

BOE-P-4-Self Policing-111711

TDEC POLICY ENCOURAGING SELF-POLICING AND VOLUNTARY CORRECTION

DISCLAIMER: This document is policy only and does not create legal rights or obligations. It is intended to provide the Department's Bureau of Environment staff guidance on how to apply decisions, procedures, and practices pertaining to the internal operation or actions of the bureau. Decisions affecting the public, including the regulated community, in any particular case will be made applying applicable laws and regulations to the specific facts.

EFFECTIVE DATE: NOVEMBER 30, 2020

SIGNATURES:

Gregory T. Young

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A. Purpose

This policy is designed to enhance protection of human health and the environment by encouraging regulated entities to voluntarily discover, disclose, correct, and prevent violations of Tennessee environmental requirements. Information about the background and applicability of this policy is contained in the Appendix.

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B. Definitions

For purposes of this policy, the following definitions apply:

1. "Compliance assistance" means assistance with environmental compliance or pollution prevention given to a small business by, or supported by, a governmental entity or an institution of higher education, including, but not limited to, such programs under the Clean Air Act.
2. "Department" means the Department of Environment and Conservation and its employees but does not include the environmental boards attached to the Department and their members.
3. "Due Diligence" encompasses a regulated entity's systematic efforts, appropriate to the size and nature of its business, to prevent, detect, and correct violations through the following:
 - a. Compliance policies, standards, and procedures that identify how employees and agents are to meet the requirements of laws, regulations, permits, and other sources of authority for environmental requirements;
 - b. Assignment of overall responsibility for overseeing compliance with policies, standards, and procedures, and assignment of specific responsibility for assuring compliance at each facility or operation;
 - c. Mechanisms for systematically assuring that compliance policies, standards, and procedures are being carried out, including monitoring and auditing systems reasonably designed to detect and correct violations, periodic evaluation of the overall performance of the compliance 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 standards and procedures to all employees and other agents;
 - e. Appropriate incentives to managers and employees to perform in accordance with the compliance policies, standards and procedures, including consistent enforcement through appropriate disciplinary mechanisms; and

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- f. Procedures for the prompt and appropriate correction of any violations, and any necessary modifications to the regulated entity's program to prevent future violations.
4. "Environmental audit" means a systematic, documented, periodic, and objective review by a regulated entity of facility operations and practices related to meeting environmental requirements. ISO 9001 (or latest version of the International Organization for Standardization Quality Management System), is an example of such a process.
5. "Environmental audit report" means the analysis, conclusions, and recommendations resulting from an environmental audit, but does not include data obtained in, or testimonial evidence concerning, the environmental audit.
6. "Regulated entity" means any person or entity, including a federal, state, or municipal agency or facility, regulated under Tennessee environmental laws.

C. Incentives for Self-Policing

1. Civil Penalty.

- a. If a regulated entity establishes that it satisfies all of the conditions of section D in relation to a violation of Tennessee environmental requirements, the Department will not seek non-contingent civil penalties for that violation, unless the Department determines that the entity made a significant economic gain because of the violation.
- b. If a regulated entity does not meet the letter of all of the conditions in subsection D.1 or subsection D.3, the Department will consider all of the actions of the entity when assessing any civil penalty. If the deviation is minor, the entity may receive the same treatment as in subdivision C.1.a.

2. No Criminal Recommendations.

- a. The Department will not recommend to any prosecuting authority that criminal charges be brought against a regulated entity for a violation if the Department determines that all of

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the conditions in section D are satisfied, so long as the violation does not demonstrate or involve:

- i. a prevalent management philosophy or practice that concealed or condoned environmental violations; or
- ii. high-level corporate officials' or managers' conscious involvement in, or willful blindness to, the violations.

b. Whether or not the Department refers the regulated entity for criminal prosecution under this section, the Department reserves the right to recommend prosecution for the criminal acts of individual managers or employees under existing policies guiding the exercise of enforcement discretion.

3. No Routine Request for Audits. The Department will not routinely request or use an environmental audit report. For example, the Department will not request an environmental audit report in routine inspections. ·

D. Conditions

1. Systematic Discovery. The violation was discovered during:

- a. an environmental audit;
- b. an objective, documented, systematic procedure or practice reflecting the regulated entity's due diligence in preventing, detecting, and correcting violations (the Department may require as a condition of penalty mitigation that a description of the regulated entity's due diligence efforts be made publicly available); or
- c. on-site compliance assistance.

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2. Voluntary Discovery. The violation was identified voluntarily, and not through a legally mandated activity prescribed by statute, regulation, permit, judicial or administrative order, or consent agreement. For example, the policy does not apply to:

- a. emissions violations detected through a continuous emissions monitor (or alternative monitor established in a permit) where any such monitoring is required;
- b. violations of National Pollutant Discharge Elimination System (NPDES) discharge limits detected through required sampling or monitoring; or
- c. violations discovered through a compliance audit required to be performed by the terms of a consent order or any final order.

3. Prompt Disclosure. The regulated entity fully discloses a specific violation within 21 days (or such shorter period provided by law) after it has discovered that the violation has occurred by notifying the Department in writing.

4. Discovery and Disclosure Independent of Government or Third-Party Plaintiff. The violation must also be identified and disclosed by the regulated entity prior to:

- a. the commencement of a federal, state, or local regulatory agency inspection or investigation, or the issuance by such agency of an information request to the regulated entity;
- b. notice of a citizen suit;
- c. the filing of a complaint by a third party;
- d. the reporting of the violation to the Department (or other government agency) by a "whistleblower" employee, rather than by one authorized to speak on behalf of the regulated entity; or
- e. imminent discovery of the violation by a federal, state, or local regulatory agency.

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5. Correction and Remediation. The regulated entity must:

- a. correct the violation within 60 days of discovery and certify in writing to the Department that the violation has been corrected, and any appropriate remedial measures, including any determined by the Department, have been completed; or
- b. if more than 60 days will be needed to correct the violation and complete remedial measures, if any, the regulated entity must notify the Department in writing before the 60-day period has passed and submit a proposed schedule of correction, not to exceed 24 months.

If the regulated entity proceeds under D.5.b, it must also complete the scheduled activities within the time proposed or as modified by the Department. The Department may either extend or shorten proposed deadlines for good cause. Such changes to deadlines must be in writing.

6. Prevent Recurrence. The regulated entity agrees in writing to take steps to prevent a recurrence of the violation, which may include improvements to its environmental auditing or due diligence efforts.

7. No Repeat Violations. The specific violation (or closely related violation) has not occurred previously within the past three years at the same facility or other facilities of the regulated entity, or is not part of a pattern of federal, state, or local violations by the facility's parent organization (if any), which have occurred within the past five years. For the purposes of this section D.7, a violation is:

- a. any violation of federal, state, or local environmental law identified in a judicial or administrative order, consent agreement or order, complaint, or notice of violation, conviction or plea agreement; or
- b. any act or omission for which the regulated entity has previously received penalty mitigation from the Department or a federal or local agency.

8. Certain Violations Excluded. The violation is not one that (a) resulted in serious actual harm or may have presented an imminent and substantial endangerment to human health or the

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environment, or (b) violates the specific terms of any judicial or administrative order or consent agreement.

9. Cooperation. The regulated entity cooperates as requested by the Department and provides such information as is necessary and requested by the Department to determine applicability of this policy. Cooperation includes, at a minimum, providing all requested documents and access to employees and assistance in investigating the violation, any noncompliance problems related to the disclosure, and any environmental consequences related to the violations.

E. General Considerations.

1. The Department reserves its right and responsibility to take necessary actions to protect public health or the environment by enforcing against any violations of Tennessee law.

2. This policy sets forth factors for consideration that will guide the Department in the exercise of its enforcement discretion. It states the Department's views as to the proper allocation of its enforcement resources. The policy is not final Departmental action and is intended as guidance. It does not create any rights, duties, obligations, or defenses, implied or otherwise, in any third parties.

3. This policy should be used whenever applicable in settlement negotiations for both administrative and civil judicial enforcement actions. It is not intended for use in pleading, at hearing, or at trial. The policy may be applied at the Department's sole discretion to the settlement of administrative and judicial enforcement actions instituted prior to, but not yet resolved, as of November 17, 2011.

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APPENDIX

BACKGROUND

This policy is based primarily upon the policy promulgated by the United States Environmental Protection Agency (EPA) on December 22, 1995, and revised on May 11, 2000. As such, many of the comments made in the "explanation of policy" sections of those documents are applicable to this policy as well. In applying this policy, the Department may consider any EPA guidance on the Audit Policy (formerly, "Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations") and any EPA interpretive statement of said policy, including but not limited to EPA's "Interim Approach to Applying the Audit Policy to New Owners" 73 C.F.R. §109 (2008).

The Department is aware of the development of the International Organization for Standardization's Quality Management System series of standards. As mentioned above, an audit conducted in accordance with ISO 9001 meets the definition of an environmental audit under this policy. The Department also wishes to encourage the use of environmental management systems such as those set forth in the rest of the Quality Management System series of standards.

APPLICABILITY

This policy is directly applicable to the issuance of commissioner's orders and assessments under the environmental programs administered by the Department, including orders issued under delegated authority. It also applies to the recommendations the Department may make to any other person or body (such as an administrative board or a chancery court) regarding civil penalties. A few provisions of this policy apply directly to recommendations Department staff may make regarding criminal prosecutions. The Department has no power to limit the discretion of the courts, or those authorized to prosecute crimes.

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The Department will not assess a civil penalty against entities that act in accordance with this policy unless they have received significant economic gain resulting from any noncompliance. This discretion is being exercised because the Department believes that there will be an increase in compliance if regulated entities follow the steps provided in section D. The Department will still assess penalties if there is significant economic gain in order to maintain the "level playing field" among the regulated community. It is not fair for a regulated entity to obtain a competitive advantage through its noncompliance with environmental laws.

This policy addresses what the Department often refers to as "up-front" penalties. Nothing in this policy should be understood to limit the use of contingent penalties in orders and assessments. Contingent penalties are penalties that only become due if the Respondent named in an order fails to comply with the order. One example of this would be an order that incorporates a corrective action schedule developed pursuant to section D.5 and includes contingent penalties for failure to meet the schedule.

NOTIFICATIONS TO THE DEPARTMENT

The written notifications required under subsections D.3 and D.5 should be sent to the environmental division of the Department with jurisdiction over the violation or to the following address:

Office of General Counsel, Department of Environment and Conservation, William R. Snodgrass Tennessee Tower, 312 Rosa L. Parks Avenue, 2nd Floor, Nashville, Tennessee 37243-1548.

PUBLIC INFORMATION

Under Tennessee Code Annotated title 10 , chapter 5, part 7, documents received or generated by the Department under this policy will be available for review by the public, unless they are subject to a legal privilege or fall under a statutory exemption (e.g., information covered by Tennessee Code Annotated sections 68-212-109 and 69-3-113(b)).

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ASSUMPTION OF GOOD FAITH

This policy is based upon an assumption that the regulated entities that seek the benefits it offers are doing so in good faith. When that is the case, the Department should not be reluctant to grant those benefits, because among other things the goal of compliance should be furthered by the policy. In any situation in which the Department has reason to believe that a regulated entity is not acting in good faith, the Department is not bound to follow the policy and generally will not.

REVISION HISTORY TABLE

Revision Number	Date	Brief Summary of Change
1	11/25/20	Formatting and style revisions.