

# CP-59 / Environmental Audit Incentive Policy

New York State Department of Environmental Conservation

## DEC Policy

**Issuing Authority:** Joseph J. Martens, Commissioner

**Date Issued:** October 16, 2013

**Latest Date Revised:** October 16, 2013

### I. Summary:

This Department of Environmental Conservation (Department) Policy encourages regulated entities to audit their operations and adopt effective approaches to prevent violations, including environmental management systems and pollution prevention, thereby improving compliance with environmental laws statewide and protecting public health and the environment. To support these actions, this Policy reduces or waives penalties for violations that are discovered and disclosed voluntarily, or discovered during pollution prevention or compliance assistance and encourages regulated entities to engage, during the ordinary course of business, in an environmental audit program. This Policy also identifies incentives for regulated entities to go “beyond compliance” by agreeing to evaluate and incorporate environmental management and pollution prevention into their systems.

### II. Policy:

The Department will encourage compliance with environmental laws, as well as advance the use of environmental management systems and pollution prevention, by reducing or waiving civil penalties for eligible violations discovered by a regulated entity through an environmental audit, compliance assistance or pollution prevention. The violations must be disclosed to the Department and expeditiously corrected. Working with the Pollution Prevention and Environmental Compliance Coordinating Council including Empire State Development (ESD), Environmental Facilities Corporation (EFC), and New York State Energy Research & Development Authority (NYSERDA), and in partnership with the Pollution Prevention Institute (P2I), the Department will also identify and provide financial incentives that encourage the use of environmental management systems and pollution prevention. Environmental management system is defined in Commissioner Policy 34, Using EMSs and Other Environmental Performance Improvement Tools in Department Programs. Pollution Prevention is defined by Environmental Conservation Law (ECL) §28-0105.3.

Unless otherwise agreed to by the Department in writing, this Policy does not create any rights enforceable by any party and does not restrict or alter the authority or enforcement discretion of the Commissioner as currently implemented by the Department. The Department reserves the right to select eligible entities for this policy. This Policy does not apply to criminal violations, nor does it limit the Department’s ability to collect natural resource damages, regulatory fees or remedial costs owed to the Department.

### III. Purpose and Background:

The Department is responsible for ensuring compliance with environmental laws. To that end, the

Department has authority to enforce the environmental laws of New York State, and maintains an inspection and enforcement program intended to deter violations. In an effort to further protect human health and the environment through innovative and efficient regulatory activities, the Department will implement this Policy to recognize entities that are willing to take affirmative steps to maintain compliance, and engage in environmental management practices and/or pollution prevention. Article 28 of the ECL promotes pollution prevention, which can enhance environmental performance while improving the competitiveness of New York businesses. Many members of the regulated community already use environmental management systems and pollution prevention. This Policy supports those efforts and encourages widespread use.

This Policy also encourages new owners of regulated entities to disclose, correct, and prevent the recurrence of violations; and implement pollution prevention. Given the unique circumstances surrounding acquisition of a regulated entity, additional considerations are warranted. Therefore, this Policy lengthens the disclosure period for new owners and provides a penalty waiver for disclosure of violations required to be self-reported pursuant to Federal or State statute, regulation, permit or order that were discovered prior to, or within 60 days after, acquisition of the regulated entity.

This Policy supplements the penalty adjustment provisions of the Civil Penalty Policy and Enforcement Guidance Memoranda Series, and formalizes the Department's practice of exercising its prosecutorial discretion for all regulatory and natural resource programs, as appropriate, by eliminating or mitigating the payable civil penalty that may otherwise be imposed for certain types of violations. The Department's use of such prosecutorial discretion is consistent with its enforcement authority conferred by ECL Article 71.

This Policy supersedes Commissioner Policy 19, Small Business Self-Disclosure Policy, which is repealed.

#### **IV. Responsibility:**

The Office of General Counsel, the Pollution Prevention Unit, and Department program and regional staff will work collectively to implement this Policy.

The Office of General Counsel will oversee the implementation and interpretation of this Policy and ensure consistent implementation. It will also maintain and update this Policy as needed and track the Policy's use and periodically report on progress made under the policy, including the number of entities which have participated and the type and number of violations reported and corrected.

The Office of Environmental Justice will review requests for penalty waivers in potential environmental justice areas as defined by Commissioner Policy 29 – Environmental Justice and Permitting, or subsequent revisions thereto, and advise staff of issues that should be considered in a determination of eligibility under this Policy. The Office of Environmental Justice will also make recommendations to Department staff and regulated entities for public outreach, as necessary, and serve as a resource for public outreach activities.

The Pollution Prevention Unit will serve as a resource and clearinghouse for the Office of General Counsel and Department program and regional staff as this Policy is implemented, particularly in relation to the use of environmental management systems and pollution prevention by regulated entities. The Pollution Prevention Unit will also help to design and implement targeted outreach activities and collaborate with other agencies to achieve the goals of this Policy.

## **V. Eligibility Criteria and Procedure:**

**A. Regulated Entities** - 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. The Department shall exclude regulated entities that, within the past 5 years:

1. received a Notice of Violation, Environmental Conservation Appearance Ticket, Notice of Hearing and Complaint, an administrative or judicial order or was subject to a penalty demand; and
2. were uncooperative in remedying past violations. The term “uncooperative” includes, but is not limited to, such conduct as failing to respond to Department correspondence (e.g. Environmental Conservation Appearance Ticket, Notice of Hearing and Complaint), or failing to take good faith steps to remedy violations within time frames prescribed by law and as may be directed by the Department in an administrative order. In such situations, the Department may use the traditional enforcement process to solicit environmental audits.

**B. Eligible Violations** - This Policy applies to violations of New York State law and regulations discovered by an eligible regulated entity through an environmental audit, or discovered by the Department, its contractors, or other state, federal or local government agencies during pollution prevention or compliance assistance. 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. Pollution prevention and compliance assistance include, but are not limited to, telephone and on-site assistance.

1. The following violations are excluded from eligibility under this Policy:

- a. a violation of the same requirement for which the entity has received a notice of violation, Environmental Conservation Appearance Ticket or Notice of Hearing and Complaint, administrative or judicial order or was subject to a penalty demand, within the past five years;
- b. a violation of the same requirement for which the entity has already received a penalty waiver under this policy within the past five years;
- c. a violation of an administrative or judicial order;
- d. a violation of the terms of any response, removal or remedial action covered by a written agreement;
- e. a violation that involves alleged criminal conduct. Referral for criminal prosecution is not necessary for culpability to disqualify an entity;
- f. a violation discovered through Department inspection activities, including information requests and review of records related to inspection activities;
- g. a violation reported to a Federal, State or local agency by a member of the public or a "whistleblower" employee;

h. a violation required to be self-reported pursuant to Federal or State statute, regulation, permit or order, except for violations disclosed by new owners pursuant to Section V.J. and state agencies pursuant to ECL § 3-0311; and

i. a violation resulting in a natural resources damage claim, serious actual harm, or one that may have presented an imminent and substantial endangerment to human health or the environment;

2. 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 excluded from eligibility under this policy, except for new owners pursuant to Section V.J. The determination of eligibility will consider the extent to which the violation meets the criteria for exclusion listed in Subsection V.B.1 above.

3. Regulated entities that own or operate multiple facilities may remain eligible for penalty mitigation under this Policy for violations discovered at facilities that meet eligibility criteria, even if another facility with the same ownership is already the subject of an investigation, inspection, information request, third-party complaint or ticket.

**C. Disclosure Period** - A regulated entity must voluntarily disclose a violation or suspected violation expeditiously in writing, consistent with any applicable time frame prescribed by law or regulation. Where no time frame is specified, disclosure of the violation to the Department must occur within 30 calendar days after the entity discovered the violation unless an alternate time frame is established as part of an environmental audit agreement. This time frame may be extended, as necessary, pursuant to the discretion of the Department. A regulated entity is deemed to have discovered the violation when any officer, director, employee, or agent of the facility knows or has reason to believe that a violation has, or may have, occurred. 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;

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.

**D. Scope of Disclosure** – Regulated entities may identify the scope of their disclosure. Disclosure may consist of a single violation or may include a variety of violations from one or more environmental regulatory programs.

**E. Correcting the Violation(s)** – A regulated entity must correct all disclosed violations expeditiously, consistent with any applicable time frame and protocol prescribed by law and regulation, and as may be directed by the Department in writing. Where no time frame is specified elsewhere, correction of the violation(s) should not exceed 60 days after disclosure to the Department, unless an alternate time frame is established as part of an environmental audit agreement or agreed to by the Department in writing. Correcting violations includes remediating any environmental harm associated with the violations, as well as implementing procedures to prevent future violations. The regulated entity must secure all permits, approvals and authorizations required by law; and comply with all existing and applicable statutes, regulations, permits, Orders, or any other legally binding obligation. Department oversight of remedial activity will be implemented where appropriate.

**F. Penalty Waiver** – Pursuant to the Civil Penalty Policy, monetary penalties levied against regulated entities for violations of state environmental laws and regulations regularly include an amount representing the gravity of the violation and an amount equal to the economic benefit of delayed compliance. Pursuant to this Policy, the Department will waive the gravity component of the penalty against regulated entities that are eligible for penalty mitigation and self-disclose, provided the regulated entity takes appropriate action to remedy the violation and prevent its reoccurrence. For entities engaged in environmental audits and environmental management systems during the ordinary course of business or pursuant to an environmental audit agreement, additional penalty reductions will be considered. For example, the economic benefit component may be waived where de minimis and, in other circumstances, where deemed appropriate by the Department. As applied under this Policy, de minimis means equal to or less than \$5,000. If the economic benefit exceeds the de minimis threshold, the Department may reduce the payable economic benefit penalty component by an amount not to exceed the amount that the entity commits to invest in pollution prevention not otherwise required by law at the facility.

**G. Manner of Disclosure** – 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. The voluntarily disclosure of a violation or suspected violation by a regulated entity must be made in writing to the Regional Office. Eligibility under the Policy will be determined by the Regional Office within 30 days of receipt of the disclosure and communicated to the regulated entity in writing. The determination of eligibility does not extend the time frame for correcting the violation as specified in Section V.E. of this Policy.

**H. Ensuring Future Compliance** – Regulated entities that receive penalty mitigation under this Policy must identify measures to ensure future compliance with the violated regulatory provision(s) and state in writing that those measures will be implemented and maintained. Regulated entities are encouraged to implement environmental management systems and pollution prevention, to ensure future compliance with regulatory requirements.

**I. Incentives for Comprehensive Environmental Audit Agreements and Pollution Prevention** – Regulated entities that commit through an environmental audit agreement to improve compliance through the implementation of compliance audits, or to reduce the adverse environmental impact of their activities, products, and services by using environmental management systems and/or pollution prevention, will receive certain incentives under this Policy. These incentives include, but are not limited to the following. Additional incentives will be identified as they become available.

1. 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:
  - a. Receive recognition on the Department’s public website for implementing measures that go beyond environmental compliance, where recognition is requested.
  - b. Be eligible to apply for a cost share of up to fifty percent of audit activities related to energy reduction through NYSERDA’s Flexible Technical Assistance (Flextech) program.
  - c. Be given priority for assistance from the Small Business Environmental Assistance Program implemented by EFC and the Small Business Ombudsman Program implemented by ESD.

d. Meet the compliance requirements for ESD's Environmental Investment Program, provided that any environmental compliance issues are fully resolved prior to the date on which final application decisions are made.

e. Meet the record of compliance standard required for entrance into the Entry Tier of the Department's New York Environmental Leaders (NYEL) program; and

f. Although eligible for inspection at any time, not be prioritized for inspection during the limited audit period, unless Department staff receive a complaint concerning the regulated entity; must inspect pursuant to federal or state requirements; have reason to believe that a violation has occurred resulting in serious actual harm, or which may have presented an imminent and substantial endangerment to human health or the environment; or suspect criminal activity.

2. Entities that enter into an environmental audit agreement to implement an environmental management system that has an agreed scope covering all significant aspects of the entity's operations, integrates a compliance audit and identifies opportunities for pollution prevention, will:

a. Receive the incentives listed in Subsection V.I.1 of this Policy.

b. Receive a waiver of any payable economic benefit component of any penalty arising out of a disclosure by the amount the entity commits to invest in pollution prevention at the facility not otherwise required by law.

c. Meet the record of compliance standard required for entrance into the Leadership Tier of the Department's NYEL program.

3. Entities that enter into an environmental audit agreement to implement an environmental management system, pursuant to Subsection V.I.2, that results in compliance with laws and regulations and implementation of pollution prevention, are encouraged to apply to the Department's NYEL program. In addition to the incentives already established for the NYEL program, the following incentives will be available to NYEL leadership tier members pursuant to this policy:

a. Additional points in the scoring process used to determine awards under relevant DEC technical and financial assistance programs.

b. Additional points in the scoring process used to determine awards under relevant technical and financial assistance programs funded through DEC's partners on the Pollution Prevention and Environmental Compliance Coordinating Council.

c. Priority for assistance through the NYS P2I.

See Addendum A for a listing of compliance and pollution prevention technical and financial assistance programs offered by New York State. This list will be updated by the Pollution Prevention Unit as needed.

**J. New Owners** – Regulated entities acquired by a new owner must satisfy the eligibility criteria specified in this Policy, except that violations must be disclosed within 60 calendar days after acquisition or within 30 calendar days after the entity discovered the violation, whichever is later. If a new owner, within 60 calendar days after acquisition of the regulated entity, discovers a violation either

required to be self-reported pursuant to Federal or State statute, regulation, permit or order; or categorized as an SNC or HPV, and discloses the violation within the 60-day new owner disclosure period, the new owner will be eligible for a penalty waiver for those violations. A prior owner's history of non-compliance will not preclude a new owner from eligibility under this Policy.

A new owner must verify that prior to acquisition: 1) the new owner was not responsible for environmental compliance at the facility which is the subject of the disclosure, did not cause the violations being disclosed and could not have prevented their occurrence; and 2) the new owner had no connection to the facility or significant relationship to the prior owner.

**K. Outreach** – Although not required, regulated entities requesting a penalty waiver or mitigation under this policy for violations that negatively impact human health or the environment are encouraged to perform outreach activities in the surrounding community.

## **VI. Related References:**

ECL § 1-0101 et seq. General Provisions

ECL § 3-0101 et seq. Department of Environmental Conservation; General Functions, Powers, Duties and Jurisdictions

ECL § 28-0101 et seq. Pollution Prevention

USEPA Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations (December 22, 1995).

Commissioner Policy #29, Environmental Justice and Permitting

Commissioner Policy #34, Using EMSs and Other Environmental Performance Improvement tools in Department Programs

Commissioner Policy #40, New York Environmental Leaders