that are not within its jurisdiction (i.e., drinking water).
- The Audit does not protect the Company/Respondent from any Notice of Intent to Sue (NOI) or other third-party litigation.
- All correspondence/documents are submitted to the Department's Electronic Management Data System (EDMS).
- The Department utilize(s) current/existing staff to review reports, process documents, etc.

Partnership with EPA

- The Department also communicates and/or partners with EPA on Disclosures submitted to EPA in accordance with EPA's Audit Policy, "Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations".
- The Department exercises enforcement discretion not to pursue violations/findings of the Self-Audit.
 - Exception will be for violations above and beyond those already reported to, identified and/or addressed by the Department.
 - The Department will delay resolution of the state's enforcement actions until the Self-Audit (under EPA's policy) is completed.
- The Department works with EPA and the Company on submittals:
 - If documents submitted to the Department contain information that does not comply with the Department's Confidentiality regulations, the documents will be submitted to the Department's Electronic Management Data System (EDMS).
 - EPA's Policy allows documents to remain confidential until findings have been corrected/schedule implemented.
 - LDEQ regulations do not allow this.