



# **Interim Enforcement Program Response Guidance to Public Data Access Issues**

**U.S. Environmental Protection Agency  
Office of Enforcement and Compliance Assurance  
Office of Compliance  
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*The policies and procedures set forth in this document are intended solely for the guidance of employees of the Environmental Protection Agency (EPA) and State Enforcement Agencies. They are not intended to, nor do they, constitute rulemaking by EPA. They may not be relied upon to create a right or a benefit, substantive or procedural, enforceable at law or in equity, by any person.*

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These internal scenarios and questions and answers are offered to assist EPA and State enforcement personnel on how to respond to the scenarios described below. (These scenarios do not include routine comments that question the validity of the data, which will be addressed through an electronic data correction process.) ***Under the scenarios, the Regions will be asked to report to the Office of Regulatory Enforcement (ORE) on the extent to which, after the public release of the Enforcement and Compliance History Online (ECHO) Web site, they have experienced an increase in (1) requests to settle unresolved violations and (2) self disclosures of violations. Such information may be helpful in identifying future MOA priorities and assessing possible shifts in resource needs. The first report will be due on January 31, 2003, and will continue on a quarterly basis throughout FY 2003.***

**SCENARIO 1:** Facility wants to get “a clean bill of health” by (a) resolving an outstanding violation that has not been addressed by a formal enforcement action; and/or (b) having EPA or the State inspect its facility and affirm the facility’s compliance.

- i. **Authorized State Program:** Unless EPA conducted the inspection, such inquiries will be referred to the appropriate State agency.
  - (a) In the event that the State has not taken timely and appropriate enforcement action, Regions should raise such issues to the State and work with the State to assure that the violation is addressed.
  - (a) Generally, EPA does not conduct inspections to confirm a facility’s assertion that it is in compliance. Where a request for inspection is directed to the State, it should be handled in accordance with State policies.
- ii. **Federally Implemented Program:** Such inquiries will be forwarded to the appropriate Region.
  - (a) **Resolution of Outstanding Violations:** EPA has developed policies and procedures Enforcement Response Policies (ERPs) and Enforcement Management Systems (EMSs) governing when and under what circumstances formal enforcement should be initiated under each environmental statute. ERPs

prioritize the seriousness of violations; outline what enforcement response is appropriate (e.g., informal versus formal) for different violations or classes of violators; and provide the time frames within which such actions should be taken.

- ▶ For minor violations, EPA's Enforcement Response Policies (ERPs/EMSs) often provide that EPA should take informal action, such as providing the regulated entity with a notice of its noncompliance and establish a date by which that noncompliance is to be corrected, rather than formal enforcement action (e.g., administrative or civil judicial actions).
- ▶ **Where EPA has not taken timely, formal enforcement consistent with the ERP, EPA will address those violations expeditiously, giving priority to those that pose a greater risk to human health or the environment.**
- ▶ Regions and States will take all reasonable steps to ensure that old, minor violations that are obsolete do not linger in the databases. For example, a RCRA barrel spacing problem identified at an inspection in 1990 should not keep the facility in violation until 2002 when the next inspection occurs. In these situations, we recommend that the Regions and States consider whether documentation can be provided to justify that the violation is corrected and thus can be turned off in the data system.
- ▶ Under no circumstances, should EPA agree to issue a no action assurance to a company seeking resolution of a violation.

- (b) *Where Inspection is Requested:* If a regulated entity requests an inspection, EPA should indicate that we conduct inspections consistent with our MOA and other priorities, where we have information to indicate that a particular facility is violating the law, or pursuant to inspection plans developed to focus resources on the most critical or potential problems. Generally, EPA does not conduct inspections to confirm a facility's assertion that it is in compliance. Rather, we encourage facilities to conduct their own compliance audits and seek audit policy penalty mitigation where they voluntarily discover, self-disclose, correct and prevent recurring violations.

**SCENARIO 2: Facility wants to resolve an outstanding violation and wants penalty mitigation under the Audit Policy if it commits to an audit and self-discloses violations discovered, corrected and prevented. (Note that any violation already reflected in ECHO would not qualify as voluntarily discovered pursuant to EPA's Audit Policy.)**

- i. **Authorized State Program:** To the extent that an outstanding violation was identified by a federally authorized State, generally, the facility should seek to resolve that violation

with the State. In the event that the regulated entity wants to self-disclose and receive Audit Policy penalty mitigation for other violations not previously detected, EPA will coordinate with the State and either refer the self-disclosure to the State or agree to proceed with the implementation of EPA's Audit Policy, if applicable.

- ii. **Federally Implemented Program:** A company with violations identified in ECHO may avail itself of the benefits of EPA's Audit Policy so long as the disclosed violations otherwise meet the conditions of the policy (e.g., are not the same or closely related to the type of violation identified in ECHO, have not occurred within 3 years of a prior violation at the same facility). If a violator is willing to commit to conducting an audit and disclosing, correcting and preventing future violations, EPA will consider whether it is feasible to settle both the outstanding violation and those violations to be disclosed pursuant to a compliance audit. In determining whether to settle out violations already identified in ECHO, the Regions should consider whether the violator has come into compliance with the identified violation. OECA has developed a separate Web page <http://www.epa.gov/compliance/incentives/auditing/auditpolicy.html> for those interested in the Audit Policy.

#### **Additional Issues/Questions:**

1. **Public Disclosure of Violation Data:** Several Regions have expressed concern about releasing information about a violation at a facility prior to EPA initiating an enforcement action. In some Regions, it has been the practice to withhold some information from the public unless and until EPA takes a formal enforcement action. However, this practice is inconsistent with EPA policy. Legal analyses performed over the last ten years have turned up no justification for withholding such information under the Freedom of Information Act. Therefore, violations are not considered enforcement sensitive under EPA's database management guidelines. Specifically, EPA's databases have treated information about whether an inspection was conducted and whether a violation was detected as public information regardless of whether EPA has taken an enforcement action. That is, such information is not designated in the data systems as "enforcement sensitive." Accordingly, when responding to requests for information about the compliance history of a particular facility, it has been OECA's policy to disclose such information. Most Regions are providing this information (from OTIS) to the public to respond to FOIA requests. Given that this kind of information is already being made public, it will be included in ECHO.

Given the public nature of these data, EPA strongly encourages management review before a facility is put into violation in the system. This management review should be done shortly after the initial violation determination, and would normally be performed by the program managers that supervise inspectors or

compliance review officers. Legal review as to whether an action will be taken against the violation is independent of the finding of violation. Regions and States should not delay entry of violations into the system based upon pending decisions about whether a formal action will be taken by the implementing agency. This approach is important for several reasons. Most importantly, EPA needs to maintain an accurate record of violations that have occurred. If a minor violation does not require government action (e.g., it is quickly corrected), the fact the violation occurred becomes a piece of analytic information on which future decisions may build. For example, a facility with patterns of frequent small violations may not be targeted in the future if these violations were kept out of the database just because there was no case initiated. Additionally, many decisions regarding facility or corporate eligibility in performance-based programs (e.g., Performance Track, WasteWise) hinge on analysis of the data in the systems. Holding information back could allow these facilities to pass performance screens that they should not pass.

2. Prior Notice of Violation and/or Significant Noncompliance: Under some programs (e.g., CAA), EPA is required to send the regulated entity a notice of violation prior to commencing a formal enforcement action. For other programs (e.g., RCRA), Regional EPA and State enforcement personnel generally notify a facility of the presence of a violation before bringing a formal enforcement action. While notice of a violation is usually provided to the regulated entity before the violation data is entered into the data system, it is possible that, prior to the release of ECHO, a regulated entity may not be advised that EPA or the State had identified a violation. In such situations, EPA should explain that
  - ECHO includes a process by which a regulated entity can seek correction of data believed to be in error;
  - Violations detected either through inspections or self-reported information are often entered into the database prior to EPA or the State taking any action to address the violation or notify the facility;
  - Prior to the public release of ECHO, EPA already made such information available to any member of the public pursuant to FOIA upon request;
  - The regulated entity may challenge EPA’s identification of a violation either informally or in response to a formal enforcement action.