

Environmental  
Compliance  
Navigator

# 2024™

*Presented by*

**AARCHER®**

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# Audit Opportunities: If the Tool Fits . . . Use It

# Agenda

- Introduction
- Scope
- Nine Conditions for Policy to apply
- New Owners
- Small Business
- Implementation - 'How to' use the Policy
- Pros/Cons of using the Policy
- Factors to Consider
- EPA info and links



# Introduction

- EPA’s “Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations” - commonly known as the ‘Audit Policy’ or ‘Policy’
- Purpose: “to enhance the protection of human health and the environment by encouraging regulated entities to voluntarily discover, disclose, correct and prevent violations of Federal environmental requirements.”
- Incentives to use the Policy:
  - ◇ elimination or reduction of gravity-based penalties,
  - ◇ no recommendation for criminal prosecution, and
  - ◇ no routine requests for audit reports
- EPA recognizes that they are resource-limited; the Policy supports/encourages the regulated community to utilize compliance or environmental management systems (CMSs/EMSs) to regularly audit their facilities

- **The Audit Policy does not take precedence over EPA’s normal enforcement response policies (ERPs); however, EPA:**
  - ◇ in almost all circumstances uses the Policy for penalty mitigation; and
  - ◇ does not use Policy disclosures for enforcement leads
- **Recall background on normal ERPs’ penalty calculations:**
  - ◇ Two components - ‘gravity’ of violation, and ‘economic benefit of non-compliance’
  - ◇ “Gravity” is the nature, duration, environmental, health and safety impacts of the violation(s), good faith efforts to promptly correct/remedy the violation, and the business’s overall record of compliance
  - ◇ “Economic benefit of non-compliance” is the economic benefit or advantage gained over the business’s competitors
- **Recall interaction between Federal and States’ audit and self-disclosure policies**
  - ◇ If a State is delegated/authorized for environmental programs (from EPA), State usually has the lead on enforcement
  - ◇ If the State also has an audit/self-disclosure policy akin to EPA’s, State policy may be best
  - ◇ For EPCRA violations (no State equivalent), must use EPA Policy if you choose to use it
  - ◇ Must check this interaction if you are considering using State and/or EPA audit policies

# Scope

- Civil environmental violations
- May apply to potential criminal violations in rare circumstances (after DOJ review and approval)
- Used by EPA to guide settlement actions
  - ◇ Even if all Policy conditions not met, and/or
  - ◇ EPA decides later to take some sort of enforcement action on independent information (Note: EPA does not routinely use disclosures under the Policy for enforcement leads)
- Policy is just that: guidance policy (that EPA follows), but not regulation
- Limitations/exclusions:
  - ◇ Repeat violations (within certain time limits)
  - ◇ Violations causing serious actual harm or imminent and substantial endangerment

# Nine Conditions for Coverage under the Policy

## 1. Systematic Discovery

- Through an environmental audit or a Compliance Management System (CMS)
- CMS = entity's documented systematic efforts to prevent, detect, and correct violations (think ISO 14001)
- CMS must meet basic due diligence



- **NOTE: If you find a violation - but not via audit or CMS - YOU MAY STILL QUALIFY FOR A 75% REDUCTION OF THE GRAVITY-BASED PENALTY**

## 2. Voluntary Discovery

- Discovery of the violation must not be from any requirement contained in:

- ◇ permit
- ◇ law or regulation
- ◇ judicial or administrative order
- ◇ consent decree

- Can be discovered via an audit or CMS that is/was required under a settlement agreement
- Applies to discovery only, not reporting: if reporting was required, file the report ASAP (e.g. EPCRA)





### 3. Prompt Disclosure

- **Within 21 (calendar) days after discovering a violation occurred or may have occurred**
- **Clock starts 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.”**
- **EPA may allow for more than 21 days under exceptional or complex matters (upon notice to EPA within 21-day window)**
- **Discussion point: who decides when and if a violation occurs, and who decides to use the Policy**
  - ◇ violation occurs - must be person(s) familiar with the specific requirements, process, and equipment
  - ◇ use the Policy - will likely include mid- to upper-level management, depending on organization, chain-of-command, and authority delegations

## 4. Independent Discovery and Disclosure

- **Independent of government or 3<sup>rd</sup> party actions:**
  - ◇ Inspections, investigations, citizen suit notice, 3<sup>rd</sup> party complaint, whistleblower complaint, or imminent discovery by regulatory agency
- **Multi-facility entities:** can potentially use Audit Policy at one facility even if another facility doesn't qualify because of one of the above
- **Request for Information (RFI):** If facility has received one, it still may qualify for Audit Policy (fact specific)

## 5. Correction and Remediation

- Fix and remediate (if applicable) within 60 days
- If more time needed, make the request to EPA and justify (complex fix, new or major modifications to equipment, capital required, etc.)
  - ◊ EPA may want an agreement on timing, fix details, etc.
- EPA can (and does) allow up to 180 days to correct/remediate if justified; however, 180 days is the maximum amount of time allowed under the Audit Policy
- Even if fix/remediate goes beyond 180 days, EPA recommends use of the Audit Policy mechanism (eDisclosure) - which will be considered if EPA decides to take enforcement action (using independent information)
- Discussion point: what if the fix will take longer than 180 days?

## 6. Prevent Recurrence

- **Must describe and certify steps to prevent recurrence of the violation, which may include:**
  - ◇ Process and/or O & M changes
  - ◇ Equipment mods
  - ◇ New equipment (including pollution control devices)
  - ◇ Permit changes
  - ◇ Improvements to auditing program or CMS/EMS
  - ◇ Other?



## 7. No Repeat Violations

- Same or similar violation has not occurred within last 3 years (single facility)
- Multi-facility organization: same or similar violation has not occurred as part of a pattern at the facilities within last 5 years
- Violation =
  - ◇ any prior violation of federal, state, or local environmental law or regulation via judicial or administrative order, consent decree, settlement agreement, Notice of Violation, or plea agreement
- EPA intends these 3- and 5-year periods as bright lines

## 8. Other Violations Excluded

- Violations that result in serious actual harm to the environment or which may have posed an imminent and substantial danger to the public or environment
- Violations of the terms of a prior judicial or administrative order, consent agreement, or plea agreement
- Release of pollutants to the environment may still qualify under the Policy (if they do not result in serious or potential harm)



## 9. Cooperation

- **Entity must cooperate with EPA**
  - ◇ Provide necessary information to determine if Policy applies
  - ◇ Verify fix/remediation in progress or complete
- **It is extremely rare that EPA requests audit reports (only when entity not providing adequate info)**
- **If a potential criminal violation exists, EPA will expect a full data dump, and at some point likely ask DOJ to review**



# New Owners

- In August 2008, EPA issued: “Interim Approach to Applying the Audit Policy to New Owners”. Modified 5 of the 9 conditions within Audit Policy
- Contains specific incentives for New Owners:
  - ◇ Greater potential penalty mitigation
  - ◇ Bigger range of violations that may qualify
  - ◇ More time to correct/remediate violations
- New Owners
  - ◇ Can have a ‘clean start’
  - ◇ Were not responsible for prior owner’s conduct/compliance
  - ◇ Should perform due diligence to know trouble spots and potential issues before purchase
  - ◇ May have funding available to address problems
- Definition of New Owner - prior to the transaction:
  - ◇ Not responsible for environmental compliance and did not cause the violation(s)
  - ◇ Violation(s) originated with prior owner
  - ◇ Buyer and Seller had no majority ownership share of the other, and no corporate parent



- **Potential penalty mitigation**
  - ◇ Must report violations OR enter into an audit agreement with EPA
  - ◇ No ‘economic benefit’ penalties for delayed capital equipment costs if violations corrected within 60 days (or later if EPA agrees)
  - ◇ May still have some ‘economic benefit’ penalty for avoided O & M costs AFTER closing transaction
  
- **Range of Violations that can qualify**
  - ◇ “Other Violations Excluded” condition modified to allow violations that were serious actual harm or imminent substantial endangerment . . . UNLESS a fatality, community evacuation, or other catastrophic event
  
- **Time to correct violations: 9 months (or later if EPA agrees)**
  
- **Plus (common sense) - no ‘repeat’ violations triggered for prior owner’s violations**



# Small Business

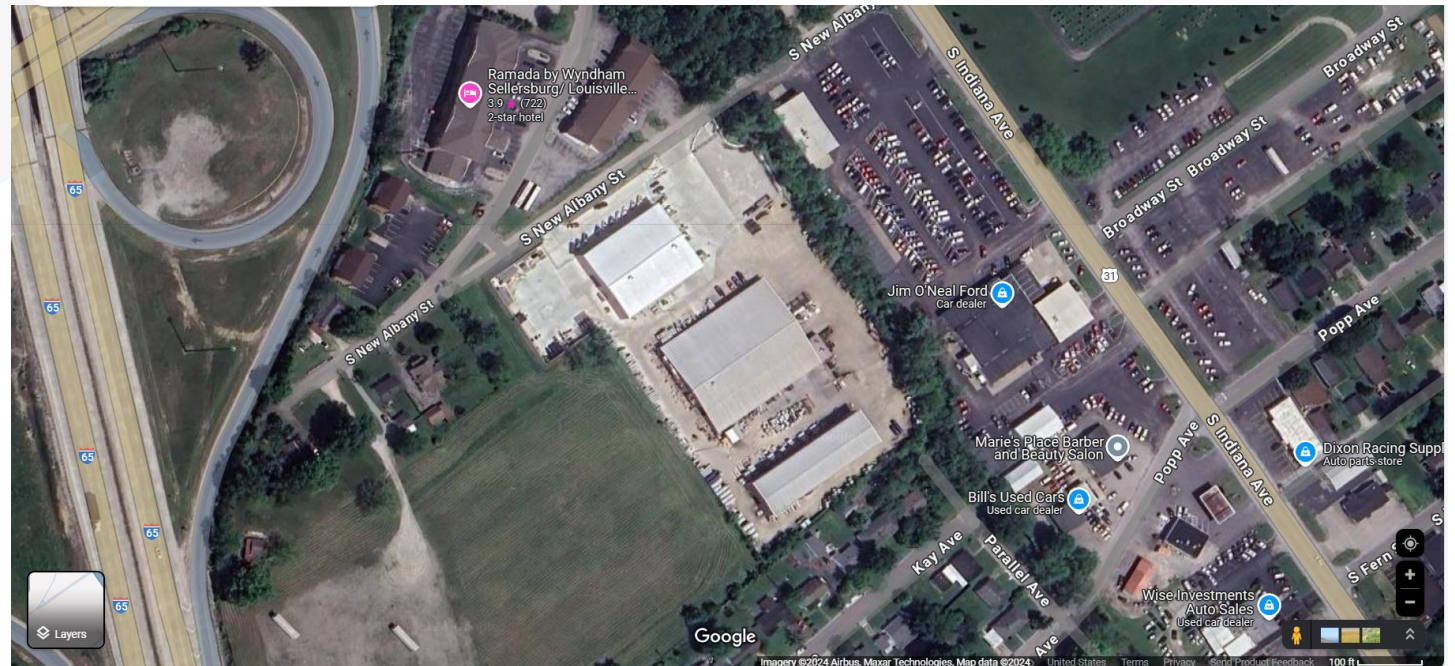
- In April 2000, EPA issued: “Small Business Compliance Policy”. Modified 2 of the 9 conditions within Audit Policy
- EPA recognizes small businesses may not have significant environmental or audit expertise
- Small business = “ . . . person, corporation, partnership, or other entity that employs 100 or fewer individuals (across all facilities and operations owned) . . . ”
  - ◇ Includes government entities and other organizations

- **Modified Conditions:**

- ◇ Discovery is Voluntary - can be through an audit OR after receiving compliance assistance (from regulatory agencies or 3<sup>rd</sup> parties) via training and provided checklists, mentoring programs, establishing an audit program or CMS, etc.
- ◇ Correction and Remediation - up to 90 days; can request extension up to 180 days and can request an additional 180 days if pollution prevention modifications are made

- If conditions met, 100% (gravity) penalty mitigation.

- Economic benefit penalty (if any) can be reduced if unable to pay

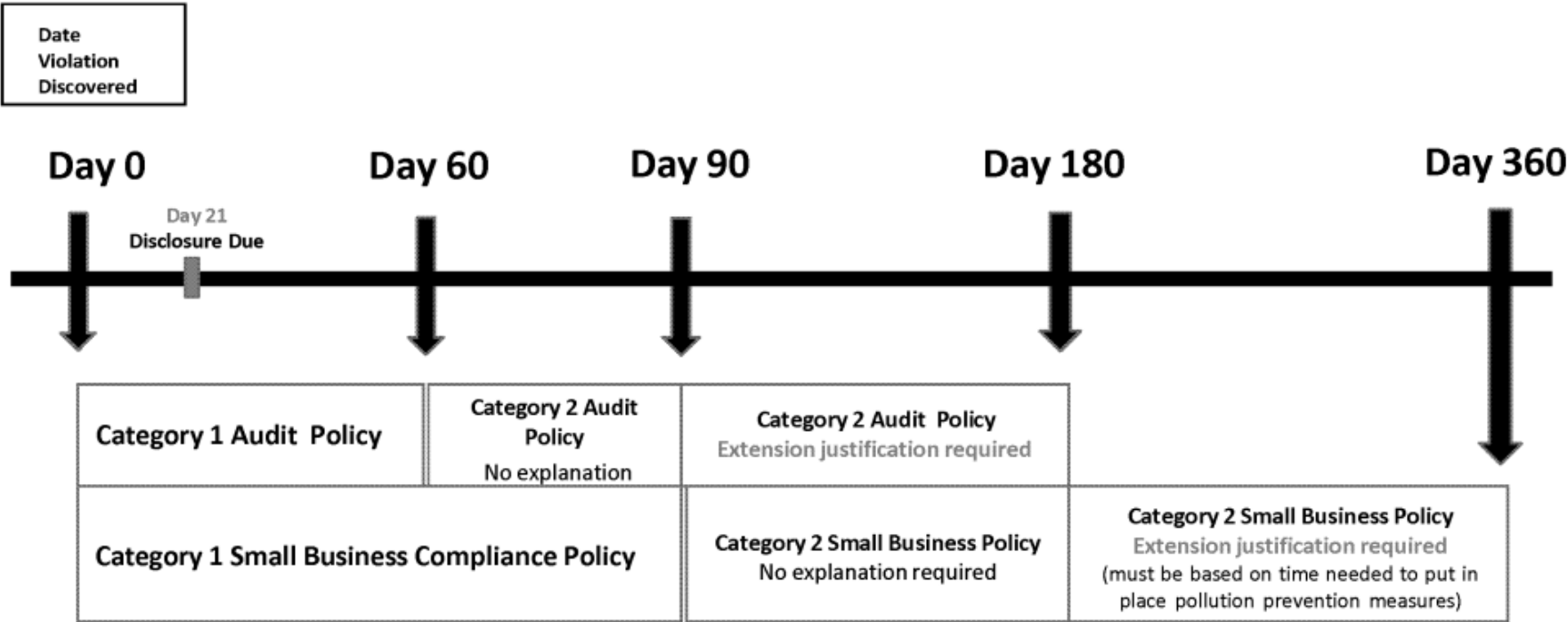


# Implementation - “How to” use the Policy

- EPA launched web-based ‘eDisclosure’ system in December 2015
  - ◇ For existing owners and Small Business owners
  - ◇ New Owners must report manually to EPA Region(s)
- To use:
  - ◇ Register facility in EPA’s Central Data Exchange (CDX). Facility may already be registered as CDX system is used for multiple required reporting obligations.
  - ◇ Submit a Voluntary Disclosure (describe violation details, add email addresses for notices, and certify compliance)
- Process:
  - ◇ Disclosures are: Category 1 (minor, e.g., simple EPCRA violations), or Category 2 (all others)
  - ◇ Cat. 1: EPA reviews (some) and issues ‘electronic Notice of Determination’ (eNOD)
  - ◇ Cat. 2: Entity/facility certifies compliance with Policy conditions  
EPA reviews FOR IMMINENT HAZARD AND POTENTIAL CRIMINAL CONDUCT ONLY  
If Policy conditions met - EPA issues an Acknowledgement Letter; if conditions not met, EPA issues an Ineligibility Letter
  - ◇ Benefit of penalty mitigation comes into play if, and when, EPA decides to take enforcement action (based on info other than in eDisclosure submittal)

- Note: CBI must be sanitized prior to info entry into eDisclosure; EPA will contact you if they need more info
- Link to 'eDisclosure' info: [EPA's eDisclosure | US EPA](#)

# Violation Correction Time Periods



Note that while the deadline for correcting violations runs from the date of violation discovery, the deadline for certifying compliance runs from the date of the disclosure (which could be up to 21 days after discovery).

Figure 1

# Pros/Cons of using the Policy

- Pros

- ◇ Reduction or elimination of ‘gravity’ portion of penalty
- ◇ Some certainty regarding outcome/closure of matter
- ◇ Enhanced public perception
- ◇ Enhanced Stakeholder perception
- ◇ Improve (or start off on good foot) regulatory relationships
- ◇ If New Owner - can be significant cost savings and good start in community and with regulators

- Cons

- ◇ 21-day reporting deadline can be difficult
- ◇ eDisclosure portal not especially user-friendly
- ◇ Public/media scrutiny can raise reputational risk
- ◇ Corrective actions can be expensive and time-sensitive
- ◇ Documentation and recordkeeping
- ◇ Potential regulatory enforcement (although not common from using the Policy)
- ◇ New Owners: potential for audit agreement with EPA (could mean regulators reviewing your CMS or auditing protocols)



# Factors to consider regarding using the Policy

- **Facts of the incident/violation**
  - ◇ Simple EPCRA report or significant pollutant release? Complicated process? New or old issue?
  - ◇ What actually happened? How long will root cause analysis take?
  - ◇ What regulation(s) or permit term(s) violated?
  - ◇ Single or multiple facilities?
- **Will 21-day reporting deadline be an issue? Who decides violation happened and who decides to use the Policy?**
- **What is the fix and is remediation needed?**
  - ◇ Easy or difficult? Any ideas on how long it may take?
  - ◇ Is capital required? If so, what is budgeting decision process and lead time?
  - ◇ Permit modification(s)? How long will that take?
- **Will the fix take longer than 180 days? Or 360 days for small business?**

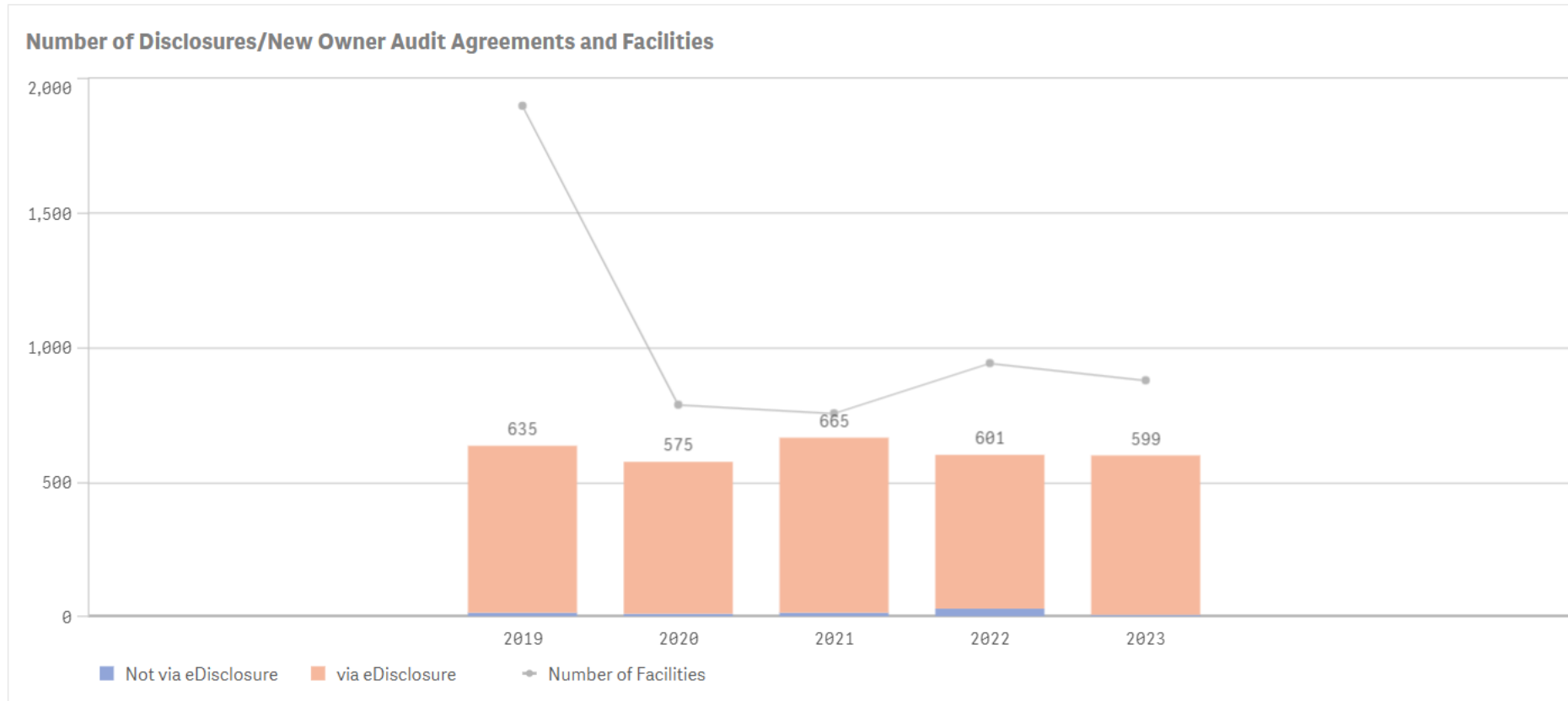


- **Is there a potential for some economic benefit to the noncompliance?**
- **Does the State have delegated authority for environmental program, and does it have an Audit Policy? If no to either, EPA Policy likely only choice**
- **Are there any reasons to suspect your industry and/or facility is/could be targeted?**
- **Other factors specific to your facility and organization**

# EPA Info, Links and POC



EPA Voluntary Disclosure Program: Number of Disclosures/New Owner Audit Agreements and Facilities  
FY 2019 – FY 2023



**Highlights:**

- In FY 2023, 599 voluntary disclosures and or new owner audit agreements covering violations at 878 facilities were made pursuant to EPA's self-disclosure policies.
- The number of facilities may vary per year and can be influenced by a few New Owner Audit Agreements. For example, in FY 2019, one New Owner Audit Agreement covered over 1,900 facilities.

- From 1995 - 2020, over 10,000 entities self-disclosed violations at nearly 28,000 facilities

- ◊ More than half were reporting (e.g. EPCRA) and recordkeeping violations

- EPA HQ POC: Chad Harsh ([harsh.chad@epa.gov](mailto:harsh.chad@epa.gov))  
202-564-0211

- Main EPA Audit webpage: [https://www.epa.gov/compliance/epas-audit-policy#New\\_Owner\\_Audit\\_Policy](https://www.epa.gov/compliance/epas-audit-policy#New_Owner_Audit_Policy)

Figure 1. Audit Settlement by Statute

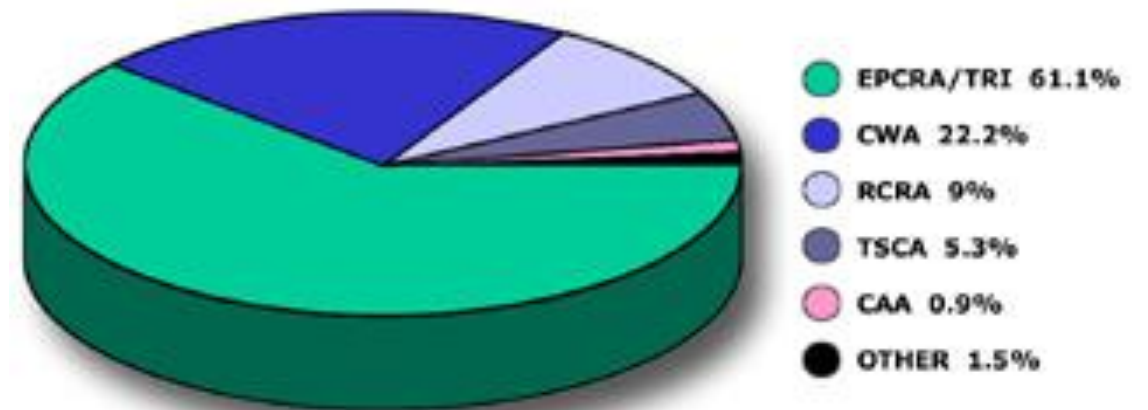


Fig. 1 - from SURFACE TECHNOLOGY Environmental Resource Center

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