

Assessment of Public Comments on the
Draft Commissioner Policy, Environmental Audit Incentive Policy
Received from February 20, 2013 through 5:00 P.M., April 22, 2013

COMMENT 1: Please state clearly that this policy may be used by both private and public entities. For example, perhaps: “This Policy applies to any entity, private or public, including a Federal, State or municipal agency, regulated...”

RESPONSE 1. The policy has been amended to address this comment and now reads, “This Policy applies to any entity, private or public, including a Federal, State or municipal agency, regulated under New York State environmental laws and regulations.

COMMENT 2: Please consider amending this sentence to indicate that internal reviews may benefit from assistance (e.g. from entities in Appendix A and professional support services including consultants); so this sentence might read as follows: “Environmental audit activities include formal, third-party audits and informal, internal reviews conducted with or without external assistance of a regulated entity’s operations and processes...”. Making this clarification would also confirm understanding of bullet 2 of the “Return to Compliance Form.”

RESPONSE 2. Examples of various environmental audit activities were added to the policy to illustrate the broad scope of audit activities under the policy. The Policy now reads, “An environmental audit is intended to assess a regulated entity’s operations and processes to determine compliance with environmental regulations. Environmental audit activities include, but are not limited to a formal audit by a third-party, an informal compliance review by a facility employee and a compliance assessment conducted pursuant to a facility’s environmental management system.”

COMMENT 3: Section V.I. Incentives for Comprehensive Environmental Audit Agreements and Pollution Prevention. No path is given for the review of agreements suggested in Sections V.I.1 or V.I.2. We suggest the following simple clarifications: for V.I.1 “Entities that with advance notice to NYSDEC enter into an environmental audit agreement to implement a compliance audit with an agreed scope covering all aspects of the entity’s operation will...”; for V.I.2 “Entities that with advance notice to NYSDEC enter into an environmental audit agreement to assess compliance...” Instructions on who to contact for agreements may also be warranted here.

RESPONSE 3. The policy was amended to indicate that environmental audit agreements implementing a compliance audit with an agreed scope covering all significant aspects of the entity’s operation will be eligible for incentives. The Policy now reads, “Entities that enter into an environmental audit agreement to implement a compliance audit with an agreed scope that covers all significant aspects of the entity’s operation will:”

Section V.G. of the policy indicates that “Regulated entities must contact the Department’s Regional Office for the region in which the alleged violation(s) occurred or the regulated

entity is located. The Department will then assign staff to work with the regulated entity to identify eligibility under this Policy, negotiate an environmental audit agreement, as necessary, and execute a return to compliance form.

COMMENT 4: Section II: "This Policy does not create any rights enforceable by any party and does not restrict the authority or enforcement discretion of the Commissioner." Potential reporting entity would be put off by this provision as it indicates that an agreement regarding a penalty waiver will not be enforceable and can be reversed at any time by the Commissioner. Suggestion: Add "except to the extent agreed upon in an environmental audit agreement executed by the parties."

RESPONSE 4. The Policy has been amended to indicate that the policy does not create any rights enforceable by any party, unless otherwise agreed to in writing. The Policy now reads, "Unless otherwise agreed to by the Department in writing, this Policy does not create any rights enforceable by any party and does not restrict the authority or enforcement discretion of the Commissioner."

COMMENT 5: The exclusion for alleged criminal conduct is badly worded. Many common violations may be enforced criminally, so this automatically excludes a large category of violations. Also, the Department may "allege" criminal conduct, but, unless it is proven, it is only an accusation and should not, in itself, disqualify an entity from trying to correct it in good faith under this program. Suggestion: Substitute with "a violation that involves actual criminal conduct, which the Department has decided to refer for criminal prosecution."

RESPONSE 5. No change was made to the Policy concerning criminal activity. While entities are always encouraged and obligated to correct a violation in good faith, violations which could be criminal in nature will not be eligible for a penalty waiver under this Policy.

COMMENT 6: The policy applies not only to self-reported violations, but also to those discovered during Department inspections (see Section V.B.1.e). This provision contradicts this purpose, or, at most, states the Department is not bound by this policy and may choose the traditional enforcement route. Suggestion: Delete this section or add "except to the extent that the violation would have been considered eligible under this policy had it been self reported."

RESPONSE 6. The Policy was amended to clarify that violations discovered during Department inspections are not eligible under the policy. The phrase "and deemed appropriate for enforcement" in Section V.B. of the Policy was eliminated.

COMMENT 7: Many violations give rise to a potential natural resources damage claim and, if all such violations are ineligible, this severely narrows the self-reporting incentive. The policy already makes clear that environmental damage would be considered as a separate penalty component, which is not waived (see Section V. F.). Also, the last part of the sentence appears to talk about past endangerment rather than an ongoing hazard. If there is no immediate threat, the entity should be allowed to benefit from the audit program. Suggestion: Replace the entire sentence with "a violation that currently presents an imminent and substantial threat to human health or the environment."

RESPONSE 7. No change was made to the policy concerning the ineligibility of violations that give rise to a natural resource damage (NRD) claim. The Department's NRD staff seeks to recover damages from responsible parties when natural resources are injured and use such damages to restore or replace those resources. NRD staff review data and quantify the extent of the injury to determine whether a claim is warranted. Not every violation that gives rise to a potential natural resource damage claim will result in an actual claim.

COMMENT 8: "Violations must be disclosed prior to: 1. announcement or commencement of a Federal State or local agency inspection or investigation, including issuance of an information request to the regulated entity;" Again, this contradicts the stated policy which allows an entity to participate in the incentive program even if the violation is initially discovered by the Department (see Section V. B.) Suggestion: Delete this provision.

RESPONSE 8. The Policy was amended to clarify that violations discovered during Department inspections are not eligible under the policy. The phrase "and deemed appropriate for enforcement" was eliminated. While a violation discovered by Department staff during pollution prevention or compliance assistance may be eligible under the policy, the policy does not apply to violations discovered by Department staff during inspections.

COMMENT 9: Section V. F. " ... Any regulatory program fees, natural resource damages and remedial costs owed to the Department must be paid." The Department should offer flexibility regarding the payment of natural resource damages, so as to be consistent with the goal of encouraging coming into compliance. The concern over large damage claims for the actions of a prior owner will be a disincentive for new owners. Also, all regulated entities may see the potential natural resource damage claim as a back door for assessing other penalties supposedly waived under this policy. Suggestion: Add, "but will be subject to negotiation and additional waivers, depending on the severity of the violation and the comprehensive nature of the corrective action."

RESPONSE 9. Section II. of the Policy now reads, "This Policy does not ... limit the Department's ability to collect natural resource damages, regulatory fees or remedial costs owed to the Department." The sentence that reads, "Any regulatory program fees, natural resource damages and remedial costs owed to the Department must be paid," was deleted. The revised language reserves the Department's authority to collect payment on NRD claims, but also preserves the Department's flexibility where an NRD claim is not appropriate.

COMMENT 10: Section V. J. New Owners. " ... or within 30 calendar days after the entity discovered the violation, whichever is later" This period is too short. Also, the paragraph does not offer a penalty waiver in this situation. Suggestion: Change period to 60 days to be consistent with the other periods. Also, clarify that, in any the self-disclosure situations, the new owner will be eligible for a penalty waiver.

RESPONSE 10. No change was made to the Policy as a result of this comment. This paragraph on New Owners is part of the larger policy and affords a penalty waiver to an entity that satisfies the specified criteria.

The time frame is intended to encourage disclosure of violations in a timely fashion. It affords new owners extra time to disclose from the date of acquisition (60 days). However, beyond that initial 60 day window, disclosure of a violation must be within 30 days, similar to other eligible entities. The disclosure and remedy provisions do allow for alternate time frames established as part of an environmental audit agreement or as necessary pursuant to the discretion of the Department.

COMMENT 11: "A new owner must verify that prior to acquisition:2) the new owner had no connection to the facility or significant relationship to the prior owner" This requirement is vague (what is a "connection" or "significant" relationship), onerous (one may have some connection that has no relation to environmental compliance issues), and unfair (penalizes child taking over parent's business, a parent or daughter corporation, a supplier, client, contractor, or bank). Suggestion: Delete this section.

RESPONSE 11. No change was made to the policy as a result of this comment. This section is intended to prevent changes in ownership for the purpose of avoiding penalties.

COMMENT 12: The section on outreach is unenforceable and rightly so. If required to do public outreach, many regulated entities will be put off by the cost, the open-ended nature of the obligation, and premises liability concerns, to name a few. Suggestion: Delete this section.

RESPONSE 12. No change was made to the policy as a result of this comment. Outreach is recommended as a tool to foster positive community relations, it is not required.

COMMENT 13: DEC should provide specificity regarding what special considerations the Office of Environmental Justice will recommend relating to the eligibility of violations reported in Environmental Justice Areas. Insofar as the City operates a significant number of regulated facilities in environmental justice areas, any distinction in the eligibility of self-disclosed violations would affect the City's incentives to participate in the program at these facilities. If such violations are to be evaluated differently than violations at properties located outside Environmental Justice Areas, the Policy should specify how.

RESPONSE 13. Eligibility under the policy for all entities will be determined based on the criteria specified in the "Eligibility Criteria and Procedure" section. No other special considerations will be used.

COMMENT 14: Is there a role for the OEJ in a request by a regulated entity to enter into a comprehensive environmental audit agreement?

RESPONSE 14. Pursuant to section IV. of the Policy, the Office of Environmental Justice will review requests for penalty waivers in Potential Environmental Justice Areas, including requests for penalty waivers that are part of an environmental audit agreement.

COMMENT 15: The Policy requires that eligible violations be identified during the course of "an environmental audit . . . [or] pollution prevention or compliance assistance." The Policy continues to define environmental audit as including both "formal, third party audits and informal, internal reviews of a regulated entity's operations and processes to determine compliance with environmental regulations." Consistent with DEC's stated purposes, we would think that violations identified by an agency employee during routine inspections, informal compliance checks, maintenance activities, or mere employee observations would be eligible. If so, the Policy should make this clear and should be explicit that the definition of "environmental audit" found in Commissioner's Policy 34 is not relevant to determining whether a violation is eligible.

RESPONSE 15. Examples of various environmental audit activities were added to the policy to illustrate the broad scope of audit activities under the policy.

COMMENT 16: The Policy should provide further guidance regarding the qualifications and authority required of a third-party or an employee responsible for completing auditing activities, environmental management system ("EMS") obligations, or pollution prevention measures.

RESPONSE 16. Environmental audits, management systems and pollution prevention should be conducted by a skilled environmental professional, an employee of the regulated entity knowledgeable about pertinent environmental laws, regulations and environmental management at the regulated facility; or similarly skilled individual. Where a specific skill set is required for audits, management systems or pollution prevention at a facility, an environmental audit agreement can be used to specify the minimum qualifications and authority of those individuals leading the work contemplated under the agreement, if deemed necessary by the Department.

COMMENT 17: The Policy should clarify (1) whether a violation identified at a facility that has implemented pollution prevention initiatives for certain processes and activities would be an eligible violation if the reported violation relates to a process or activity not subject to pollution prevention initiatives and (2) whether there are metrics or standards to govern the level of effectiveness of pollution prevention measures, and if so, whether effectiveness is evaluated or rewarded pursuant to the Policy.

RESPONSE 17. In regards to item 1, the policy does not link eligibility of a disclosed violation to pollution prevention initiatives being undertaken at the facility. In regards to item 2, section V.I.3 of the policy encourages those entities that have positive outcomes associated with the EMSs and P2 measures implemented under an Environmental Audit Agreement to apply to the Department's NY Environmental Leaders (NYEL) program. The NYEL program does have established metrics and standards that are used to determine whether an entity's environmental programs are effective. Thus, the NYEL program will be utilized to evaluate and recognize those entities that implement successful compliance, EMS and P2 programs under this policy.

COMMENT 18: The Policy is not sufficiently clear whether a violation incurred at one facility within the past five years renders violations only of the same statute, regulation, or permit at that facility ineligible or renders the whole facility ineligible from participating in the

program. Given that many City agencies operate facilities subject to myriad DEC-enforced statutes, regulations, and permits, precluding eligibility of a whole facility because of a single violation would be unduly severe and would inhibit the goals DEC is seeking to advance.

RESPONSE 18. The policy identifies eligibility criteria for regulated entities and violations separately. Failure to satisfy criteria of eligibility under section B. of the policy “Eligible Violations,” would render that violation ineligible under the policy. It would not by extension render the entire facility ineligible for penalty waivers or incentives relating to other disclosed violations at that same facility or another facility owned by the same regulated entity.

COMMENT 19: It is similarly unclear whether a City agency's violation of a DEC consent order at one facility renders that agency ineligible for Policy benefits at other facilities that are not subject to the consent order. The City believes that even if an agency is in violation of a consent order at one of its facilities, it should remain eligible to participate in the program at its other facilities. The Policy should also clarify whether the City would be able to seek penalty waivers or reductions pursuant to the Policy for an identified and self-reported violation that is also a violation of a consent order entered into with another enforcement agency, such as EPA.

RESPONSE 19. See answer to prior comment. Violations at one facility do not automatically render violations at another facility ineligible for policy benefits as long as both the regulated entity and the violation in question satisfy the policy’s eligibility criteria. Violations of a consent order, including consent orders with another enforcement agency, are not eligible for penalty waivers.

COMMENT 20: The Policy should provide guidance regarding its application to the ongoing three-year cycle of DEC inspections of federally regulated underground storage tanks conducted pursuant to the Energy Policy Act. It is unclear whether such tanks at facilities participating in the audit program would be inspected by DEC, and whether the facilities would be eligible for Policy benefits. The City believes that facilities participating in the audit program should be exempt from the DEC inspections. Alternatively, any violations self-disclosed prior to a DEC inspection should be eligible for Policy benefits.

RESPONSE 20. The policy does not exempt any facilities from inspection by DEC. Facilities that meet the eligibility criteria outlined in the policy will be eligible for a penalty waiver and incentives as specified.

COMMENT 21: To assist regulated entities in better understanding what violations or categories of violations are eligible, the Policy should identify any categories of violations or particular violations that are ineligible for the benefits of the Policy, including violations that, if discovered by DEC during the course of pollution prevention activities or compliance assistance, would be ineligible for the benefits of the Policy and subject to full enforcement.

RESPONSE 21. Eligibility for penalty waivers and incentives under the policy will be evaluated based on the eligibility criteria specified in the policy. Specific exceptions to violation eligibility under the policy are listed in section V.B of the policy.

COMMENT 22: If a City agency were to self-report non-compliance subsequently deemed by DEC ineligible under the Policy, how would DEC determine what penalties are appropriate if the agency demonstrated that it was diligently working to resolve the violation and to prevent recurrence of such a condition?

RESPONSE 22. Violations ineligible for penalty waiver under this policy may be subject to a penalty consistent with DEE-1: Civil Penalty Policy (DEE-1), which guides the penalty calculations for violations of the Environmental Conservation Law (ECL) and the Department's regulations. Under DEE-1, violator cooperation is a consideration for downward adjustments of a penalty calculation. According to DEE-1, "Adjustment may be considered when there has been prompt reporting of non-compliance and the cooperation of the violator is manifested by the violator's self-reporting, if such self reporting was not otherwise required by law. Such behavior may result in mitigation of the penalty, particularly if the violator has promptly corrected the environmental problems caused by the violation, and the violator is willing to enter into a binding and enforceable agreement to carry out appropriate remediation."

COMMENT 23: The Policy should make clear that participation does not impose a duty on regulated entities to report a potential violation identified during a routine inspection or internal audit, if the entity does not intend to seek relief under the Policy.

RESPONSE 23. While the policy does not create an affirmative duty to report all violations identified by the facility, the Department does encourage broad disclosure of violations. Any violation that is not disclosed remains subject to potential enforcement as appropriate.

COMMENT 24: The Policy should make clear that regulated entities are not obligated to disclose to DEC violations of federal programs (for example, spill prevention, control and countermeasure) or local programs (for example, NYCDEP boiler registration).

RESPONSE 24. The Policy pertains to violations of state environmental laws and regulations.

COMMENT 25: DEC should consider the eligibility of violations that have resulted in de minimis and readily reversible damage to natural resources on a case by case basis, distinguishing such damage from "natural resources damage" that may render a violation ineligible.

RESPONSE 25. No change was made to the policy concerning the ineligibility of violations that give rise to a natural resource damage (NRD) claim. The Department's NRD staff seeks to recover damages from responsible parties when natural resources are injured and use such damages to restore or replace those resources. NRD staff review data and quantify the extent of the injury to determine whether a claim is warranted. Not every violation that gives rise to a potential natural resource damage claim will result in an actual claim.

COMMENT 26: Government entities, including City agencies, frequently face constraints related to procurement or capital contracts with variable construction schedules in their efforts to resolve violations. DEC should consider setting forth timetables for resolving specific types of violations in Self-Audit Agreements and allow for greater time if a public agency must: Procure or allocate funds for services; the violation does not result in serious actual harm or present an imminent and substantial endangerment to natural resources, human health, or the environment; and the agency can show that it is diligently pursuing corrective action, as demonstrated by development of a timeline in a corrective action plan.

RESPONSE 26. Time frames for remedial activities may be extended, as necessary, and should be documented in an environmental audit agreement or otherwise in writing.

COMMENT 27: The Policy's penalty mitigation provisions should provide targeted mitigation of penalties for public sector entities, as several of the existing mitigation proposals benefit only the private sector. For example, the waiver of penalties based on the "economic benefit of delayed compliance" is relevant only to the profit-based private sector. Penalty mitigation provisions that would be specifically applicable to municipal agencies would promote greater implementation of the Policy statewide.

RESPONSE 27. The Department appreciates the value of providing additional incentives for public sector entities, and is considering a variety of means to assist municipal agencies in addition to the Environmental Audit Policy. Specific recommendations for incentives are welcome.

COMMENT 28: DEC should coordinate with other regulating agencies that have similar incentive policies, such as EPA, to allow regulated entities to enter into a multi-party comprehensive Self Audit agreement. A joint agreement would resolve any ambiguities or variations between state and federal programs and result in more efficient self reporting procedures and enforcement.

RESPONSE 28. The Policy addresses violations of New York State law and regulation. However, multi-party agreements have been used by the Department to address compliance issues and could be explored under existing legal theories as warranted.

COMMENT 29: Other voluntary audit programs, such as the Voluntary Protection Program of the Occupational Health and Safety Administration, do not monetarily penalize entities for reporting violations pursuant to audit agreements, provided that any violations are timely corrected. DEC should waive penalties entirely for an eligible violation or, at a minimum, should clarify in advance what percentage of an applicable penalty would be waived for a self-reported violation.

RESPONSE 29. Pursuant to the Policy, the Department will waive 100% of the penalty's gravity component for eligible violations. The Department will also waive 100% of the penalty's economic benefit component if it is de minimis, equal to or less than \$5,000.

Economic benefit that is greater than \$5,000 may be reduced if the entity commits to invest in pollution prevention not otherwise required by law.

COMMENT 30: The Policy refers to a specific definition of environmental management system ("EMS"), found in Section II.C.2 of Commissioner's Policy 34. However, the City agencies have developed internal review procedures specific to the needs of the agency and, at times, the facility in question, DEC should consider City agency internal review procedures, on a case-by case basis and subject to DEC approval, as sufficient EMSs for its purposes.

RESPONSE 30. The EMS definition found in Commissioner's Policy 34 (see <http://www.dec.ny.gov/regulations/64558.html>) effectively lays out the items that the Department should look for in considering whether an entity has implemented an EMS. With that said, the EMS definition in Commissioner's Policy 34 is sufficiently broad to allow the Department to consider existing facility procedures and operational practices as components of an acceptable EMS.

COMMENT 31: DEC should allow an agency to enter into separate Self-Audit Agreements for distinct facilities, or sets of facilities, operated by the agency, where appropriate. If different facilities operated by a single agency perform different functions, some but not all facilities operated by that agency may be eligible to participate. Similarly, if one agency has facilities in multiple DEC regions, it could be advantageous for DEC to enter into Self Audit Agreements covering some but not all of that agency's facilities.

RESPONSE 31. Environmental audit agreements negotiated pursuant to the Policy may be tailored to a single facility or multiple facilities.

COMMENT 32: Like the penalty mitigation provisions, the other incentives proposed in the Policy benefit only private-sector entities. The Policy should include incentives and priority assistance targeted at public sector entities, which would promote greater implementation of the Policy state-wide.

RESPONSE 32. Additional incentives, including those for public sector entities, are being considered. Specific recommendations for incentives are welcome.

COMMENT 33: DEC should waive a participating entity's obligation to pay an electric or gas System Benefits Charge (SBC) as a component of the cost sharing of energy reduction measures available through NYSERDA's Flextech program.

RESPONSE 33. The System Benefits Charge is a non-by passable charge imposed on ratepayers by the Public Service Commission to fund certain public benefits programs. DEC does not have authority to waive the charge.

COMMENT 34: The EPA Audit Policy covers violations that are discovered through an environmental audit or a compliance management system (CMS). I suggest that the DEC's policy do the same.

RESPONSE 34. Examples of various environmental audit activities, including a compliance assessment conducted pursuant to a facility’s environmental management system, were added to the Policy to illustrate the broad scope of audit activities covered under the Policy. The Policy now reads, “Environmental audit activities include, but are not limited to a formal audit by a third-party, an informal compliance review by a facility employee and a compliance assessment conducted pursuant to a facility’s environmental management system.”

COMMENT 35: Clarify that an environmental audit can be focused on a single set of environmental requirements.

RESPONSE 35. An environmental audit may focus on a single set of environmental requirements or address numerous requirements in a variety of environmental programs. However, to qualify for incentives under section I. of the Policy, the environmental audit must cover environmental requirements relating to all significant aspects of the entity’s operation.

COMMENT 36: The policy states that a violation categorized as Significant Non-Compliance (SNC) by the Federal Clean Water Act National Pollutant Discharge Elimination System (NPDES) program or the Resource Conservation and Recovery Act (RCRA) hazardous waste compliance monitoring and enforcement program; or a violation categorized as a High Priority Violation (HPV) under the Clean Air Act may be eligible under the Policy. The qualification "may" noted here will result in at least a soft stop due to uncertainty. I understand that this caveat is a product of existing arrangements with the EPA, which has oversight of these delegated federal programs. However, in the spirit of that delegation, the Department should encourage the EPA to let it make the call without pulling in the Agency.

RESPONSE 36. The Department will continue to work with EPA to address these categories of violations in a manner that is protective of the environment.

COMMENT 37: An audit checklist and form agreement that would be used would be a helpful component to this policy.

RESPONSE 37. The Department anticipates development of a model environmental audit agreement and will consider creating an audit checklist to identify programs that may be included in the agreement.

COMMENT 38: Section V.I.1 of the draft policy provides that entities that enter into an environmental audit agreement to implement a compliance audit that covers all aspects of the entity's operation will receive a range of benefits. However, what is considered to be "all aspects?"

RESPONSE 38. Section V.I.1 of the Policy was amended to indicate that entities that enter into an environmental audit agreement with an agreed scope covering all significant aspects of the entity’s operation will be eligible for certain listed benefits. Significance will be determined by the operations of the facility and the environmental requirements

imposed on the facility which the Department has authority to enforce. The Policy also provides for audit agreements that are less comprehensive in scope; however entities that enter into such agreements will not be eligible for the incentives listed in Section V.I. of the Policy.

COMMENT 39: Is my understanding correct that it is the Department's view that there would be a penalty waiver for any violations detected in the course of a compliance audit? What would be the terms of such an agreement and would more than one audit be required?

RESPONSE 39. Penalty waivers would apply to violations that are detected in the course of a compliance audit and meet the eligibility criteria. The penalty waiver is based on a single audit. However, multiple audits may be negotiated as part of an audit agreement, if warranted.

COMMENT 40: Will there be an assigned Department representative available to answer questions on the policy in Central Office and/or the various Regions?

RESPONSE 40. General questions concerning the Policy may be addressed by Monica Kreshik in the Office of General Counsel in Central Office at 518-402-8556. To initiate a disclosure, please contact the Regional Office for the region in which the alleged violation(s) occurred or the regulated entity is located.

COMMENT 41: EPA and other states limit the availability of their audit policies to entities that engage in defined systematic “environmental audits” or “compliance management systems.” By contrast, DEC’s proposed policy would apply not only to “formal, third-party audits” but also to “informal, internal reviews of a regulated entity’s operations and processes.”

RESPONSE 41. The Department’s policy promotes systematic environmental audits and compliance management systems by providing added incentives to entities that use those tools to ensure environmental compliance. Additionally, the Department’s policy encourages compliance and disclosure of violations by entities that may not have the resources to implement systematic environmental audits and compliance management systems, by allowing disclosure of violations discovered through informal internal reviews, such as an internal compliance review by a facility employee.

COMMENT 42: In addition, DEC’s provisions on reporting are looser than those of EPA and other states in key respects. For example, in addition to excluding violations discovered through announced enforcement actions, they require that violations must be reported “prior to discovery by a regulatory agency” or “the filing of a complaint by a third party.” (DEC requires disclosure prior to “the reporting of a violation” by a member of the public, but that person will probably not know there is a violation per se but instead will make a general complaint, e.g., about a bad odor or a discolored discharge.)

RESPONSE 42. The draft policy has been amended to require disclosure of a violation prior to the filing of a complaint by a member of the public. The Policy now reads, “Violations must be disclosed prior to:... 2. reporting of the violation or filing of a

complaint with a Federal, State or local agency by a member of the public or a "whistleblower" employee.

COMMENT 43: As a result of its laxity concerning the kinds of violations that can be reported and the omission of any standards on a qualifying audit, DEC's policy may encourage too many regulated entities to adopt a "wait and see" approach to disclosure of violations.

RESPONSE 43. The broad scope of the policy is intended to encourage disclosure of a variety of violations and discourages a "wait and see" approach to disclosure since that would subject the facility to potential penalties for those violations once discovered by the Department.

COMMENT 44: The policy should explicitly not apply to any facilities that are required to have on-site environmental monitors as permit conditions.

RESPONSE 44. On-site environmental monitors are positioned at facilities for a variety of reasons. A monitor may be required by law; or because the facility involves a unique concern. An on-site monitor may also be required because the compliance history of the regulated entity has included significant or repeated violations. Facilities required to have an on-site monitor due to a history of violations will not be eligible under the Policy.

COMMENT 45: The policy applies to state agencies, but it is unclear how it would interrelate with the requirements of ECL §3-0311 for state agency environmental audits.

RESPONSE 45. Language was added to the Policy to clarify its applicability to state agency environmental audits. The Policy now clarifies that disclosures made by a state agency pursuant to ECL § 3-0311 are eligible for penalty waivers under the policy if all other eligibility criteria are met.

COMMENT 46: The policy excludes violations "of the same requirement for which the entity has received a penalty waiver under this policy within the past five years." It should also exclude such penalty waivers that were received under the current small business self-disclosure policy (CP-19).

RESPONSE 46. CP-19 was limited in scope and not widely used. Few recent waivers have been granted under that policy. This policy will replace CP-19.

COMMENT 47: The list of ineligible violations should be expanded to include violations that an entity committed knowingly, violations that were known prior to the commencement of an environmental review, or violations that are discovered through continuous emissions monitoring or similar activities.

RESPONSE 47. Violations committed knowingly may be subject to criminal prosecution and, therefore, excluded under Section V.B. of the policy which excludes violations involving alleged criminal conduct. Certain violations discovered through continuous monitoring would be excluded by Section V.B. of the Policy if they are required

to be self-reported pursuant to federal or state statute or regulation. Furthermore, the Policy is intended to encourage continuous monitoring and audits to promote compliance. Therefore, a categorical exclusion of violations detected through continuous monitoring would run contrary to the purpose of the Policy

COMMENT 48: Audit policies should require that all discovered violations must be reported. Failure to do so invites abuse by an entity that wants to minimize the risk of being inspected to prevent the discovery of more serious infractions.

RESPONSE 48. Facilities that disclose under the policy remain subject to inspection, and any unreported violations remain subject to potential enforcement and penalties.

COMMENT 49: The proposed policy provides that an entity may but is not required to “perform outreach activities in the surrounding community” when violations that negatively impact human health or the environment are involved. It is unclear whether DEC contemplates any circumstances where a violation that has negatively impacted the health of the public or resulted in environmental contamination may remain concealed from public view. DEC should clearly provide that this will never be allowed under the audit policy.

RESPONSE 49. The outreach provision is intended to encourage positive relations between the community and the regulated entity. Outreach is not the only mechanism by which the community can learn of violations under this program. The Return to Compliance forms and other submissions required by the policy are subject to public availability.

COMMENT 50: The Audit Policy should provide greater flexibility to the Department to determine eligibility of regulated facilities to participate in the Audit Policy under Part V, Section A. The current criteria of eligibility could eliminate entities which are diligently allocating large amounts of resources toward environmental compliance. Eligibility should be based upon on a low to high level offender status so as not to preclude low-level and mid-level violators which have past violations but have made significant efforts to achieve and maintain compliance, and so not to completely exclude high-level violators.

RESPONSE 50. The policy provides a high degree of flexibility in regard to eligibility criteria for regulated entities. The presence of a violation alone does not exclude the regulated entity. The policy only excludes regulated entities that had a violation within the last 5 years AND were uncooperative in remedying past violations. These “bad actors” are excluded from eligibility within that five year window, however, may become eligible over time if they no longer meet the excluding criteria.

COMMENT 51: The Audit Policy should also provide greater flexibility to the Department to determine which violations are excluded as eligible violations. For example, Part V, Section B, subsection 1(a), provides that a repeat violation within a five-year period is ineligible under the Audit Policy. We recommend that the five-year period is lessened to a two-year period for violations not considered as a major threat to public health.

RESPONSE 51. The policy provides a penalty waiver for violations that are disclosed as specified. As a condition of the penalty waiver, the policy requires that the regulated entity identify measures to ensure future compliance with the violated regulatory provision(s) and state in writing that those measures will be implemented and maintained. Reducing the ineligibility period would negate the intent of the policy which is to encourage long-term compliance through environmental management systems and pollution prevention.

COMMENT 52: Finally, the Audit Policy provides that it applies to violations "discovered by the Department, its contractors, or other state, federal or local government agencies during pollution prevention or compliance assistance," but does not apply to violations "discovered through Department inspection activities." The Audit Policy should provide the regulated community with some guidance regarding when the Department is undertaking an inspection and when it is providing pollution prevention or compliance assistance.

RESPONSE 52. Pollution prevention and compliance assistance activities are generally voluntary activities initiated by the regulated entity, whereas inspection activities – including on-site inspections and requests for records, among other things - are initiated by the Department to assess compliance at a facility. Pollution prevention and compliance assistance activities may include site visits by DEC staff under the NY Environmental Leaders program; on site direct assistance offered by the NYS Pollution Prevention Institute; and assistance offered through EFC’s Small Business Environmental Assistance Program or ESD’s Small Business Environmental Ombudsman Program.

COMMENT 53: The broad language of this Audit Policy encourages regulated entities to audit their operations and adopt effective approaches to prevent violations, including environmental management systems and pollution prevention. We assume that references to using this Audit Policy to improve compliance with statewide environmental laws includes the entire "regulated community" statewide operating under various programs and regulated activities. As an example, Part V, Section J provides for eligibility for new entity owners under the Policy and accordingly, we assume that the term entity includes a regulated facility as the term facility is defined by the Environmental Conservation Law § 17-1003.

RESPONSE 53. The term “facility” is used generically to accommodate various programs and regulated activities; and indicates property that is regulated by the Department with authority granted in the state environmental Law and related regulations. The terms “regulated entity” and “facility” may be interchangeable where they are one in the same. However, they are distinguished in the Policy to allow for a regulated entity that has numerous facilities.

COMMENT 54: The Audit Policy should include coverage for the acquisition of multiple facilities by one new owner. We propose an extension of the 60 day period to 90 days or 120 days (to be determined by the Department at the time of application) in the case that multiple facilities are acquired simultaneously by one entity.

RESPONSE 54. Section V.C. Disclosure Period, indicates that an alternative time frame may be established as part of an environmental audit agreement and may be extended as necessary pursuant to the discretion of the Department. This flexibility is intended to also apply to new owners as appropriate.

COMMENT 55: We request that such form is drafted and provided for public comment in advance of completion of the Audit Policy. Further, we request that the Department develop standard form environmental audit checklists as an appendix to the Audit Policy in order to aid the regulated community in performing audits.

RESPONSE 55. The Department will strive to make these resources available.

COMMENT 56: We encourage DEC to enter into an agreement with USEPA Region 2 to protect from dual enforcement of any regulated entity electing to participate and deemed eligible for the Audit Policy. For the same reasons, we encourage DEC to enter into similar agreements with the various delegated counties regarding the enforcement of environmental laws and regulations, most notably in the area of petroleum bulk storage.

RESPONSE 56. The Department will inform staff at U.S. Environmental Protection Agency, Region 2 of any violations disclosed by a regulated entity pursuant to the Policy and provide EPA with information concerning the regulated entity's return to compliance.

COMMENT 57: NSWC is interested in knowing who were the regulated businesses and/or industries that New York State Department of Environmental Conservation (DEC) found so exemplary in their operations that they felt this Environmental Audit Incentive Policy was necessary?

RESPONSE 57. Regulated entities in New York state have demonstrated the use of pollution prevention practices, beyond compliance performance, and sustainable business practices as a result of their participation in the Department's New York Environmental Leaders Program. Further, independent of that program, other regulated entities have committed to making improvements in their environmental performance. The eligibility requirements are clearly defined in the policy and will benefit these types of regulated entities. By incentivizing disclosure, more compliance problems will be detected and corrected.

COMMENT 58: The severe reduction in NYSDEC staffing and enforcement personnel makes it impossible for this agency to effectively cover the entire state of New York. Therefore leaving Environmental Justice Communities extremely vulnerable. And making most actions reactionary instead of proactive.

RESPONSE 58. This policy will enhance DEC's ability to provide greater compliance assurance coverage across the State.

COMMENT 59: Also with the reduction in enforcement staffing at NYS DEC it is still leaving the residents in a position of having to monitor and report on businesses that are

negatively impacting them. Instead of the residents being able to go about their daily lives and to be productive.

RESPONSE 59. This policy incentivizes the voluntary disclosure and correction of violations by the regulated entity and should encourage regulated entities to come forward. Regulated entities that do not disclose remain subject to inspection and potential enforcement action for any violations discovered by the Department during an inspection.

COMMENT 60: We believe that at no point and time should any business, industry, entity, authority or its subsidiaries that are involved in fossil fuels be eligible for this program. Providing incentives to fossil fuel driven companies gives them less of an incentive to look for energy resources that are truly clean and efficient.

RESPONSE 60. The Policy is intended to encourage and incentivize pollution prevention by waiving penalties for violations identified during pollution prevention activities and identifying resources to help regulated entities implement pollution prevention measures, among other things. Therefore, all eligible regulated entities should be encouraged to participate.

COMMENT 61: How would this policy involve eligibility on regulated municipalities and state entities, authorities whose administration changes every 4 years depending on who is in office?

RESPONSE 61. The policy is intended to institutionalize environmental compliance audits and environmental management systems at regulated entities. By doing so, compliance checks will remain in place regardless of staff turnover within the organization.

COMMENT 62: The policy is overly broad and should exclude regulated entities that have received more than one Environmental Conservation Appearance Ticket, Notice of Hearing and Complaint, or administrative or judicial order within the last five years.

RESPONSE 62. The Policy is intended to apply broadly and solicit compliance from a wide variety of regulated entities. Excluding entities with violations within the last five years arbitrarily excludes entities that may have had a Department inspection, while allowing facilities that have not been inspected to participate regardless of the type of violations at the facility or the level of cooperation and good faith on the part of the regulated entity to remedy the violations.

COMMENT 63: The policy should limit the definition of audit to require systematic, periodic auditing and exclude informal reviews of compliance by a regulated entity.

RESPONSE 63. The Policy requires regulated entities that discover a violation to indicate how they will prevent future violations, thereby encouraging systematic, periodic auditing, while also providing flexibility to regulated entities that discover a violation

outside of the systematic audit. The Policy also provides a variety of incentives to encourage systematic auditing.

COMMENT 64: The terms “serious actual harm” and “imminent and substantial endangerment to human health or the environment,” should be defined.

RESPONSE 64. The Policy uses terminology consistent with U.S. EPA’s Policy Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations. Specific definitions may vary depending upon the environmental media of concern.

COMMENT 65: Violations categorizes as significant non-compliance or high priority violations should be excluded from eligibility.

RESPONSE 65. The Department will review violations categorized as significant non-compliance or high priority violations and make a determination of eligibility based on the type of violation and the other excluding criteria identified in the policy. These types of violations are not categorically excluded from other similar state and federal auditing programs.

COMMENT 66: Entities that own or operate multiple facilities should not be eligible for penalty mitigation under the policy at one facility if other facilities owned by the entity are currently the subject of an investigation, inspection, information request, third-party complaint, or ticket.

RESPONSE 66. The Policy is intended to encourage and secure broad compliance from regulated entities. Limiting participation by regulated entities that own more than one facility would discourage disclosure at those other facilities.

COMMENT 67: Disclosure time frames should be shortened to 10 days and only be extended in extraordinary circumstances.

RESPONSE 67. The disclosure time frames in the Policy encourage prompt reporting, consistent with applicable legal requirements.

COMMENT 68: The Policy should mandate that entities be required to report any violations in writing, in order to ensure a complete and adequate record of facility compliance.

RESPONSE 68. The Policy has been amended to require that regulated entities report violations in writing.

COMMENT 69: The Policy should require that entities must report all violations at a facility, including those that may not qualify for penalty mitigation.

RESPONSE 69. The Policy encourages comprehensive auditing and disclosure of all violations of the Environmental Conservation Law and related regulations. However, penalty waivers under the policy may also be sought for disclosure of a single violation.

COMMENT 70: The de minimis threshold for economic benefit should be reduced. Furthermore, economic benefit penalties should not be reduced by the amount the entity commits to invest in pollution prevention.

RESPONSE 70. The \$5,000 de minimis threshold for economic benefit is appropriate and consistent with other environmental enforcement programs. The U.S. EPA RCRA Civil Penalty Policy indicates that enforcement personnel may forego collection of the economic benefit component where the amount is less than \$5,000. Reinvestment of economic benefit penalties in pollution prevention is beneficial to the environmental and human health.

COMMENT 71: To ensure future compliance, the policy should mandate due diligence improvements such as (1) compliance policies and standards that identify how employees and agents are to meet the applicable environmental laws, regulations, and permit conditions, and a training program to communicate these policies and standards; (2) assignment of overall and specific responsibility for compliance assurance at each facility; (3) mechanisms for ensuring compliance, such as monitoring and auditing systems designed to detect violations, periodic evaluations of the compliance management system, and a means for employee and agent violation reporting without fear of retaliation; (4) incentives for managers and employees to obey compliance policies and standards and disciplinary mechanisms to punish individual violators; and (5) procedures for the prompt correction and reporting of violations.

RESPONSE 71. Regulated entities are required to identify how they will ensure future compliance with the subject violations. These suggestions are helpful and will be referenced as examples of means to ensure future compliance and can be appropriately tailored to the subject violations.

COMMENT 72: The provisions for new owners should be more restrictive similar to EPA's Policy.

RESPONSE 72. The New Owner section of the policy is intended to encourage maximum disclosure and remedy of violations identified during and shortly after acquisition.

COMMENT 73: The policy should require public outreach and public availability of disclosures; and the Department should publish an annual report assessing success of the policy.

RESPONSE 73. The Department will strive to provide information about disclosures on the Department's website, including regular reporting on use of the policy and resulting benefits to human health and the environment.

COMMENT 74: A person from DEC must be at any drilling, manufacturing & construction site 24/7 for the life of a project. I do not believe we can trust companies to self regulate themselves. DEC needs to make available how they are going to monitor sites and if not there every day, they must go unannounced.

RESPONSE 74. The Department will continue its inspection and enforcement program to deter violations. Department staff use unannounced inspections and will continue to use unannounced inspections as appropriate.

COMMENT 75: Section A.1 and B.1.a of the policy should be consistent in relation to the types of enforcement actions listed.

RESPONSE 75. The policy has been amended to address this comment.

COMMENT 76: In both Section A.1 and B.1.a, history of noncompliance is limited to NYSDEC actions - no reference to EPA enforcement actions or compliance issues. We recommend that you consider revising these sections to include EPA actions in determining history of noncompliance.

RESPONSE 76. The Policy is specific to violations of the Environmental Conservation Law and New York State Regulations.

COMMENT 77: The policy seems to allow NYSDEC to issue penalty waivers for EPA (or other Federal agency) discovered violations during pollution prevention or environmental assistance. If this is the case, the policy should be revised to clarify that the NYSDEC cannot waive penalties for violations of federal statutes discovered by EPA (or other Federal agency).

RESPONSE 77. Section V.F. of the Policy concerning penalty waivers is specific to violations of state environmental laws and regulations. As indicated in the comment, the Department cannot waive penalties for violations of federal statutes discovered by EPA (or other Federal agency).

COMMENT 78: The NYSDEC seems to have removed the criteria that similar violations for which the entity had received an enforcement action within the past five years may be excluded from eligibility and only excludes a facility with such violations if they were uncooperative in remedying past solutions. To be consistent with EPA's Audit policies, we recommend that Section V.B.1.a and b be revised to include same or similar requirement.

RESPONSE 78. Section V.B. of the Policy excludes violations of the same requirement within the preceding five years.

COMMENT 79: EPA was pleased to see that violations of consent orders were excluded from eligibility under Section V. B.1.c of the proposed revised NYSDEC Audit Policy. EPA's Audit Policy, however, excludes not only violations of specific terms of any order, consent agreement, or plea agreement but also any response, removal or remedial action covered by a written agreement EPA suggests modifying the language to explicitly state that violations of any

clean-up response, removal or remedial action covered by a written agreement are excluded as well.

RESPONSE 79. The Policy was amended to address this comment. The Policy now excludes, “a violation of the terms of any response, removal or remedial action covered by a written agreement.”

COMMENT 80: Under Section V.B.1.e, it appears as if violations discovered through a NYSDEC inspection and NOT deemed appropriate for enforcement could be eligible under the Audit Policy. This is inconsistent with Section V.C. which clearly states that violations need to be disclosed by the entity prior to an announcement or commencement of a NYSDEC inspection. To be consistent with EPA’s audit policies, violations need to be disclosed by the regulated entity independent of any government agency inspection regardless of whether or not the violations discovered through these inspections warrant an enforcement action. Thus, EPA recommends that “and deemed appropriate for enforcement” be eliminated from Section V.B.1.e.

RESPONSE 80. The policy was amended to address this comment. The phrase “and deemed appropriate for enforcement” was eliminated.

COMMENT 81: It is unclear whether or not violations found through environmental audits that were required to be performed under a settlement agreement are excluded.

RESPONSE 81. Violations discovered through an environmental audit performed pursuant to a consent order would not be an eligible violation under the policy. Section V.B.1. of the Policy excludes violations required to be reported pursuant to an order.

COMMENT 82: Section V.B.3 allows regulated entities that own/operate multiple facilities to remain eligible under the Audit Policy for violations discovered at facilities that meet eligibility criteria, even if another facility with the same ownership is already subject of an investigation, inspection, information request, thirty party complaint or ticket for the same or similar violations. Under EPA’s Audit policy, a company may only receive audit credit if the violation at the second facility is not the same (or similar to) the violation that was detected at the first facility (i.e., first facility had a CWA violation and the second facility has a CAA violation). EPA recommends a similar approach by the NYSDEC.

RESPONSE 82. The Policy is intended to encourage and maximize disclosure of violations that the Department has not yet discovered through an inspection. While the Department may have discovered violations at one facility through inspection, other facilities owned by the same regulated entity may not be scheduled for inspection. Therefore, violations at that facility may not be discovered by the Department and corrected unless the regulated entity discloses them. Barring disclosure of similar violations at the second facility would discourage disclosure.

COMMENT 83: Section V. B.3 allows a facility to remain eligible even if another facility owned or operated by the same entity is being investigated. EPA suggests further clarification of

eligibility if one facility is inspected and then an information request is sent covering all other facilities owned or operated by the same entity.

RESPONSE 83. Section V.B.1. excludes violations discovered by the Department through inspection activities, which includes information requests and review of records. Therefore, if the Department inspects one facility, then sends an information request to other facilities owned by the same regulated entity, violations discovered at the second facility pursuant to the information request would not be eligible for penalty waivers or other benefits under the Policy.

COMMENT 84: The proposed NYSDEC audit policy states that a regulated entity must voluntarily disclose a violation or suspected violation within 30 days of discovery unless another timeframe is prescribed by law or regulation or as part of an environmental audit agreement. In EPA's Audit Policy we explicitly define "discovery" as beginning when "any officer, director, employee, or agent of the facility has an objective reasonable basis for believing that a violation has, or may have, occurred. EPA recommends that the NYSDEC also define in their policy when an entity is thought to have discovered the violation (i.e. when the 30 day disclosure period starts).

RESPONSE 84. The definition has been added to the Policy.

COMMENT 85: EPA recommends adding "in a timely and expeditious manner" to the sentence concerning remediating any environmental harm associated with the violations and implementing procedures to prevent future violations in Section V.E.

RESPONSE 85. Section V.E. of the Policy states that a regulated entity must correct all violations expeditiously. This statement also applies to remediating environmental harm and implementing procedures to prevent future violations.

COMMENT 86: Section V. E states that "a regulated entity must correct violations expeditiously" but later states "should not exceed 60 days." The NYSDEC should consider adding "as soon as possible" language.

RESPONSE 86. The term "expeditiously" is intended to convey that the violation should be corrected as soon as possible.

COMMENT 87: The Department should use evaluation criteria when deciding to accept pollution prevention as an alternative method of economic benefit recovery. The amount of the reduction should take into account the profitability of the pollution prevention investment; any cost-share provided by the Department or other agency in the form of money or resources; and the quality of the pollution prevention project.

RESPONSE 87. The Department appreciates the suggested criteria and will evaluate them for use with the policy.

Comments submitted by:

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