



Audits and Self-Disclosure

MASSACHUSETTS CHEMISTRY & TECHNOLOGY ALLIANCE
CONFERENCE

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Overview

- Case Study: Acme Co.
- Why Perform Audits?
- Self-policing policies: Mass. DEP and US EPA
 - Eligibility Criteria
 - Benefits
- Common Pitfalls
- Responding to Audit Findings

Introduction to Acme Co.

- Corporate headquarters in Roadrunner, NM
- Makes a variety of products including explosives and triggers, glue, magnets, costumes, boxed tornados, and rocket-propelled skates.
- You are the new EHS director at its Massachusetts facility.
- You have been asked to evaluate the facility's compliance and address any issues with minimal exposure.



Introduction to Acme Co.

- On your first week on the job, you learn:
 - There are no records of any EPCRA filings from 2013 on.
 - An addition to the facility was built in 2015.
 - A new bird-trap glue line was added in 2016. While the glue is very effective, it is very high in VOCs.



What to do?



Why Perform Audits?

- The most common reason: Search for knowledge
- With knowledge, improvements can be made, opportunities secured, and risks or exposures managed
- Other reasons
 - Consistent with industry or company best management practices (e.g. Responsible Care)
 - Transactional due diligence – buy/sell/lease/joint venture/finance
 - Preparation for or response to agency inspections
 - Response to employee or third party complaints
 - Required by law, permit, judgment, settlement, consent
 - EPA/OSHA/State Agency – Audit Policy Incentives
 - DOJ – Self-disclosure Considerations

To disclose or not to disclose?

- What have you “discovered”?
- Driver: “prompt disclosure” deadline
 - Deadline runs from “discovery” ... discovery of what?
 - Beware: EPA emphasizes this includes possible non-compliance
 - Practical problems from such an approach



Self-Policing Policies: EPA and MassDEP

- Substance of both programs substantially the same
 - Basic benefits
 - Eligibility criteria
- Not identical
 - EPA eDisclosure system
 - Two categories of violation for automatic treatment

Eligibility Criteria

- In order to be eligible for the incentives discussed above, the following conditions must be met:
 - Systematic discovery
 - Voluntary discovery
 - Prompt disclosure
 - Independent discovery
 - Prompt correction/remediation (60 days)
 - Prevent recurrence
 - No repeat violations
 - No harm to public or imminent and substantial endangerment
 - Cooperation

Basic Benefits

- Gravity-based penalty waived or reduced 75%
 - Policy is waive gravity-based penalties but collect economic benefit
- No criminal recommendations
 - Except in cases of egregious or bad-faith behavior
 - Only applicable to disclosing entities, not to individuals
- No routine request for audit reports

Some Common Audit Pitfalls

- Use of “bad words” / admissions (“spill” ... “release” ... “violation”)
- Failure to recognize potential triggers for additional action
- Not preserving confidentiality through the use of a control group and process
- Lack of preparation for reporting obligations
- Failure to understand and utilize agency protections

Some More Common Audit Pitfalls

- Creation of a potential “smoking gun” in the form of an audit report
- Not recognizing the “spectrum” of compliance options that may be available
- Appearing to benefit economically from noncompliance
- Failure to adequately prepare for an audit

Responding to Audit Findings

- **Identify Corrective Measures:**
 - Evaluate options (including second opinions)
 - Implement as appropriate
 - Remain aware of deadlines
 - Document completion and costs
- **Continue to Fine-Tune Audit Procedures**
 - Documentation/communications protocols
 - Team members (participation and performance)
 - Training
 - Lessons learned

Closing Thoughts on Audits

- Understand value of and corporate preference for managing or protecting sensitive information
- Understand legal and policy triggers for further involving corporate EHS and legal counsel
- Involve corporate EHS, consultants, and lawyers early, starting with the pre-audit planning process
- Get documentation in order
- Understand what you're getting into and how you'll get out of it before you start
- Establish, maintain and continue to refine the control process
- Take advantage of agency protections and a job well done

Questions?

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