

# Air Quality Regulation

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# Trends in Enforcement Policy Related to Transfer of Ownership of Existing Sources

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## Current Audit Policy

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- Original “Audit Policy” issued in 1995, modified in 2000.
  - “Incentives for Self Policing: Discovery, Disclosure, Correction and Prevention of Violations,” 65 Fed. Reg. 19,618 (April 11, 2000).
  - Penalty mitigation for Gravity Component.
  - Typically, no recommendations of criminal prosecution.
  - No routine requests for Audit Reports.
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## Major Revisions to Audit Policy in 2000

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- Time for disclosure lengthened from 10 to 21 days from discovery.
  - Clarifying that Facility may qualify even if another facility operated by same parent is already the subject of an inspection, investigation, or information request.
  - Clarifying that entities have at least 21 days to disclose violations at newly acquired facilities.
  - Clarifying that repeat violations at newly acquired facilities are not disqualified, if the violations pre-dated acquisition.
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## Nine Qualifying Criteria

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- Violation discovered during an Audit or other systematic discovery.
  - Voluntary discovery.
  - Prompt disclosure.
  - Disclosure precedes inspections investigation, citizens suit notice, whistleblowers, imminent agency discovery.
  - Prompt correction of violation.
  - Prevent recurring violations.
  - No similar violations within prior three years at the facility, no pattern of violations within prior five years.
  - No serious actual harm, no imminent and substantial endangerment to public health or the environment.
  - Full cooperation.
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# Consideration of a Pilot Program for New Owners

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- “Enhancing Environmental Outcomes From Audit Policy Disclosures through tailored Incentives for New Owners,” 72 Fed. Reg. 27,116 (May 14, 2007).
- Goals
  - Maximize compliance.
  - Increase disclosures.
  - Attain significant environmental benefits.

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## Past Audit Policy Results\*

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- Over 3,000 voluntary disclosures.
- Majority of voluntary disclosures have been reporting violations.
- Most have not resulted in significant pollution reduction.
- EPCRA 52%.
- CAA 17%
- RCRA 10%
- TSCA 10%
- CWA 9%
- FIFRA 1%
- CERCLA 1%

\*Source: EPA-through FY 2006

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## New Owners

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- Not responsible for prior non-compliance.
  - Under new ownership and control, opportunity for a clean start.
  - Enhanced likelihood of available funding.
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## EPA Sought Comment on Several Questions

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- Should the Agency offer tailored incentives to new owners?
  - Who should qualify as a bona-fide “new owner” and what should a pilot program require?
  - What incentives should be offered?
  - How can the Agency measure success of any potential pilot program?
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# Why Offer Tailored Incentives to New Owners?

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- Are they warranted?
    - New owner not responsible for past violations.
    - Potential environmental benefit due to disclosure and correction.
  - Is current audit policy adequate?
  - Does pre-acquisition due diligence reveal non-compliance?
    - Noncompliance.
    - Remedial liability.
  - Does the purchase price reflect these environmental liabilities?
  - Might tailored incentives to new owners potentially effect environmental compliance due diligence reviews?
  - Should EPA consider Indemnification Agreements in determining need for tailored incentives?
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# Eligibility Issues for New Owners?

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- Who is a bona-fide new owner?
    - Arm's length transaction.
  - How is this demonstrated?
    - Self certification? As to what exactly?
    - Other means of proof.
  - How long after an acquisition is an owner new?
  - Treatment of variety of transactions.
    - Mergers.
    - Bankruptcy.
    - Controlling interest by new firm, but no interest in managing operations.
    - Employee purchase transaction.
    - Required level of due diligence?
    - Should the Agency consider whether the purchase price reflected non-compliance? If so, how?
  - Is indemnification an appropriate eligibility factor?
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# What are some Potential Incentives?

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- Mitigation of Economic Benefit Calculation?
    - When should the clock start running to calculate economic benefit?
      - ❖ Date of acquisition?
      - ❖ Date post-acquisition audit is completed? What is a reasonable period?
      - ❖ Date controls are installed? What is a reasonable period?
  - Is indemnification an appropriate consideration in calculating economic benefit?
  - Should the Agency allow for off-setting the cost of an audit?
    - How do you fairly, objectively, and efficiently calculate the audit cost?
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# What are some Potential Incentives?

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- Allow audit treatment of previously ineligible violations.
    - Violations ineligible if discovery is already legally required, and thus not voluntary.
    - How can EPA encourage new owners to assess compliance status, correct violations, and upgrade deficient equipment and practices?
    - EPA currently allows Audit Policy treatment for new owners that disclose Clean Air Act Title V violations before the first required annual certification.
    - Should EPA consider other categories of currently ineligible violations, that existed prior to the acquisition?
  - Provide Positive Recognition
    - Would this encourage new owners to voluntarily audit, disclose and correct violations?
    - If so, what sort of recognition is desirable?
    - Other incentives?
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## How can the Agency measure Success of Potential Pilot Program?

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- Number and significance of disclosed violations?
  - Significance of pollutant reductions?
  - Transparency of program?
  - Efficiency of administering the program?
  - Low transaction costs?
  - Other measurements?
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## Status of Consideration of Pilot Program

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- 60-day comment period ended July 13, 2007.
  - Docket ID # EPA-HQ-OECA-2007-0291 ([www.regulations.gov](http://www.regulations.gov)).
  - Oral Comments
    - Public meeting in Washington, D.C. June 12, 2007 (See EPA Summary Notes attached as Exhibit 1).
    - Public meeting in San Francisco, June 20, 2007 (See EPA Summary Notes attached as Exhibit 2).
  - EPA is currently reviewing comments, and considering options for a potential pilot program.
  - If EPA proceeds, it will seek comment on a pilot program in February or March.
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