

Texas and EPA Self Audit Privileges

Jess A McAngus, Spirit Environmental, LLC

Co-speaker: Joseph F. Guida,
Managing Shareholder, Attorney,
Guida, Slavich & Flores, P.C.

December 2, 2015

***TEXAS
ENVIRONMENTAL, HEALTH,
AND SAFETY
AUDIT PRIVILEGE ACT***

Joseph F. Guida
Guida, Slavich & Flores, P.C.
750 N. St. Paul, Suite 200
Dallas, Texas
214.692.0014
guida@gsfpc.com

GUIDA, SLAVICH & FLORES, P.C.

The Environmental Law FirmSM

TEXAS ENVIRONMENTAL, HEALTH, AND SAFETY AUDIT PRIVILEGE ACT ("EHS AUDIT LAW")

- **ORIGINALLY ENACTED IN 1995.**
- **AMENDED IN 1997 AND 2013.**

WHAT DOES IT DO?

- **PROVIDES INCENTIVES TO OWNERS AND OPERATORS OF REGULATED FACILITIES TO:**
 - **PERFORM REGULATORY COMPLIANCE AUDITS RELATING TO ENVIRONMENTAL OR OCCUPATIONAL HEALTH AND SAFETY LAWS ("EHS AUDITS"); AND**
 - **TO VOLUNTARILY COMPLY WITH THE LAW WITHOUT THE NEED FOR GOVERNMENT ENFORCEMENT.**

WHAT IS AN EHS AUDIT?

“Environmental or health and safety audit” or “audit” means **a systematic voluntary evaluation, review, or assessment** of compliance with environmental or health and safety laws or with any permit issued under an environmental or health and safety law **conducted by:**

- **an owner or operator;**
- an employee of an owner or operator;
- **a person**, including an employee or independent contractor of the person, that is **considering the acquisition of a regulated facility or operation;** or
- an independent contractor of:
 - (A) A regulated facility or operation; or
 - (B) An activity at a regulated facility or operation.

WHAT IS AN EHS LAW?

“Environmental or health and safety law” means:

- (A) a federal or state environmental or occupational health and safety law; or
- (B) a rule, regulation, or regional or local law adopted in conjunction with a law described by Paragraph (A) of this subdivision.

EHS LAWS PRESUMABLY INCLUDE:

- TEXAS WATER CODE;
- TEXAS HEALTH AND SAFETY CODE;
- TEXAS NATURAL RESOURCES CODE;
- TEXAS AGRICULTURE CODE; AND
- TEXAS OCCUPATIONS CODE.

EHS AGENCIES INCLUDE:

- TEXAS COMMISSION ON ENVIRONMENTAL QUALITY;
- TEXAS RAILROAD COMMISSION;
- TEXAS STATE DEPARTMENT OF HEALTH SERVICES;
AND
- TEXAS DEPARTMENT OF PUBLIC SAFETY.

TCEQ HAS ISSUED GUIDANCE ON USE OF EHS AUDIT LAW

- See: A Guide to the Texas Environmental, Health, and Safety Audit Privilege Act TCEQ Publication RG-173, Revised November 2013
- Web Page Citation:
<https://www.tceq.texas.gov/publications/rg/rg-173.html>
- TCEQ GUIDANCE SHOULD BE USEFUL RELATIVE TO USE OF EHS LAW WITH OTHER STATE OF TEXAS AGENCIES

WHAT ARE THE SPECIFIC INCENTIVES OF THE EHS AUDIT LAW?

- **THE PRODUCT OF THE AUDIT, THE AUDIT REPORT IS LEGALLY PRIVILEGED AND, THEREFORE, NOT SUBJECT TO DISCLOSURE TO OUTSIDE PARTIES, WITH EXCEPTIONS; and**
- **IMMUNITY FROM ADMINISTRATIVE OR CIVIL PENALTIES FOR NON-COMPLIANCES PROPERLY DISCLOSED TO THE AGENCY, WITH EXCEPTIONS.**

CONTENTS OF AUDIT REPORT AND AUDIT TIMING CONSTRAINTS

- MAIN ELEMENTS
 - *SCOPE*
 - *FINDINGS, CONCLUSIONS, AND RECOMMENDATIONS*
 - *EXHIBITS, APPENDICES, SUPPORTING DOCUMENTS*
 - *IMPLEMENTATION PLAN TO CORRECT PAST NON-COMPLIANCE, IMPROVE CURRENT COMPLIANCE, AND PREVENT FUTURE NON-COMPLIANCE*
- AUDIT MUST BE COMPLETED WITHIN 6 MONTHS OF THE DATE OF AUDIT INITIATION; EXTENSIONS CAN BE GRANTED
- SPECIAL TIMING RULES IN FACILITY ACQUISITION CONTEXT

HOW IS THE AUDIT REPORT PRIVILEGED?

- DISCLOSURE CANNOT BE REQUIRED IN A CIVIL, JUDICIAL, OR ADMINISTRATIVE ACTION
- CERTAIN PERSONS CAN SEE AUDIT REPORT WITHOUT WAIVER, INCLUDING:
 - *TCEQ UNDER A CLAIM OF PRIVILEGE OR PURSUANT TO A CONFIDENTIALITY AGREEMENT;*
 - *ATTORNEYS OF ENTITY DOING AUDIT;*
 - *CONSULTANTS HIRED FOR AUDIT;*
 - *EMPLOYEES OF ENTITY;*
 - *PERSONS CONSIDERING ACQUISITION OF FACILITY; AND*
 - *CERTAIN PERSONS COVERED BY A CONFIDENTIALITY AGREEMENT (e.g. facility transferees, lenders, and insurers).*
- BUT ACTUAL DISCLOSURE LETTER IS NOT PRIVILEGED

BUT PRIVILEGE MUST NOT BE WAIVED

- PRIVILEGE CAN BE LOST UNDER CERTAIN CIRCUMSTANCES, E.G. FRAUD OR LACK OF DILIGENCE
- PRIVILEGE ALSO CAN BE LOST IF REPORT GIVEN TO EPA!
- NO WAIVER RELATIVE TO CIVIL OR ADMINISTRATIVE PROCEEDINGS WHERE AN AUDIT REPORT IS OBTAINED, REVIEWED, OR USED IN A CRIMINAL PROCEEDING.

HOW DOES THE EHS AUDIT LAW PROVIDE FOR IMMUNITY FROM ADMINISTRATIVE OR CIVIL PENALTIES?

- IMMUNITY FROM ADMINISTRATIVE OR CIVIL PENALTIES RELATING TO SELF-DISCLOSED VIOLATIONS.
- DOES NOT AFFECT AGENCY'S AUTHORITY TO SEEK:
 - *INJUNCTIVE RELIEF;*
 - *MAKE TECHNICAL RECOMMENDATIONS; OR*
 - *OTHERWISE ENFORCE COMPLIANCE.*

HOW DOES THE EHS AUDIT LAW PROVIDE FOR IMMUNITY FROM ADMINISTRATIVE OR CIVIL PENALTIES? (continued)

- TO RECEIVE IMMUNITY THE DISCLOSURE MUST BE BOTH:
 - *VOLUNTARY; AND*
 - *PRECEDED BY A PROPER “NOTICE OF AUDIT,” WHERE APPLICABLE, THAT NOTIFIED AGENCY OF INTENT TO INITIATE AN ENVIRONMENTAL AUDIT.*

- PERSON MUST DEMONSTRATE:
 - *INITIATION OF APPROPRIATE EFFORT TO ACHIEVE COMPLIANCE*
 - *PURSUE COMPLIANCE EFFORT WITH DUE DILIGENCE; AND*
 - *CORRECT OR CORRECTED NON-COMPLIANCE WITHIN A REASONABLE TIME.*

WHEN WILL A DISCLOSURE BE DEEMED “VOLUNTARY”?

- ELEMENTS SUMMARIZED BY MNEMONIC: “PINNACLE”:

P-the disclosure was made promptly after the violation was discovered;

I-the disclosure was made in writing by certified mail to the TCEQ;

N-the violation was not independently detected, or an investigation of the violation was not initiated, before the disclosure was made in writing by certified mail;

N-the violation was noted and disclosed as the result of a voluntary environmental audit;

A-appropriate efforts to correct the noncompliance are initiated, pursued, and completed within a reasonable amount of time;

C-the disclosing person cooperates in the investigation of the issues identified in the disclosure;

L-the violation lacks injury or imminent and substantial risk of injury; and

E-the disclosure is not required by an enforcement order or decree.

- SPECIAL PREREQUISITES FOR VIOLATIONS DISCOVERED DURING PRE-ACQUISITION AUDIT

OTHER WAYS TO LOSE IMMUNITY UNDER THE EHS AUDIT LAW:

- if the violation was **intentionally or knowingly committed**;
- was recklessly committed;
- resulted in a “**substantial economic benefit** which gives the violator a clear advantage over its business competitors”;
- if a court or administrative law judge finds that the person claiming immunity has **repeatedly or continuously committed significant violations** and has **not attempted to bring the facility into compliance**, resulting in a **pattern of disregard of environmental or health and safety laws**. A three-year period will be reviewed to determine whether a pattern exists.

WHAT SUBMISSIONS ARE REQUIRED TO IMPLEMENT AN EHS AUDIT LAW AUDIT?

- NOTICE OF AUDIT
 - *(IF SEEKING IMMUNITY; NOT NEEDED FOR PRIVILEGE)*
 - *NEEDED IN ACQUISITION CONTEXT FOR IMMUNITY, IF AUDIT WILL CONTINUE BEYOND CLOSING DATE*
- DISCLOSURE OF VIOLATION
 - *IN WRITING BY CERTIFIED MAIL*
 - *CERTAIN NECESSARY ELEMENTS*
- REQUEST FOR EXTENSION (WHERE NECESSARY). BUT ASK BEFORE INITIAL AUDIT PERIOD EXPIRES
- *See Forms at “A Guide to the Texas Environmental, Health and Safety Audit Privilege Act” TCEQ Publication RG-173, Revised November 2013*

Web Page Citation: <https://www.tceq.texas.gov/publications/rg/rg-173.html>

NOTE ON RELATED (BUT DIFFERENT) SELF-DISCLOSURE AND PRIVILEGE VEHICLES

- **EPA AUDIT/SELF-DISCLOSURE POLICY**
 - EPA AUDIT POLICY: “INCENTIVES FOR SELF-POLICING: DISCOVERY, DISCLOSURE, CORRECTION AND PREVENTION OF VIOLATIONS.” 65 FED. REG. 19,618 (APRIL 11, 2001).
 - 9 CONDITIONS TO QUALIFY FOR 100% MITIGATION OF GRAVITY-BASED PENALTY:
 - SYSTEMATIC DISCOVERY;
 - VOLUNTARY DISCOVERY;
 - PROMPT DISCLOSURE WITHIN 21 DAYS;
 - INDEPENDENT DISCLOSURE (BEFORE DISCOVERED BY OTHERS);
 - PROMPT CORRECTION;
 - RECURRENCE PREVENTION;
 - REPEAT VIOLATIONS INELIGIBLE;
 - NO ACTUAL HARM OR IMMINENT AND SUBSTANTIAL ENDANGERMENT; AND
 - COOPERATION WITH EPA.
 - EPA “INTERIM APPROACH TO APPLYING THE AUDIT POLICY TO NEW OWNERS,” 73 FED. REG. 44,991 (AUGUST 1, 2008).

ATTORNEY-CLIENT PRIVILEGE/ATTORNEY WORK PRODUCT PROTECTION

- DERIVED FROM RULES OF EVIDENCE AS INTERPRETED BY COURTS;
- AUDIT CAN BE PRIVILEGED AND OTHERWISE PROTECTED FROM DISCLOSURE TO THIRD PARTIES AND IN LITIGATION;
- CONSULTANTS CAN BE INCLUDED WITH PROPER PROCEDURES;
- SIMILAR PROTECTIONS TO THOSE UNDER EHS AUDIT LAW, BUT THERE ARE DIFFERENCES THAT NEED TO BE CONSIDERED WITH HELP FROM COMPETENT LEGAL COUNSEL;
- BUT NO PENALTY IMMUNITY.

SOME PRACTICAL TIPS FOR EHS AUDITS

- **DON'T START ONE UNLESS YOU ARE PREPARED TO ADDRESS WHAT YOU FIND.**
- **THINK CAREFULLY ABOUT WHETHER “THE HORSE IS ALREADY OUT OF THE BARN” BEFORE INITIATING AUDIT.**
- **BE PREPARED TO TELL THE AGENCY WHEN THE VIOLATION COMMENCED.**
- **BE PREPARED TO FIND CONDITIONS THAT PRESENT HEALTH AND SAFETY CONCERNS TO WORKERS AND/OR THE SURROUNDING COMMUNITY.**
- **UNION CONTRACTS AND OTHER CONTRACTUAL OBLIGATIONS MAY REQUIRE DISCLOSURE OF VIOLATIONS OR OTHER CONDITIONS DISCOVERED IN AN EHS AUDIT.**
- **DEFINE THE AUDIT SCOPE CAREFULLY.**
- **REPORT PROMPTLY.**
- **IF A COMPANY HAS MULTIPLE PLANTS WITH SIMILAR OPERATIONS, VIOLATIONS AT ONE PLANT MAY WELL EXIST AT THE OTHERS.**
- **THE DISCLOSURE OF VIOLATION NEEDS TO BE CAREFULLY CRAFTED.**
- **BE AWARE OF SPECIAL CONSIDERATIONS FOR CLEAN AIR ACT TITLE V PROGRAM.**

GUIDA, SLAVICH & FLORES, P.C.

The Environmental Law FirmSM

Disclaimer: The information provided in this presentation is intended solely as an educational resource, does not constitute legal advice, and should not be used as a substitute for careful review of the rules and enforcement actions themselves and consultation with competent legal and technical professionals as to site-specific circumstances. The views expressed in this presentation are solely those of the author and should not be construed as representative of the views of any other person or entity.

Copyright 2015. Joseph F. Guida. All rights reserved.

EPA's New eDisclosure Portal

***Streamlining Implementation
for Self-Disclosed Violations***

Webinars for Stakeholders

June 10, 2015

June 15, 2015

**Special Litigation & Projects Division
Office of Civil Enforcement
Office of Enforcement & Compliance Assurance**



Purpose of Webinars

- Describe EPA's plan for a new streamlined "Next Generation" approach to more efficiently process disclosed violations submitted to the Agency under the Audit Policy and the Small Business Compliance Policy
- Allow stakeholders to:
 - learn how the new eDisclosure system will be designed and implemented
 - share their views and ask questions about the approach
 - begin preparing for the expected Fall 2015 launch



Outline of the Webinar

- Overview of eDisclosure Approach
- Process and Timing
- Implementation Details
- Questions



Overview of eDisclosure Approach

- EPA believes strongly in the benefits of the Audit Policy and the Small Business Compliance Policy: to provide penalty mitigation and other incentives for companies to self-police, disclose, correct and prevent violations.
- Over the past several years, EPA has been evaluating how best to realize these benefits. Companies have suggested that EPA could streamline implementation of the Audit Policy for more routine disclosures to make the process faster, more efficient, and to save time and resources for regulated entities and EPA, while still retaining the incentives to self-police environmental problems.
- The regulated community also emphasized that a key time to encourage self-auditing and self-disclosure is when new companies are purchased or acquired because that is when companies are very motivated to fix problems and make a fresh start.



Overview of eDisclosure Approach

- EPA has decided to modernize implementation of these self-disclosure policies by creating a centralized web-based “eDisclosure” portal to meet these goals, and in a way that also will be easy for small businesses to use.
- Under the automated eDisclosure system, large and small businesses with some of the more routine types of violations will quickly get their disclosures resolved. At the same time, EPA is retaining the incentives outlined in its New Owner Policy and will continue to accept and process new owner disclosures outside the automated eDisclosure system.



Process and Timing

- After considering input received as a result of EPA's public engagement webinars, EPA will build out and target the launch of eDisclosure for the Fall of 2015.
- Simultaneous with the launch, EPA will issue a *Federal Register* notice describing in detail how EPA plans to implement the Audit Policy and Small Business Compliance Policy.
- Prior to launch, implementation of the Audit Policy, New Owner Policy and Small Business Compliance Policy remains unchanged, and EPA will evaluate on a case-by-case basis whether to enter into new audit agreements outside the New Owner context.





Existing Audit Policy Conditions

1. **Systematic Discovery** - *required for 100% penalty mitigation, otherwise only 75% mitigation*
2. **Voluntary Discovery**
3. **Prompt Disclosure** – *within 21 days of discovery*
4. **Discovery, Disclosure Independent of Government/Third Party Plaintiff**
5. **Correction and Remediation** - *within 60 days after discovery unless written agreement/order*
6. **Prevent Recurrence**
7. **No Repeat Violations** – *can't have same or closely related violation at same facility w/i past 3 yrs*
8. **Other Violations Excluded** (*serious actual harm, imminent and substantial endangerment*)
9. **Cooperation**



Existing Small Business Compliance Policy Conditions

Primary Differences from Audit Policy Conditions:

- 1. Systematic Discovery** *100% penalty mitigation even if discovery is not systematic*
- 5. Correction/Remediation** *within 90 days after discovery unless written schedule/order (maximum time allowed is 360 days, only under certain circumstances)*
- 7. No Repeat Violations** *similar 3-year bar as Audit Policy plus can't have more than one violation of any environmental requirement for past five years*

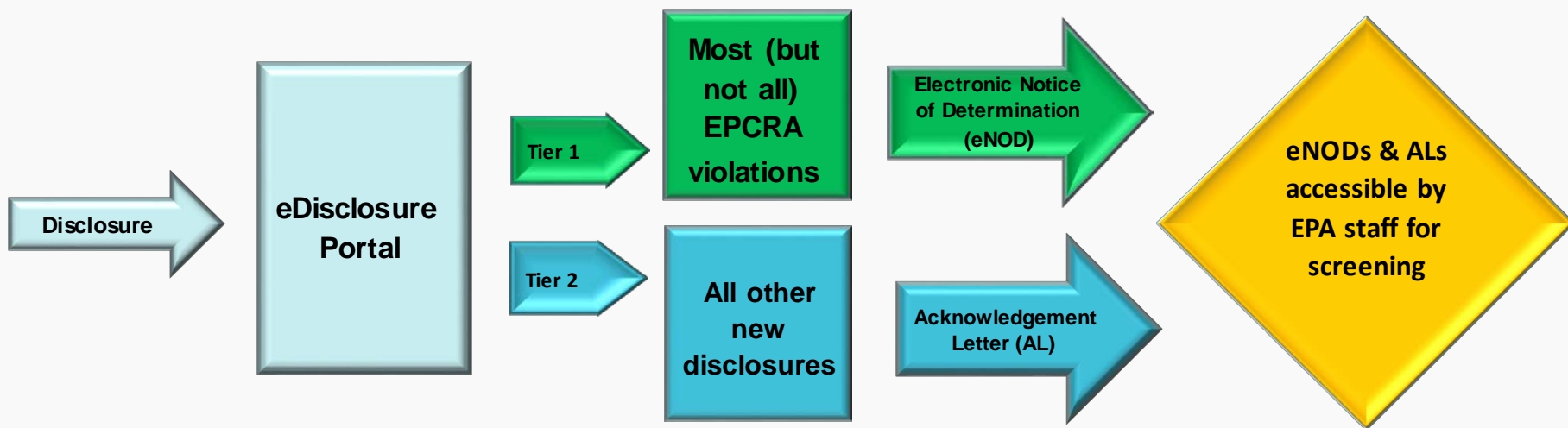


eDisclosure Implementation Details





Two-Tiered System with Different Types of Resolution



These two Tiers are paths through the eDisclosure system and should not be confused with EPCRA Tier I and Tier II inventory reports.



Tier 1 v. Tier 2

Tier 1	<p><u>Includes:</u></p> <ul style="list-style-type: none">-EPCRA violations that meet <i>all</i> Audit Policy conditions-EPCRA violations that meet <i>all</i> Small Business Compliance Policy conditions <p><u>But Does Not Include:</u></p> <ul style="list-style-type: none">- CERCLA 103/EPCRA 304 chemical release reporting violations- EPCRA violations with significant economic benefit (as defined by EPA)	<p>The eDisclosure system will automatically issue an electronic Notice of Determination (eNOD) confirming that the violations are resolved with no assessment of civil penalties, conditioned on the accuracy and completeness of the submitter's eDisclosure.</p>
Tier 2	<p><u>Includes:</u></p> <ul style="list-style-type: none">-All Non-EPCRA violations-EPCRA violations where discloser can only certify compliance with Audit Policy Conditions 2-9 (i.e., discovery was not systematic)-EPCRA/CERCLA violations excluded above	<p>The eDisclosure system will automatically issue an Acknowledgement Letter (AL) noting EPA's receipt of the disclosure and promising that EPA will make a determination as to eligibility for penalty mitigation if and when it considers taking enforcement action for environmental violations.</p>



Why Tier 1 is Limited to EPCRA Violations Meeting All Policy Conditions

- It is easy to confirm compliance with EPCRA reporting requirements.
- EPA has significant experience with providing NODs for these self-disclosed violations (about half the disclosures EPA receives involve EPCRA reporting violations).
- The regulated community suggested such violations for streamlined Audit Policy treatment.



Three-Step Process

1. Register to File With the Centralized Web-Based Portal
2. Submit Violation Disclosure Report
3. Certify Compliance (Submit Compliance Report)



Step One: Register to File With the Centralized Web-Based Portal

- Register with EPA Central Data Exchange (CDX) system.
- Existing CDX registrants who are already identity-proofed under the Cross Media Electronic Reporting and Recordkeeping Rule (CROMERR) would not be required to re-register with CDX.
- Paper identity proofing is available if electronic ID-proofing fails.



Step Two: Submit Violation Disclosure Report

- In order to be considered “prompt” under both the Audit Policy and Small Business Compliance Policy, the discloser must report online within 21 days of “discovery” that it may have violated a particular environmental requirement and the date such potential violations were discovered.
- Regulated entities may submit disclosures to give them time to determine whether a violation actually occurred and to more specifically identify the particular violation(s).
- eDisclosure will not be designed to receive or process any information claimed as Confidential Business Information (CBI), so disclosers must submit sanitized (non-CBI) information through the portal.
- Any follow-up CBI that needs to be submitted must be done manually according to EPA procedures and the requirements of 40 CFR Part 2.





Step Three: Certify Compliance (Submit Compliance Report)

- Within 60 days of submitting an initial online Audit Policy disclosure (or within 90 days of submitting an initial online Small Business Compliance Policy disclosure), the discloser ordinarily must submit a Compliance Report.
- The Compliance Report must identify the specific violations, and certify that the violations have been corrected and that the Audit Policy or Small Business Compliance Policy conditions have been met.
- The compliance reporting deadlines are subject to limited reporting deadline extensions that automatically apply when the violation correction deadline is extended (discussed later).
- The compliance reporting deadlines are different from the deadlines to correct the violations:
 - violation correction deadline: runs from date violations are **discovered**;
 - compliance reporting deadline: runs from date violations are **disclosed** (up to 21 days after discovery).



Disclosers Who Do Not Timely Certify Compliance

- A regulated entity may withdraw its disclosure before submitting its Compliance Report and certification, for example:
 - where someone submitted a disclosure and then determined that no violations actually occurred; or
 - where a Tier 2 discloser ultimately determined that it cannot certify compliance with Conditions 2-9 of the Audit Policy.
- For whatever reason, if a discloser does not timely certify compliance with conditions of the Audit Policy or Small Business Compliance Policy, the eDisclosure system automatically will:
 - record the entity's attempt to disclose violations and notify it that EPA will retain such record of violation; and
 - send the discloser a notice that the disclosure does not qualify for Audit Policy or Small Business Compliance Policy penalty mitigation through the eDisclosure system.



Can the Violation Correction Period be Extended?

For Tier 1 Disclosures: **No**

To obtain an electronic Notice of Determination (eNOD), disclosers must correct their violations:

- within 60 days of the date of discovery for those seeking penalty mitigation under the Audit Policy; or
- within 90 days of the date of discovery for those seeking penalty mitigation under the Small Business Compliance Policy.



Can the Violation Correction Period be Extended?

For Tier 2 Disclosures Pursuant to the Audit Policy: **Yes**

- Tier 2 disclosers seeking penalty mitigation under the Audit Policy can make an online request for 30 additional days (beyond the 60 days already allowed under the policy) to correct their violations, with no explanation required.
- Such requests will be considered granted at the time of the request, and the eDisclosure system will automatically extend the Compliance Report due date by an amount equal to the correction period extension (e.g., if you get 30 extra days to correct, you get 30 extra days to certify compliance).



Can the Violation Correction Period be Extended?

For Tier 2 Disclosures Pursuant to the Audit Policy: **Yes**

- Tier 2 disclosers seeking penalty mitigation under the Audit Policy can make an online request for more than 30 additional days to correct their violations, provided the violation correction date does not extend beyond 180 days after the date of discovery.
- To make such a request for an extension of more than 30 days, disclosers must include in the eDisclosure system a justification for such extension.
- Upon such request, the eDisclosure system will automatically extend the Compliance Report due date by an amount equal to the correction period extension, but the request is not considered granted or denied at the time of the request.
- EPA is more likely to scrutinize requests for extension beyond 30 additional days and ultimately may decide that correction was not prompt, if and when it considers taking an enforcement action for environmental violations.



Can the Violation Correction Period be Extended?

For Tier 2 Disclosures Pursuant to the Small Business Compliance Policy: **Yes**

- Tier 2 disclosers seeking penalty mitigation under the Small Business Compliance Policy can make an online request for 90 additional days (beyond the 90 days already allowed under the policy) to correct their violations, with no explanation required.
- Such requests are considered granted at the time of the request and the eDisclosure system will automatically extend the Compliance Report due date by an amount equal to the correction period extension (e.g., if you get 90 extra days to correct, you get 90 extra days to certify compliance).

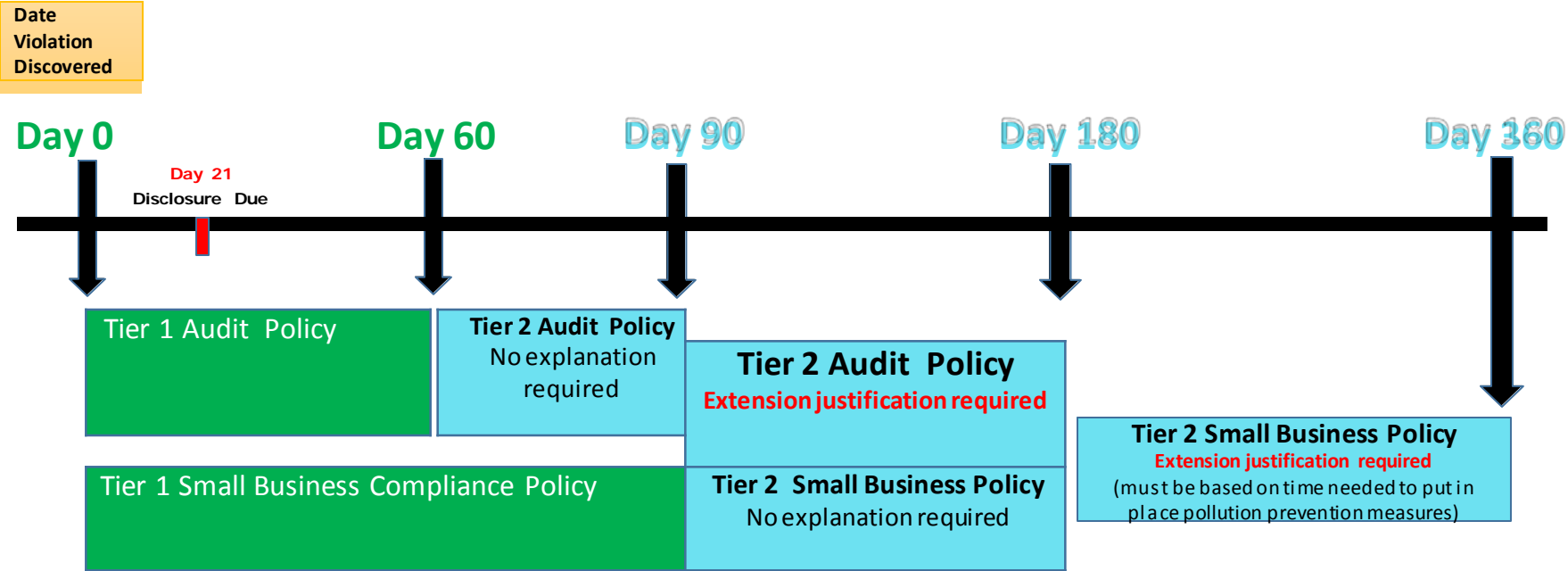


Can the Violation Correction Period be Extended?

For Tier 2 Disclosures Pursuant to the Small Business Compliance Policy: **Yes**

- Tier 2 disclosers seeking penalty mitigation under the Small Business Compliance Policy can make an online request for more than 90 additional days to correct their violations, provided the violation correction date does not extend beyond 360 days after the date of discovery.
- To make such a request for an extension of more than 90 days, disclosers must include in the eDisclosure system a justification for such extension.
- Extensions of more than 180 days after discovery must be based on the time needed to correct the violation(s) by putting into place pollution prevention measures.
- Upon such request, the eDisclosure system will automatically extend the Compliance Report due date by an amount equal to the correction period extension, but the request is not considered granted or denied at the time of the request.
- EPA is more likely to scrutinize requests for extension beyond 90 additional days and ultimately may decide that correction was not prompt, if and when it considers taking an enforcement action for environmental violations.

Violation Correction Time Periods





Post-Submission Follow-Up

Tier 1 submissions:

- EPA will spot check to ensure conformance with EPCRA the Audit Policy, the Small Business Compliance Policy, and eDisclosure requirements.



Tier 2 submissions:

- EPA will screen for significant concerns (e.g., criminal conduct, imminent hazard).
- If and when EPA decides to take an enforcement action for environmental violations, it will then make a determination as to whether the discloser is eligible for penalty mitigation.



Procedure for Processing Pre-Existing Disclosures

- EPA will allow regulated entities with pre-existing unresolved EPCRA disclosures to resubmit their disclosures as a Tier 1 disclosure through the eDisclosure system within 90 days after launching the portal (in such disclosure they must certify that they corrected their violations within 60 days of when they were discovered).
- For pre-existing disclosures subject to an audit agreement or significant settlement negotiations, EPA will resolve such disclosures with a Notice of Determination (NOD), Consent Agreement and Final Order (CAFO), or Consent Decree (CD).
- All other pre-existing disclosures (including pre-existing EPCRA disclosures that are not resubmitted within 90 days of the eDisclosure launch) will be treated as a Tier 2 disclosure and the *Federal Register* Notice announcing the launch of eDisclosure will serve as an Acknowledgement Letter.



New Owner Disclosures

- EPA's approach to resolving New Owner disclosures is not changing.
- Pre-existing New Owner disclosures will not be resolved through the eDisclosure system but instead will be resolved manually.
- New owners may elect to use the portal to disclose future violations, but EPA also will continue to accept and manually process new owner disclosures outside of the eDisclosure system pursuant to EPA's New Owner Policy and EPA will enter into audit agreements as appropriate with new owners.



EPA Approach to FOIA Requests Seeking Disclosures

- EPA has always considered *resolved* Audit Policy disclosures as publicly releasable under FOIA and plans to continue such policy (see 1997 Memo “Confidentiality of Information Received Under Agency’s Self-Disclosure Policy”).
- The 1997 memo also states that EPA can withhold *unresolved* disclosures pursuant to the FOIA “law enforcement proceeding” exemption, Exemption 7(A).
- In response to any requests for individual *unresolved* disclosures, EPA will determine on a case-by-case basis whether it reasonably foresees that release would harm an interest protected by a FOIA exemption.
- EPA generally expects to make Tier 1 and Tier 2 disclosures publicly available within a relatively short period of time after their receipt.



Next Steps

**Finish building
and testing portal**

(Summer/Fall 2015)

**Publish *Federal
Register* Notice
launching and
describing eDisclosure**

(Fall 2015)

Questions





Contact Info



Phil Milton

milton.philip@epa.gov

202-564-5029

Please remember to fill out the conference survey. This will be sent to you by email.

<https://www.surveymonkey.com/r/2015OGENV>

Conference participants are eligible for up to 13 contact hours 1.3 CEUs. Forms will be available after lunch on Wednesday at the registration area.

Return completed forms at the conclusion of the conference.