ENVIRONMENTAL QUALITY

THE ENVIRONMENTAL
SELF-DISCLOSURE INCENTIVE POLICY

BACKGROUND

The Arkansas Department of Energy and Environment (E&E), Division of Environmental Quality (DEQ) believes that voluntary compliance with environmental laws, regulations, and permit requirements is necessary to effectively protect human health and the environment of the state. DEQ also believes that voluntary compliance can be achieved through the adoption and implementation of regularly scheduled, systematic, and objective self-policing activities known as environmental audits or environmental management systems designed to monitor and maintain compliance with state law and regulations. **In an effort to encourage members of the regulated community to adopt and implement environmental management systems, DEQ adopts this Environmental Self-Disclosure Incentive Policy.**

This policy is developed to guide DEQ in the exercise of its enforcement discretion and sets out the terms under which DEQ may reduce the amount of civil penalties contained in consent administrative orders following voluntary self-evaluation and self-disclosure of environmental violations. DEQ believes this policy will encourage candid self-assessment, prompt disclosure, and expeditious correction of environmental violations, which in turn will enhance protection of human health and the environment.

DEFINITIONS

As used in this policy:

1. "**Civil Penalty**" or "**Penalty**" means a monetary assessment contained in a consent administrative order for a violation of any environmental law or regulation or permit condition except:
   a. any civil penalty assessed pursuant to Chapters 57 and 58 of Title 15 of the Arkansas Code Annotated and any regulation promulgated thereunder; or
   b. any penalty or portion of a penalty assessed for the pecuniary gain or economic or competitive advantage realized as a result of the violation.
2. "**Disclosure**" means a written communication to DEQ by a regulated entity subject to the compliance requirements of state environmental laws, regulations, or permits, which conveys information concerning a violation or instance of noncompliance.
3. "**Environmental audit**" means the same as defined in § 8-1-302(3).

4. "**Environmental management system**" means a voluntarily adopted documented system of procedures, standards, or policies not otherwise required by environmental law, regulation, or permit condition, through which a regulated entity monitors its environmental performance in order to prevent, detect, and correct violations. Such documentation shall include:
   a. compliance procedures, standards, and policies that identify how employees and agents are to meet the requirements of environmental laws, regulations, permits, or enforceable agreements;
   b. assignment of overall responsibility for overseeing compliance with procedures, standards, and policies and assignment of specific responsibility for assuring compliance with environmental laws, regulations, or permits;
   c. mechanisms for systematically assuring that procedures, standards, and policies are being carried out, including monitoring and auditing reasonably designed to detect and correct violations, periodic evaluation of the overall performance of the environmental management system, and a means for employees or agents to report violations of environmental requirements without fear of retaliation;
   d. efforts to communicate effectively the regulated entity's procedures, standards, and policies to all employees and agents;
   e. appropriate incentives to managers and employees to perform in accordance with the compliance procedures, standards, and policies; and
   f. procedures for the prompt and appropriate correction of any violations and any necessary modifications to the environmental management system to prevent future violations.
5. "**Regulated entity**" means any person or entity subject to the compliance requirements of state environmental law, regulation, or permit.
6. "**Systematic discovery**" means the detection of a potential violation through an environmental audit or an environmental management system that reflects a regulated entity's due diligence in preventing, detecting, and correcting violations.

INCENTIVES FOR SELF-POLICING

Where regulated entities meet the requirements and conditions of this policy, DEQ may mitigate the gravity-based component of a civil penalty contained in a consent administrative order. Civil penalties that DEQ assesses comprise two elements: the economic benefit component and the gravity-based component. The economic benefit component reflects the economic gain or competitive advantage derived from violating a state law, regulation, or permit requirement.[1] Gravity-based penalties are that portion of the penalty over and above the economic benefit. Under this policy, DEQ may mitigate the gravity-based penalties for violations discovered systematically, recognizing that environmental auditing and management systems play a critical role in protecting human health and the environment by identifying, correcting, and ultimately preventing violations.

1. In Arkansas, as an alternative to the statutory limits on civil penalties, DEQ may seek to recover civil penalties equal to the amount of pecuniary gain derived from committing the violation. Under these circumstances, DEQ would not mitigate the civil penalty.

DEQ reserves the right to collect any pecuniary gain or economic benefit that may be realized as a result of a violation, even where the regulated entity meets all the terms of this policy. DEQ retains its discretion to recover the pecuniary gain or economic benefit for two reasons. First, facing the risk that DEQ will recoup economic benefit provides an incentive for regulated entities to timely comply with environmental requirements. Second, collecting the economic benefit protects law-abiding companies from being undercut by their noncomplying competitors, thereby preserving a level playing field.

Where regulated entities meet all the requirements and conditions of this policy, DEQ may mitigate up to 100 percent of the gravity-based component of a civil penalty contained in a consent administrative order. Where regulated entities meet all of the requirements and conditions of this policy except the first condition systematic discovery of violations, DEQ may mitigate up to 75 percent of the gravity-based component of a civil penalty contained in a consent administrative order.

SECTION A:

CONDITIONS

A regulated entity must meet the following eight conditions in order for DEQ to mitigate the gravity-based penalties under this policy.

1. **Systematic Discovery Through an Environmental Audit or an Environmental Management System**

   The violation must have been discovered through either (a) an environmental audit, or (b) an environmental management system that reflects due diligence in preventing, detecting, and correcting violations.

   Environmental management systems that train and motivate employees to prevent, detect, and correct violations on a daily basis are a valuable complement to periodic auditing. Where the violation is discovered through an environmental management system and not through an audit, the disclosing entity should be prepared to document how its system meets the due diligence requirement and how the regulated entity discovered the violation through its system. DEQ recognizes that a variety of environmental management systems are feasible, and it will determine whether basic due diligence criteria have been met in deciding whether mitigation under this policy is appropriate. As a condition of penalty mitigation, DEQ may require that a description of the regulated entity's environmental management system be made publicly available. DEQ believes that the availability of such information will allow the public to judge the adequacy of environmental management systems, lead to enhanced compliance, and foster greater public trust in the integrity of these systems.

2. **Voluntary Discovery**

The violation disclosed must have been identified voluntarily, not through a legally mandated monitoring, sampling, or auditing procedure that is required by statute, regulation, permit, judicial, or administrative order. The policy provides three specific examples of discovery that would not be voluntary and therefore would be excluded from eligibility for penalty mitigation: emissions violations detected through a required continuous emissions monitor, violations of NPDES discharge limits found through prescribed monitoring, and violations discovered through a compliance audit required to be performed by the terms of a consent administrative order or consent decree. The exclusion does not apply to violations that are discovered pursuant to audits that are conducted as part of a comprehensive environmental management system required under a consent administrative order or consent decree. In general, DEQ supports the implementation of comprehensive environmental management systems that promote compliance, prevent pollution, and improve overall environmental performance. Precluding the availability of this policy for discoveries made through a comprehensive environmental management system that has been implemented pursuant to a consent administrative order or consent decree might discourage entities from agreeing to implement such a system. The voluntary requirement applies to discovery only, not reporting.

3. **Prompt Disclosure**

A regulated entity is required to fully disclose the violation in writing to DEQ within 21 calendar days (or within such shorter time as required by law) after the entity discovered that the violation has, or may have, occurred. If the 21st day after discovery falls on a weekend or state holiday, the disclosure period will be extended to the first business day following the 21st day after discovery. If a statute or regulation requires the regulated entity to report the violation in fewer than 21 days, disclosure must be made within the time limit established by law.

The 21-day disclosure period begins when the entity discovers that a violation has, or may have, occurred. The trigger for discovery is when any officer, director, employee, or agent of the facility has an objectively reasonable basis for believing that a violation has, or may have, occurred. The "objectively reasonable basis" standard is measured against what a prudent person, having the same information as was available to the individual in question, would have believed. It is not measured against what the individual in question thought was reasonable at the time the situation was encountered. If an entity has some doubt as to the existence of a violation, the recommended course is for the entity to proceed with the disclosure and allow the regulatory authorities to make a definitive determination.

It is critical for DEQ to receive a timely report of violations in order to have clear notice of the violations and the opportunity to respond if necessary. Prompt disclosure also is evidence of the regulated entity's good faith in wanting to achieve or return to compliance as soon as possible. This policy cannot be used to justify delayed reporting. When violations of reporting requirements are voluntarily discovered, they must be promptly reported.

4. **Discovery Must Be Made Independently**

   A regulated entity must discover the violation independently. That is, the violation must be discovered and identified before DEQ or another government agency likely would have identified the problem either through its own investigation or from information received through a third party. This condition requires regulated entities to take the initiative to find violations on their own and disclose them promptly instead of waiting for an indication of a pending enforcement action or third-party complaint. For example, a disclosure will not be independent where DEQ is already investigating the facility in question. Other examples of situations in which discovery is not considered independent are where a citizens' group has provided notice of its intent to sue, where a third party has already filed a complaint, where a whistleblower has reported the potential violation to government authorities, or where discovery of the violation by the government is imminent.

5. **Correction and Remediation**

   Upon discovery of the violation, a regulated entity must voluntarily and timely take immediate and appropriate action to correct the violation. The regulated entity should correct the violation within 60 calendar days from the date of discovery, or as expeditiously as possible. If a shorter time frame for response to the violation is required by law, regulation, or permit condition, then the regulated entity must correct the violation within the shorter period of time. Additionally, DEQ retains the authority to order an entity to correct a violation within a specified time shorter than 60 days whenever correction in a shorter period of time is necessary to protect public health and the environment adequately.

   A regulated entity must remedy any harm caused by the violation. Correction and remediation include responding to spills and carrying out any removal or remedial actions required by law. Within 60 calendar days from the date of discovery of the violation, the regulated entity must submit accurate and complete documentation acceptable to DEQ showing how and when the violation was corrected.

   DEQ recognizes that some violations may take longer than 60 days to correct. If more than 60 days will be required, the disclosing entity must so notify DEQ in writing and DEQ may grant an extension of time prior to the conclusion of the 60-day period. **In all cases, the regulated entity will be expected to do its utmost to achieve or return to compliance as expeditiously as possible.** If a regulated entity cannot return to compliance within 60 calendar days of discovery, then the entity must enter into a consent administrative order to remedy the violation with DEQ within 120 calendar days of discovery.

   If correction of a violation depends upon issuance of a permit that has been applied for but not issued, DEQ will, where appropriate, make reasonable efforts to secure timely review of the permit.

6. **Prevent Recurrence**

   The regulated entity must promptly takes measures to prevent the recurrence of the violation and submit documentation acceptable to DEQ showing the steps taken to prevent the violation's recurrence and when those steps were implemented. This documentation must be submitted to DEQ within 60 calendar days of discovery of the violation.

7. **No Repeat Violations**

   A regulated entity must not have committed the same, or a closely-related, violation within the past three years. The three-year period begins to run when the government or third party has given the violator notice of a specific violation, without regard to when the original violation cited in the notice actually occurred. Examples of notice include a complaint, consent order, notice of violation, receipt of a written inspection report or findings of an inspection, or receipt of notice of a citizen suit.

   This policy shall not be available to repeat offenders. This repeat violation exclusion benefits both the public and law-abiding entities by ensuring that penalties are not mitigated for those regulated entities that have previously been notified of violations and fail to prevent repeat violations.

8. **Cooperation**

   The regulated entity must cooperate with DEQ and provide information as DEQ requests to confirm the regulated entity's compliance with the terms of this policy. In order for DEQ to apply this policy fairly, it must have sufficient information to determine whether its conditions are satisfied in each individual case.

SECTION B:

CONDITIONS UNDER WHICH PENALTY MITIGATION SHALL NOT BE ALLOWED

Penalty mitigation under this policy shall not be allowed if any of the following conditions exist:

1. The violation creates an imminent and substantial endangerment to human health or the environment;
2. The violation creates serious actual harm to human health or the environment;
3. The violation is deliberate or intentional;
4. The facts and circumstances surrounding the violation indicate the lack of a good faith attempt to understand and comply with applicable state environmental laws or regulations, or permit requirements through environmental management systems appropriate to the size and nature of the activities engaged in by the regulated entity;
5. The regulated entity is routinely out of compliance with environmental laws, regulations, or permit conditions; or
6. The violation violates the specific terms of any judicial or administrative order.

POLICY IS FOR SETTLEMENT PURPOSES ONLY

This policy is intended as guidance for the assessment of civil penalties in settlement negotiations of consent administrative orders only. This policy is not intended, nor can it be relied upon, to create any rights enforceable by any party in litigation with DEQ before any administrative body or any court. DEQ may decide to follow guidance in this policy or to act at variance with it based on its analysis of the specific facts presented. This policy may be revised, updated, or revoked at any time by DEQ.

CONFLICTS

All conflicts between this policy and any regulatory program delegation or program authorization from the United States Environmental Protection Agency (USEPA) to DEQ shall be resolved in favor of the agreements between DEQ and the USEPA.

COMPLIANCE INCENTIVES

If a regulated entity does not meet all of the conditions for penalty mitigation under this policy, DEQ may consider the actions of the regulated entity taken to correct the violation and prevent its recurrence in mitigation of any civil penalty assessed under media-specific enforcement policies.

POLICY INAPPLICABLE TO VIOLATIONS DETECTED DURING PRE-ACQUISITION REVIEW

This policy does not apply to violations discovered while performing an audit or investigation of a facility or entity prior to its acquisition. However, this policy does not preclude penalty mitigation of violations discovered during such a pre-acquisition review, where, in a timely manner, those violations are discovered, disclosed to DEQ, and corrected appropriately.

Self Disclosures for consideration under this policy should be submitted through the E&E SEEK site. Please email questions or requests for additional information to ee.selfdisclosurepolicy@arkansas.gov