

Summary: EPA expressed environmental concerns about potential water quality impacts to riparian/stream systems due to past grazing activities. EPA supports adaptive management practices proposed by the Forest Service for improve existing resource conditions impacted by grazing and long-term drought. EPA requested that the final EIS include a drought management plan and baseline data for monitoring and protecting water quality. Rating EC2.

EIS No. 20080219, ERP No. D-NOA-E39073-00, Programmatic—Coral Restoration in the Florida Keys and Flower Garden Banks National Marine Sanctuaries, Implementation, FL, TX, and LA.

Summary: EPA does not object to the proposed action, but requested additional data to clarify timeframes of coral growth and the level of effort to conduct the restoration projects. Rating LO.

Dated: July 29, 2008.

Robert W. Hargrove,
Director, NEPA Compliance Division, Office of Federal Activities.

[FR Doc. E8-17718 Filed 7-31-08; 8:45 am]

BILLING CODE 6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

[ER-FRL-8584-2]

Environmental Impacts Statements; Notice of Availability

Responsible Agency: Office of Federal Activities, General Information (202) 564-7167 or <http://www.epa.gov/compliance/nepa/>.

Weekly receipt of Environmental Impact Statements

Filed 07/21/2008 Through 07/25/2008. Pursuant to 40 CFR 1506.9.

EIS No. 20080285, Final EIS, NPS, MT, Avalanche Hazard Reduction Project, Issuance of Special Use Permit for the Use of Explosives in the Park, Burlington Northern Santa Fe Railway, Glacier National Park, Flathead National Forest, Flathead and Glacier Counties, MT, Wait Period Ends: 09/02/2008, Contact: Chas Cartwright 406-888-7898.

EIS No. 20080286, Final EIS, AFS, UT, Pockets Resource Management Project, Proposes to Salvage Dead and Dying Spruce/Fir, Regenerate Aspen, and Manage Travel, Escalante Ranger District, Dixie National Forest, Garfield County, UT, Wait Period Ends: 09/02/2008, Contact: Robert G. MacWhorter 435-826-5400.

EIS No. 20080287, Final EIS, BLM, UT, Moab Field Office Planning Area,

Resource Management Plan, Implementation, Grand and San Juan Counties, UT, Wait Period Ends: 09/02/2008, Contact: Brent Northrup 435-259-2100.

EIS No. 20080288, Draft Supplement, NOA, 00, Amendment 16 to the Fishery Management Plan for the Snapper Grouper Fishery, Additional Information to Analyze Four New Management Measures Alternatives for Gag and Vermillion Snapper, Implementation, South Atlantic Region, Comment Period Ends: 09/15/2008, Contact: Dr. Roy E. Crabtree 727-824-5305.

EIS No. 20080289, Final EIS, FTA, TX, Northwest Corridor Light Rail Transit Line (LRT) to Irving/Dallas/Fort Worth International Airport, Construction, Dallas County, TX, Wait Period Ends: 09/02/2008, Contact: Elizabeth Zekasko 202-366-0244.

EIS No. 20080290, Draft EIS, STB, 00, Elgin, Joliet & Eastern Railroad (Finance Docket No. 35087) Proposed Acquisition by Canadian National (CN) Railway and Grand Trunk Corporation to connect all Five of CN's Rail lines, Chicago, Illinois and Gary, Indiana, Comment Period Ends: 09/30/2008, Contact: Phillis Johnson-Ball 202-245-0304.

EIS No. 20080291, Draft EIS, AFS, CO, Colorado Roadless Areas Rulemaking, Proposes to Promulgate a State-Specific Rule to Manage Roadless Values and Characteristics, Colorado Forests with Roadless Areas include: Arapaho and Roosevelt: Grand Mesa, Uncompahgre, and Gunnison; Manti-La Sal (portion in Colorado); Pike and San Isabel; Rio Grande; Routt; San Juan; and White River National Forests, CO, Comment Period Ends: 10/23/2008, Contact: Kathy Kurtz 303-275-5083.

EIS No. 20080292, Draft EIS, IBR, CA, Millerton Lake Resource Management Plan (RMP) and General Plan, Implementation, Fresno and Madera Counties, CA, Comment Period Ends: 09/15/2008, Contact: Robert Epperson 559-269-4518.

EIS No. 20080293, Draft EIS, IBR, CA, Cachuma Lake Resource Management Plan, Implementation, Cachuma Lake, Santa Barbara County, CA, Comment Period Ends: 09/15/2008, Contact: Sharon McHale 916-989-7172.

EIS No. 20080294, Final EIS, FHW, VA, U.S. 460 Location Study Project, Transportation Improvements from I-295 in Prince George County to the Interchange of Route 460 and 58 along the Suffolk Bypass, Funding, U.S. Army COE Section 10 and 404 Permits, Prince George, Sussex, Surry, Southampton and Isle of Wight

Counties, VA, Wait Period Ends: 09/02/2008, Contact: Kenneth Myers 804-775-3353.

Amended Notices

EIS No. 20080227, Second Draft Supplement, TPT, CA, Presidio Trust Management Plan (PTMP), Updated Information on the Concept for the 120-Acre Main Post District, Area B of the Presidio of San Francisco, Implementation, City and County of San Francisco, CA, Comment Period Ends: 09/19/2008, Contact: John G. Pelka 415-561-5300.

Revision to FR Notice Published: Extending Comment Period from 07/31/2008 to 09/19/2008.

Dated: July 29, 2008.

Robert W. Hargrove,
Director, NEPA Compliance Division, Office of Federal Activities.

[FR Doc. E8-17722 Filed 7-31-08; 8:45 am]

BILLING CODE 6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

[EPA-HQ-OECA-2007-0291; FRL-8700-2]

Interim Approach to Applying the Audit Policy to New Owners

AGENCY: Environmental Protection Agency.

ACTION: Notice; request for comment.

SUMMARY: The Environmental Protection Agency ("EPA" or "the Agency") announces and requests comment on its Interim Approach to Applying the Audit Policy to New Owners ("Interim Approach"). (EPA's April 11, 2000 policy on "Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations," is commonly referred to as the "Audit Policy" (65 FR 19618).) This Interim Approach offers a detailed description of how EPA will apply its Audit Policy to new owners of regulated facilities. Under the Interim Approach, EPA will offer certain incentives specifically tailored to new owners that want to make a "clean start" at their newly acquired facilities by addressing environmental noncompliance that began prior to acquisition. This Interim Approach is designed to motivate new owners to audit newly acquired facilities and use the Audit Policy to disclose, correct, and prevent the recurrence of violations. It is also designed to encourage self-disclosures of violations that will, once corrected, yield significant pollutant reductions and benefits to the environment. The incentives tailored for new owners include penalty mitigation

beyond what is provided in the Audit Policy, as well as the modification of certain Audit Policy conditions. Through applying a clear, transparent, and easily administered Interim Approach to resolving disclosures from new owners, the Agency seeks to use the Audit Policy to leverage its ability to make effective use of scarce government resources. If procedural and transaction costs can be minimized for regulators and self-disclosing new owners, EPA anticipates that the opportunity to work with new owners as they make clean starts at their new facilities can help secure higher quality environmental improvements more quickly and effectively than might otherwise occur.

On May 14, 2007, EPA published a **Federal Register** Notice entitled "Enhancing Environmental Outcomes From Audit Policy Disclosures Through Tailored Incentives for New Owners" (72 FR 27116) ("First Notice") seeking public comment on whether and to what extent the Agency should consider offering tailored incentives to encourage new owners of regulated entities to discover, disclose, correct, and prevent the recurrence of environmental violations pursuant to the Audit Policy. The Agency received public comment supportive of the idea of offering tailored incentives to new owners, and decided to develop an approach to applying the Audit Policy to new owners. The Agency believes the most efficient way to effectively test this strategy, and learn from practical experience, is to implement it on an interim basis. Accordingly, the Agency has decided to begin applying the Interim Approach, effective upon publication of this Notice. EPA is concurrently seeking public comment on the Interim Approach for a period of 90 days. EPA will be reviewing public comment as it is received and will continue its dialogue with stakeholders on whether refinements to the Interim Approach are needed. In addition, the Agency will place into the public docket copies of agreements resolving violations disclosed by new owners under the Interim Approach. In any event, EPA intends to assess the effectiveness of the Interim Approach on a continual basis. Based on public comment and after the Agency has gained sufficient experience in implementing the Interim Approach, EPA will decide to finalize, revise or discontinue these tailored incentives for new owners.

DATES: The Interim Approach is effective upon publication of this Notice. EPA urges interested parties to

comment on the Interim Approach in writing. Comments must be received by EPA no later than October 30, 2008.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA-HQ-OECA-2007-0291, by one of the following methods:

- <http://www.regulations.gov>: Follow the on-line instructions for submitting comments.
- *E-mail:* docket.oeca@epa.gov, Attention Docket ID No. EPA-HQ-OECA-2007-0291.
- *Fax:* (202) 566-9744, Attention Docket ID No. EPA-HQ-OECA-2007-0291.
- *Mail:* Enforcement and Compliance Docket Information Center, Environmental Protection Agency, Mailcode: 2822T, 1200 Pennsylvania Ave., NW., Washington, DC, 20460, Attention Docket ID No. EPA-HQ-OECA-2007-0291.
- *Hand Delivery:* Enforcement and Compliance Docket Information Center in the EPA Docket Center (EPA/DC), EPA West, Room B 3334, 1301 Constitution Avenue, NW., Washington, DC. The EPA Docket Center Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Reading Room is (202) 566-1744, and the telephone number for the Enforcement and Compliance Docket is (202) 566-1927. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA-HQ-OECA-2007-0291. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at <http://www.regulations.gov>, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through <http://www.regulations.gov>. The <http://www.regulations.gov> Web site is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through <http://www.regulations.gov>, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you

submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket, visit the EPA Docket Center homepage at <http://www.epa.gov/epahome/dockets.htm>.

Docket: All documents in the docket are listed in the <http://www.regulations.gov> index. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically at <http://www.regulations.gov> or in hard copy at the Enforcement and Compliance Docket Information Center in the EPA Docket Center (EPA/DC), EPA West, Room B 3334, 1301 Constitution Avenue, NW., Washington, DC. The EPA Docket Center Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Reading Room is (202) 566-1744, and the telephone number for the Enforcement and Compliance Docket is (202) 566-1927.

FOR FURTHER INFORMATION CONTACT: For further information, contact Caroline Makepeace of EPA's Office of Enforcement and Compliance Assurance, Office of Civil Enforcement, Special Litigation and Projects Division at makepeace.caroline@epa.gov or (202) 564-6012.

SUPPLEMENTARY INFORMATION:

I. Background and Goals

A. Background on EPA's Exploration of Tailored Incentives for New Owners

1. Overview of the Audit Policy

On April 11, 2000, EPA issued its revised final Audit Policy, or "2000 Audit Policy" (65 FR 19618). The purpose of the Audit Policy is to enhance protection of human health and the environment by encouraging regulated entities to voluntarily discover, promptly disclose, expeditiously correct and prevent the recurrence of violations of federal environmental law. Benefits available to

entities that make disclosures under the terms of the Audit Policy include reductions in and, in some cases, the elimination of civil penalties and an EPA determination not to recommend criminal prosecution of disclosing entities (ultimate prosecutorial discretion resides with the U.S. Department of Justice).

The Audit Policy contains nine conditions, and entities that meet all of them are eligible for 100 percent mitigation of any gravity-based civil penalties that otherwise could be assessed in settlement of the disclosed violations. ("Gravity-based" penalty refers to that portion of the civil penalty over and above the portion that represents the entity's economic gain from noncompliance, known as the "economic benefit.") Regulated entities that do not meet the first condition—systematic discovery of violations—but meet the other eight conditions are eligible for 75 percent mitigation of any gravity-based penalties. The Audit Policy includes important safeguards to deter violations and protect the environment. For example, the Audit Policy requires entities to act to prevent recurrence of violations and to remedy any environmental harm that may have occurred. Repeat violations, those that resulted in serious actual harm to the environment, and those that may have presented an imminent and substantial endangerment are not eligible for relief under the Audit Policy. Entities and individuals also remain criminally liable for violations that result from conscious disregard of, or willful blindness to, their obligations under the law.

Once a regulated entity discloses violations in writing to EPA, EPA evaluates the violations against the criteria set forth in the Audit Policy, and determines the appropriate enforcement response. For cases involving no assessment of penalties, the enforcement response for voluntary disclosures is usually a Notice of Determination ("NOD"). Audit Policy disclosures may also be resolved through an administrative consent agreement and final order, or a civil judicial consent decree. If the disclosure does not meet the conditions of the applicable policy, the matter is handled under the appropriate media-specific penalty policies, which often include penalty mitigation for voluntary disclosures.

The Audit Policy and related documents are available on the Internet at <http://www.epa.gov/compliance/incentives/auditing/auditpolicy.html>. Additional guidance for implementing the Policy in the context of criminal

violations can be found at <http://www.epa.gov/compliance/resources/policies/incentives/auditing/auditcrimvio-mem.PDF>. The Small Business Compliance Policy (65 FR 19630), published April 11, 2000, is an additional voluntary disclosure policy that provides incentives for small businesses (of 100 or fewer employees) that voluntarily discover, promptly disclose and expeditiously correct environmental violations. More information on the Small Business Compliance Policy is available at <http://www.epa.gov/compliance/incentives/smallbusiness/index.html>.

2. How the Audit Policy Has Been Applied to New Owners

Historically, EPA has recognized that additional flexibility in Audit Policy implementation may be appropriate for new owners. The 2000 Audit Policy addressed new owners and repeat violations, focusing on pre-acquisition violations at the newly acquired facility: "[i]f a facility has been newly acquired, the existence of a violation prior to acquisition does not trigger the repeat violations exclusion" as to the new owner (65 FR at 19623). In addition, the Audit Policy states that, in the acquisitions context, EPA will consider extending the prompt disclosure period on a case-by-case basis. It also states that the 21-day disclosure period will begin on the date of discovery by the acquiring entity, but in no case will the period begin earlier than the date of acquisition. See 65 FR at 19622.

EPA's primary interest is to encourage owners of newly acquired facilities to undertake a comprehensive examination of and improvements to a facility's environmental compliance and its compliance management systems. Notwithstanding a new owner's history of violations at its other facilities, if its efforts to examine and improve upon an acquired facility's environmental operations are thorough and are likely to result in improved compliance, EPA's intent is to encourage such examinations.

On April 30, 2007, EPA issued the "Audit Policy: Frequently Asked Questions (2007)" document ("Frequently Asked Questions") which recognizes that new owners are uniquely situated to examine and improve performance at newly acquired facilities.¹ Specifically, EPA's Answer to Question 2 of the 2007 Frequently

Asked Questions document provides that:

- For new owners that in good faith undertake a compliance evaluation and inform the Agency of such actions, either by disclosure in writing or entry into an Audit Agreement, prior to submission of its first annual Title V certification, the violations disclosed would be considered voluntarily discovered for purposes of the Audit Policy.

Generally, Clean Air Act (CAA) violations discovered during activities supporting Title V certification requirements are not eligible for penalty mitigation under the Policy. Condition 2 of the Audit Policy requires that disclosed violations must not be discovered through a legally mandated monitoring or sampling requirement prescribed by statute or regulation; therefore, examination of CAA compliance accompanying a Title V annual certification is not voluntary.² However, EPA wants to encourage new owners to examine facility operations to determine compliance, correct violations, and upgrade deficient equipment and practices. Thus, for new owners that in good faith undertake such efforts and inform the Agency of such actions, either by disclosure in writing or entry into an audit agreement with EPA prior to submission of the facility's first annual Title V certification under new ownership, the violations disclosed would be considered voluntarily discovered for purposes of the Audit Policy.

EPA's Answer to Question 5 of the 2007 Frequently Asked Questions document also provides that:

- New owners may be eligible for penalty mitigation under the Audit Policy for violations at newly acquired facilities irrespective of the disclosing entity's compliance history at other facilities.

3. First Federal Register Notice and Public Comment Process on This Topic

EPA's First Notice was issued to solicit public input and information to be used in helping EPA better understand and formulate decisions about issues associated with offering

² Under the regulations governing CAA Title V permit applications and annual compliance certifications, any application, form, report or compliance certification is required to contain a certification by a responsible official of the truth, accuracy and completeness of information contained in such documents. The regulations further provide that "[t]his certification and any other certification required under this part shall state that, based on information and belief formed after reasonable inquiry, the statements and information in the document are true, accurate, and complete." 40 CFR 70.5(d).

¹ The 2007 Frequently Asked Questions document can be found on the Internet at <http://www.epa.gov/compliance/incentives/auditing/2007-faqs.pdf>.

tailored Audit Policy incentives to new owners. The Agency identified for comment a series of questions: (1) Should EPA offer tailored incentives to encourage new owners of regulated entities to discover, disclose, correct, and prevent environmental violations; (2) how should the Agency determine who is a new owner; (3) what incentives should the Agency consider offering in order to encourage new owners to self-audit and disclose; and (4) if such tailored incentives are offered, what measures should the Agency use in determining whether and to what extent self-audits by and disclosures from new owners are achieving significant improvements to the environment. Formal notice and comment on such policy matters are not required, but the Agency thought it prudent to invite public input, given the significant objectives EPA hopes to achieve and its desire to develop any incentives in a transparent and inclusive way.

EPA set up an electronic docket to facilitate the comment process for the First Notice and to make all the comments readily available to the public. The Agency also held two public meetings, in Washington, DC and San Francisco, California to facilitate oral comments. In addition, the day after each public meeting, the Agency invited a diverse and balanced group of industry, government, academic and interest group participants to smaller working sessions to discuss the same questions and issues that were posed in the First Notice. The working sessions were designed to give the Agency an opportunity to hear the views of a variety of individuals with different perspectives and experiences in a relatively informal and frank atmosphere, where remarks would be summarized but not attributed to individual participants. No consensus of opinion was sought or presented.

The written comments, transcripts of the public meetings and summaries of the comments made during the working sessions, as well as the Notice itself are available in the docket at <http://www.regulations.gov>, Docket ID No. EPA-HQ-OECA-2007-0291, or at the EPA Docket Center for which the physical address is listed above.

EPA received thoughtful and informative comments in response to the First Notice that helped the Agency as it considered whether to proceed in developing an approach to applying the Audit Policy to new owners, and how to structure such an approach to meet the goals described below in section I.B.

B. EPA's Development of an Interim Approach to Applying the Audit Policy in the New Owner Context

While EPA's Audit Policy program has been a successful effort to date, resolving disclosed violations involving over 3,500 entities and nearly 10,000 facilities, its potential as a tool to promote compliance, and in particular to produce significant pollutant reductions, has still not been fully realized. More than half of these Audit Policy disclosures have involved reporting violations which, while important for public information and safety purposes, may not produce significant reductions in pollutant emissions once the violations are corrected. Consistent with EPA's strategic plan, the Agency is seeking ways to increase the number of Audit Policy self-disclosures that have the potential to yield significant environmental benefits while effecting compliance with federal environmental requirements. In developing and implementing an approach to applying the Audit Policy to new owners, the Agency has two primary goals: (1) To secure the prompt correction of environmental violations, and (2) to achieve significant pollutant reductions and improvements to the environment as efficiently and expeditiously as possible.

Based in part on its recent experience with corporate auditing agreements and disclosures following acquisitions, the Agency believes that encouraging the new owners of regulated facilities to assess, disclose, and address environmental compliance at their newly acquired facilities presents a promising opportunity to achieve significant improvements to the environment in an expeditious and efficient way. EPA believes that when a new owner takes control of a facility, a host of factors may make it feasible and attractive for a new owner to focus on, and invest in, assessing and addressing environmental compliance issues. New owners may be well-situated to make an environmental "clean start" because they may already be auditing and assessing their new facilities, may have funding available to fix problems, and have an opportunity to manage and reduce risk by addressing and disclosing noncompliance.

Although EPA believes there are compelling reasons that new owners may be motivated to address noncompliance at their facilities, the Agency recognizes that there may be factors that new owners otherwise interested in using the Audit Policy perceive as disincentives. New owners

may still have to pay substantial civil penalties under the Audit Policy, unless the economic benefit portion of the penalty is insignificant. Therefore, new owners may be reluctant to call EPA's attention to compliance issues at their newly acquired facilities when they themselves may not be fully aware of all the compliance issues presented. Particularly when many and/or complex facilities are involved, it may be difficult for new owners to have a reasonable idea of the full spectrum of compliance issues.

In addition, the Agency's experience with implementing the Audit Policy, especially with regard to corporate auditing agreements, suggests that one of the major reasons a company may be hesitant to self-audit and disclose under the Audit Policy is uncertainty about how the Agency will treat such self-disclosures. EPA is currently making an effort to provide greater overall certainty and consistency in the Audit Policy's implementation, and the recently-issued 2007 Frequently Asked Questions document should help provide greater certainty about how the Agency will apply the Audit Policy to a particular set of facts. Nevertheless, there is likely still some hesitation on the part of new owners to self-disclose violations, because of concerns about exactly how such disclosures will be handled by the Agency.

In the Interim Approach to applying the Audit Policy to new owners, described in this Notice, EPA is offering certain incentives to further encourage new owners to discover, disclose, correct and prevent the recurrence of violations that began prior to their acquisition. The incentives include penalty mitigation beyond what the Audit Policy generally provides and the clearly-stated modification of certain Audit Policy conditions. The Agency recognizes that there are equitable and policy arguments that a new owner should not be penalized for the full economic benefit relating to violations that arose before a facility was under its control, if that new owner is willing to promptly address such violations and make changes to ensure that the facility stays in compliance in the future. EPA anticipates that such incentives may make the difference in the willingness of new owners to come forward and commit to improving environmental compliance and reduce impacts on the environment.

Through implementing a clear, transparent, and easily administered approach to resolving disclosures from new owners, the Agency seeks to use the Audit Policy to leverage its ability to make effective use of scarce

government resources. If procedural and transaction costs can be minimized for regulators and self-disclosing new owners, EPA expects that the opportunity to work with new owners as they make clean starts at their new facilities can help secure higher quality environmental improvements more quickly and effectively than might otherwise occur.

The Agency intends to assess, on an ongoing basis, whether this is in fact a useful approach, yielding worthwhile results, and to consider whether such incentives produce any unintended adverse results, such as discouraging appropriate due diligence, timely compliance and/or the achievement and maintenance of a fair and level playing field. The approach will be implemented on an interim basis, with opportunity for changes or discontinuation, if warranted.

II. Interim Approach To Applying the Audit Policy To New Owners

To further the goals described above in section I.B., EPA has developed an Interim Approach to applying the Audit Policy to new owners, which is described in this section. Comments that the Agency received from the public in response to the First Notice on this topic were supportive of developing tailored Audit Policy incentives for new owners. Many comments did include caveats that any successful approach would need to be reasonable, simple, certain and clear, with a predictable and streamlined resolution process that still allowed flexibility, where appropriate. The Agency decided that the most efficient way to effectively test and refine the approach would be to implement it on an interim basis, and reap the benefit of practical experience. Accordingly, with this Notice, EPA is announcing that the Agency will implement the Interim Approach, effective immediately. In addition, EPA is concurrently seeking comment on the overall design and specific elements of the Interim Approach, as well as on any relevant issues or considerations which may not appear to be reflected. In some sections, certain issues are specifically raised for comment.

The Agency is now calling the initial phase of this project an Interim Approach rather than a pilot program. As EPA reviewed public comments, it appeared that certain misunderstandings arose from the concept of a "program." Many commenters incorrectly perceived that the Agency was considering some sort of award or special status program which would bestow benefits on accepted members once they had

"applied" and met eligibility requirements. To others, the term "pilot" appeared to imply, again incorrectly, that the use of this settlement approach would be a limited experiment, open only to a select group of new owners. Thus, EPA is now describing the first phase of applying of the Audit Policy to new owners as an Interim Approach. However defined, EPA intends to test the approach, and decide to continue, change, or abandon it, once the Agency has sufficient information and feedback to evaluate its effectiveness.

A. Definition of "New Owner"

EPA has developed a set of criteria defining which entities are eligible to be considered new owners under the Interim Approach.

1. Interim Approach to Defining "New Owner"

For purposes of the application of this tailored Interim Approach, an entity will be considered a "new owner" where it certifies to the following criteria:

a. Prior to the transaction, the new owner was not responsible for environmental compliance at the facility which is the subject of the disclosure, did not cause the violations being disclosed and could not have prevented their occurrence;

b. The violation which is the subject of the disclosure originated with the prior owner; and

c. Prior to the transaction, neither the buyer nor the seller had the largest ownership share of the other entity, and they did not have a common corporate parent.

2. Discussion of the "New Owner" Definition

In its First Notice, EPA sought comment on what should constitute a "new owner" for purposes of being offered tailored incentives under the Audit Policy. Commenters on the First Notice generally urged EPA to define a "new owner" broadly and to consider that a wide range of transactions might potentially produce a qualifying new owner. While most commenters recommended that the Agency make no distinctions between asset, stock, or merger transactions, most did not believe that either new entities created in corporate "spin-offs" or owners who had prior control over the facility should qualify as new owners.

The Agency intends that this Interim Approach apply only to new owners that did not control operations at the facility before the transaction, and only to violations that the new owner did not

initiate. The first criterion of the definition of "new owner" asks the new owner to confirm the history of its relationship to the facility at issue, and to the violations being disclosed. EPA intends that this criterion be interpreted broadly, and in a common sense manner. For purposes of interpreting this criterion, the Agency's focus will be on ownership, or managerial, or operational control of the environmental operations at the facility. EPA will assume, for purposes of interpreting this criterion, that responsibility for environmental compliance or for any violations may be shared by corporate entities, controlling stockholders and operators and does not, for example, lie solely with individual employees or contractors at the facility.

The second criterion specifies that the "new owner" approach will only be applied to violations that did not originate with the new owner, as opposed to violations that are wholly new and began after the transaction. For example, if the new owner were to install a new oil storage tank and fail to provide for required secondary containment pursuant to 40 CFR 112, such action would trigger a wholly new violation. If the new owner disclosed this violation to EPA, the Agency would not apply the new owner approach to resolve the disclosure, but would treat it as a regular Audit Policy matter. New owners should bear in mind that even if such violations would not qualify for new owner penalty mitigation and benefits, they may nonetheless be eligible for Audit Policy consideration.

The third criterion serves several functions. Notwithstanding that a new owner might be willing and able to certify under the first criterion that it lacked actual control of operations at the facility, the Agency is proposing to exclude all new owners that had the largest pre-transaction ownership interest in the facility. Drawing this clear line at "largest ownership share" is intended to help ensure that the Agency is faced with fewer scenarios that raise questions about the extent of influence that the new and previous owners may have had over each other. Such questions might necessitate just the sort of analysis of corporate history and the terms of the transaction the Agency seeks to avoid because of efficiency and ambiguity concerns, and would raise transaction costs for all parties involved. This criterion excludes corporate spin-offs, because it excludes situations where a seller had the largest pre-transaction ownership share of the new owner entity, or was the new owner's corporate parent. The third criterion would allow participation by a

new owner which, prior to the transaction, was a silent or inactive partner in a joint venture, and then purchased the rest of the business and became the active owner, so long as its prior share was less than the largest, and the new owner can certify to the first criterion. It would also allow participation by a new owner which is the product of a merger, so long as neither party had previously held the greatest ownership share of the entity with which it merged. In the case of stock transactions, EPA intends that "largest ownership share" be interpreted to mean ownership of the largest number either of shares of stock or of voting rights. The third criterion also bars situations where the buyer and the seller had a common corporate parent. EPA assumes, for purposes of interpreting this criterion, that the corporate parent was in control of the prior owner, the "new" owner, and facility operations. Accordingly, where two companies have a common corporate parent and one subsidiary buys another, the acquiring entity is not sufficiently "new" to warrant this tailored application of the Audit Policy.

The Agency's intent is to minimize the resources necessary to apply the Audit Policy to new owners, and sought a simple and direct way to identify owners who want to make a clean start for their newly acquired operations. EPA considered and preliminarily concluded that the expenditure of resources necessary to research and analyze corporate transactions would be so great as to be unworkable, and would detract from efficient and effective resolution of violations. Thus, the Agency decided, as a policy matter, to rely generally on a self-certification from the new owner that it meets the criteria in section II.A.1. New owners should be aware that this certification will be required as a condition to resolving disclosed violations.

Most public comments about the certification issue advised that any required certifications not be so burdensome or complex as to chill new owners' interest in coming forward to the government. The eligibility criteria above are clear and straightforward, and the certification will simply be included along with the certifications made by the self-disclosing entity that all Audit Policy conditions, as applied to new owners, have been met. This approach is designed to be sufficiently uncomplicated and manageable, while seeking to ensure that only appropriate new owners benefit from the Agency's Interim Approach.

Commenters did suggest that the Agency might adopt a range of pre-

existing methods for defining "new owner," which included: (1) Using the "no affiliation" or "bona fide prospective purchaser" definitions found in the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), as amended by the Small Business Liability Relief and Brownfields Revitalization Act (Pub. L. 107-118, 115 Stat. 2356, "the Brownfields Amendments"); (2) requiring that the transaction occurred at "at arms" length; (3) adopting the change of ownership standards used for various federal environmental statutes; (4) relying on verification of ownership change by other regulatory agencies such as the Internal Revenue Service or Securities and Exchange Commission; (5) seeking assurance from the new owner that the transaction was not conducted to avoid penalties; (6) applying a "management test;" and (7) using the definitions with which the State of New Jersey implements its Industrial Site Recovery Act (N.J.S.A. 13:1K-6 and N.J.A.C. 7:26B).

Consideration of all of these approaches was instructive and useful in developing the criteria. However, for a variety of reasons, EPA found that none of them seemed appropriate to adopt wholesale in the new owners context. Given the different scenarios to which the suggested definitions were meant to apply, and EPA's desire to provide clarity and certainty to the public, the Agency decided to adopt a bright-line approach that is easily understood and applied by regulator and regulated alike.

The Agency hopes to be inclusive enough to maximize the number of facilities brought into compliance under the Audit Policy, and to ensure sufficient opportunities to fully test the Interim Approach. This definition of new owner is solely intended to apply to the application of the Audit Policy in the context of the Interim Approach. However, since the Agency is concerned that only appropriate new owners be eligible for the benefits of this approach, EPA specifically invites comment on the criteria for defining "new ownership" and whether the standard above is appropriate.

B. Timing for Availability of New Owner Incentives: For How Long Is an Owner "New?"

1. Two Scenarios: Audit Agreement or Prompt Disclosure Within Nine Months of Closing

Under this Interim Approach, EPA will consider an owner "new," and eligible for "new owner" treatment and

benefits, for nine months after the date of the transaction closing. For nine months after the date of the transaction closing, the new owner can choose to make disclosures in two different contexts, which are described in detail in sections a. and b. below. The new owner can choose to enter into an audit agreement which will specify the facility or facilities to be audited, the scope of regulatory programs covered, dates for completion of audits and disclosure of violations. Alternatively, the new owner can choose to make disclosures individually, as violations are discovered, but each disclosure would have to be made promptly, within 21 days of discovery, or within 45 days of the closing, whichever is longer. See section II.E.3., "Prompt Disclosure Condition," below. A new owner could also elect to make separate individual disclosures as described below in section II.B.1.b., and then decide to enter into an audit agreement and make further disclosures under that agreement. Of course, such an audit agreement would need to be entered into within nine months of the closing date for the transaction.

a. New Owner Enters into an Audit Agreement with EPA, within Nine Months of the Closing, and Receives "New Owner" Audit Policy Consideration, for Violations Disclosed Pursuant to that Agreement.

An audit agreement provides the opportunity to tailor timeframes and expectations to the new owner's unique situation. While the audit agreement approach is optional, it is highly recommended if the circumstances or complexity of facilities would likely require more time to audit or if a new owner expects to be making more than one disclosure to EPA. An audit agreement also reduces uncertainty, for both the new owner and EPA, as it specifies the timeframes for completing the audit, the facilities covered, the environmental requirements to be evaluated, and when the discovered violations will be disclosed.

Most importantly, and consistent with EPA practice, an audit agreement "stops the clock" with regard to the Prompt Disclosure condition, for violations discovered and disclosed pursuant to the agreement. An audit agreement also "stops the clock" with regard to the disclosure of violations that involve required monitoring, sampling or auditing, if the new owner enters into an audit agreement prior to the first instance when such action is required. See section II.E.2., "Voluntary Discovery Condition," below.

"Entering into an audit agreement" means that (1) the new owner has

committed in writing to audit a specific newly acquired facility or facilities, (2) the new owner has specified the scope of regulatory programs to be covered, dates for completion of the audits and dates for the disclosure of violations found, and (3) EPA has accepted those terms. EPA reserves its right to negotiate with the new owner about the scope, timing and sequence of the audits and disclosures. An audit agreement may be entered via a formal bilateral agreement or through an exchange of letters, provided the letters reflect a meeting of the minds and contain the appropriate information and commitments.

EPA does not intend that entering into an audit agreement be a lengthy or resource-intensive process for either new owners or the Agency. While the Agency will not disqualify a new owner whose audit agreement was not finalized before the end of the nine-month period because of delay on the part of EPA, new owners seeking an agreement should approach the Agency as early as possible, sufficient to allow a reasonable time to finalize an audit agreement with EPA.

b. New Owner Audit Policy Treatment Will Be Available for Violations Disclosed Within Nine Months After the Transaction Closing, as Long as the New Owner Discloses and Corrects Each Violation Promptly, and Meets All Other Conditions of the Audit Policy.

If a new owner prefers not to commit to performing audits and making disclosures within particular timeframes, it need not choose the audit agreement option, and can make individual disclosures as they are found, during the nine months following acquisition. This option may give a new owner more control over, and privacy concerning, its auditing, but to be eligible for new owner Audit Policy incentives, each violation found must be disclosed and corrected promptly, as described below in sections II.E.3. "Prompt Disclosure Condition," and II.E.5. "Correction and Remediation Condition." This option also requires that the new owner disclose any violations that involve required monitoring, sampling or auditing prior to the first instance when such action is required, in order to meet the Voluntary Discovery condition, and be eligible for Audit Policy consideration, as described in section II.E.2. "Voluntary Discovery Condition." Of course, each disclosure would also have to meet the other six Audit Policy conditions, as applied to new owners.

2. Discussion of Timing

In the First Notice, EPA asked for comment on the issue of how long after acquisition an owner should be considered "new" for purposes of being eligible for new owner Audit Policy benefits. While some commenters suggested six months, the majority recommended one year or more, up to three years. Commenters described the challenges of making decisions about auditing and disclosing when, after an acquisition, there are many immediate and competing priorities.

The Agency recognizes that post-transaction demands may make it difficult to focus corporate attention on an immediate evaluation of environmental compliance issues, especially when the company would have to make a potentially expensive commitment to conduct audits and address noncompliance. The Agency believes that requiring such potentially high-stakes decision-making too quickly after the transaction, before the new owner has had the chance to operate its facility, would mean that fewer new owners would come forward, notwithstanding that, given more time for consideration and analysis of the situation, some would have indeed used the Audit Policy. Since EPA's intent is to encourage new owners to audit and disclose, and work with the Agency to correct problems, it seems advisable to provide sufficient time for decision-making.

However, the Agency is concerned that compliance may be unduly delayed if new owner benefits are offered for a year or more. The longer the Agency allows for the new owner to decide to make disclosures, or to enter into an audit agreement, the longer it may be before violations are identified, disclosed, and corrected. The potential for an audit agreement schedule to allow time frames for auditing and disclosures well beyond nine months, depending on the scope and nature of the overall auditing plan, could only exacerbate this potential issue. Notwithstanding that such extended timeframes may be approved only if the new owner is making a significant commitment to audit and fix many and/or complex facilities, there is potential for a significant passage of time before the disclosed violations are fully corrected. On the other hand, the longer a new owner delays coming forward, the more likely it is that certain violations which would have been eligible if disclosed earlier, because the new owner was coming forward before the first instance when "otherwise required" monitoring, sampling or

auditing was due, could no longer be given Audit Policy consideration. See Section II.E.2. "Voluntary Discovery Condition." In addition, as discussed below in Section II.D., the Agency would assess penalties for the economic benefit of costs saved from not having to operate or maintain controls and equipment, from the date of acquisition until the corrections are complete. Thus, the longer new owners take to undertake and complete an audit, and to disclose and correct violations found, the higher the penalty associated with avoided operation and maintenance costs would be.

Because of the above considerations, although the majority of commenters asked that new owners be considered "new" for at least a year after the transaction, EPA decided to give "new owners" a nine-month window of time to come forward to the Agency, and benefit from the new owner approach to penalty mitigation and application of the Audit Policy conditions. If a new owner makes disclosures after the nine-month window has passed, and has not entered into an audit agreement which extends the disclosure schedule, the disclosure may still be eligible for regular Audit Policy treatment, although the "new owner" benefits will not be available. EPA requests comment on whether more or less time would be advisable.

3. Flexibility Regarding Approach and Commitment to Auditing and Disclosures

On a related issue, commenters also asked for flexibility in the level of commitment to auditing and disclosure that a new owner need make when it comes forward to EPA, including when and how that commitment would be required. Some commenters suggested a tiering approach based on the level and complexity of the expected disclosures. Other commenters reflected the misapprehension that the Agency was envisioning a "program" to which a new owner would first need to apply, and be credentialed as a new owner, separate from any firm intention or commitment to actually audit or make disclosures. Since the Agency's focus is on the actual disclosure of violations and commitment to audit and correct violations, EPA believes that designing any precursory or "place-holding" steps, such as self-identifying as a new owner or merely indicating potential interest in auditing, would be unnecessary and a waste of effort for both EPA and the new owner.

C. Interim Approach to the Calculation and Assessment of Penalties

EPA's Interim Approach to implementation of the Audit Policy is designed to address the fact that new owners may still have to pay substantial civil penalties under the Audit Policy. Although 100 percent of the gravity portion of the penalty may be mitigated under the Audit Policy, the economic benefit portion may still be significant. The Agency recognizes that there are equitable and policy arguments that a new owner should not be penalized for the full economic benefit relating to violations that arose before a facility was under its control, if that new owner is willing to promptly address such violations and make changes to ensure that the facility stays in compliance in the future.

The uncertainties associated with the calculation and assessment of economic benefit may be factors that new owners otherwise interested in using the Audit Policy perceive as disincentives. In this section, EPA discusses an approach to calculating and assessing economic benefit in the new owner context.

1. Interim Approach to the Calculation and Assessment of Penalties

a. No penalties for economic benefit or gravity will be assessed against the new owner for the period before the date of acquisition.

b. Penalties for economic benefit associated with avoided operation and maintenance costs will be assessed against the new owner from the date of acquisition.

c. Penalties for economic benefit associated with delayed capital expenditures or with unfair competitive advantage will not be assessed against the new owner if violations are corrected in accordance with the Audit Policy (i.e., within 60 days of the date of discovery or another reasonable timeframe to which EPA has agreed).

2. Background of Economic Benefit Recapture

The imposition of civil penalties that recapture the economic benefit of noncompliance is a cornerstone of the EPA's civil penalty program. Benefit recapture has been a part of the Audit Policy since it was first issued on the premise that, even in self-audit and disclosure situations, penalties should not be reduced below the level necessary to recapture economic benefit when a violator has achieved an unfair economic advantage over its complying competitors. Accordingly, the Audit Policy provides that EPA reserves the right to assess any economic benefit

which may have been realized as a result of noncompliance, even where the entity meets all Audit Policy conditions. The Audit Policy further provides that the Agency may waive the economic benefit component of the penalty where the Agency determines that the economic benefit is insignificant.

Violators obtain an economic benefit from violating the law by delaying compliance, avoiding compliance, or obtaining an unfair competitive advantage. When violators delay compliance, they have the use of the money that should have been spent on compliance to put into profit-making investments. Simply put, violators "gain" the returns on the amount of money that should have been invested in pollution control equipment. A typical example is where a factory delays installation of a required wastewater treatment facility. If the wastewater treatment facility costs \$1,000,000 to install, and the violator waits three years past the required date to comply, the violator has saved over \$200,000 by delaying compliance.³

A second type of economic benefit is derived when a violator avoids the annual costs it would have incurred had it complied in a timely manner. A typical example would be where a factory avoids the operation and maintenance costs for the above-mentioned wastewater treatment plant for the three years the polluter was out of compliance.

The third type of economic benefit is derived from the violator obtaining an unfair competitive advantage. Economic benefit associated with unfair competitive advantage might arise in a number of new owner scenarios. An example could involve a newly acquired facility with permit limits on its hours of operation and/or throughput. The new owner may discover that its facility is operating two hours beyond its permit limit each day in order to achieve more output. The funds made from that extra output would also constitute unfair competitive advantage economic benefit.

³ The specific amount is \$209,530 and was generated by the current version of the Agency's BEN computer model using the following assumptions: (1) The violator was in the average maximum tax bracket of 40%; (2) the violator's cost of money (i.e., the discount/compound rate) was the current BEN default value of 9.4%; and (3) inflation was based on the Plant Cost Index published in Chemical Engineering magazine. The BEN computer model can be found at <http://www.epa.gov/compliance/civil/econmodels/index.html>.

3. Discussion of Calculation and Assessment of Penalties

In the First Notice, the Agency asked for comment on the issue of how economic benefit should be calculated for disclosures by new owners. Many commenters addressed the issue of penalties to recapture economic benefit, and the issue of whether they should be eliminated or reduced in the new owner situation. Some commenters posited that the new owner does not actually receive any economic benefit from the previous owner's delayed or avoided compliance. On the other hand, it is possible that benefit does accrue; for example, it may be reflected in the purchase price. Notwithstanding arguments over whether economic benefit could inure to a new owner, it is difficult to accurately determine the amount of any such benefit. There are also equitable and policy arguments that a new owner should not be penalized for economic benefits relating to violations that originated when a facility was not in its control, and the new owner is willing to self-disclose and expeditiously correct the violations, and make changes to ensure future compliance. The Agency has speculated that one of the reasons that there have been relatively few Audit Policy disclosures of violations requiring the installation of significant environmental controls may relate to the potential size of penalties to recapture economic benefit. There may be significant economic benefit associated with corrections requiring expensive environmental controls, and companies may well consider it prudent to quietly fix their problems, without advising EPA (or the state) or seeking input from regulators. However, new owners investing tens of millions of dollars to correct violations that began prior to their ownership may want to involve EPA and receive a covenant not to sue⁴ for those violations as part of a settlement. As a matter of course, EPA settlements typically release and covenant not to sue for the alleged violations resolved under the settlement agreement.

By providing certainty to the economic benefit assessment, EPA's intent is to increase the number of disclosures of significant violations, which will allow the Agency to participate in developing the approach to correcting such violations and

⁴ A release and covenant not to sue is a legal mechanism under which EPA agrees to relinquish any potential claims to initiate a lawsuit against a party for any of the violations settled under the agreement, where that party complies with all of the terms of the settlement agreement.

securing appropriate environmental benefit. To further this goal, and because of the equities of the new owner situation, the Agency believes it is appropriate to modify its approach to calculating and assessing economic benefit with respect to disclosures from new owners.

One issue raised in the First Notice was whether EPA should take into account possible purchase price adjustments attributable to environmental compliance liabilities in designing the Agency's approach to new owners. Such consideration of adjustments to purchase price could potentially factor into the Agency's approach to calculating and assessing penalties in the new owner context. However, no commenters recommended that EPA try to incorporate a consideration of possible purchase price adjustments into the approach to new owners. Some commenters asserted that purchase price is often set at the outset of negotiations and that, especially in larger transactions, environmental compliance costs or savings are immaterial to the pricing of the transaction. Commenters pointed out that, even in the event that there were negotiations to adjust pricing, confidentiality issues may preclude its consideration by the Agency, and inquiries into if and how price may have been adjusted may chill participation in this Interim Approach. The Agency is also concerned that it would be prohibitively costly and difficult, if not impossible, for EPA to accurately and effectively analyze whether a price adjustment attributable to environmental issues occurred, or to conclusively determine how large it was. Incurring such time-intensive transaction costs, which would likely still yield inconclusive results, would detract from EPA's goals of leveraging its resources to secure higher quality environmental improvements more quickly and effectively than might otherwise occur. Accordingly, under this Interim Approach, EPA does not intend to consider adjustments to purchase price.

Commenters offered various suggestions for ways to approach the issue of penalties for economic benefit including: Waiving any pre-closing penalties; calculating penalties from the date the audit is complete; beginning the calculation of penalties only after a reasonable period for achieving compliance; calculating penalties starting a year after the end of the audit; and offsetting penalties by the cost of the audit, or by the cost of corrective measures. EPA has considered a variety of options and the Interim Approach

focuses on two elements. First, for the reasons stated above, EPA will not seek penalties for economic benefit associated with capital expenditures, assuming the violations are promptly corrected. Second, because the new owner does clearly benefit from not having to operate and maintain controls and equipment before they are installed and functioning, the Agency will assess penalties for economic benefit associated with those savings, starting from the date the facility was acquired until the corrections are complete. EPA considers this a fair approach, and, because such penalties for avoided costs will rise the longer it takes to complete auditing, disclosures, and correction, one that may help motivate new owners to avoid delays. EPA does not intend to offset the cost of performing audits from any penalties for economic benefit since, especially for newly acquired facilities, auditing is generally a means by which to assess and assure compliance, and a cost of doing business in a responsible manner. In addition, there are situations where auditing may be required as a matter of compliance (e.g., Risk Management Plans under Clean Air Act 112(r)(7)), and where EPA considers it inappropriate to credit the cost of the audit against assessed penalties.

As is the case in the settlement of any violation, EPA may provide additional flexibility in assessing economic benefit on a case-by-case basis, if the Agency believes it is warranted and appropriate given the facts in a particular situation. As EPA has already stated in its Answer to Question 9 of the 2007 Frequently Asked Questions document, the Agency intends to consider all factors of settlement in assessing economic benefit in Audit Policy cases, and fairness is the central guiding principle underlying Agency decisions regarding the assessment of economic benefit.

D. Interim Approach to Application of Certain Audit Policy Conditions to New Owners

This section describes EPA's Interim Approach to applying the nine conditions of the Audit Policy to new owners. The Agency is proposing to apply five conditions differently in the new owner context (Condition D.1. Systematic Discovery; Condition D.2. Voluntary Discovery; Condition D.3. Prompt Disclosure; Condition D.8. Other Violations Excluded; and Condition D.9. Cooperation). For the sake of clarity and completeness, this section discusses the Agency's usual approach to applying the remaining Audit Policy conditions (Condition D.4. Independent Discovery; Condition D.5. Correction and

Remediation; Condition D.6. Prevent Recurrence; and Condition D.7. No Repeat Violations), as described in the 2000 Audit Policy, the 2007 Frequently Asked Questions document and/or the Audit Policy Interpretive Guidance ("1997 Interpretive Guidance"),⁵ although the Agency does not intend to alter the approach it has taken to their application or interpretation in the new owners context.

In order for the Agency to offer the incentives of this Interim Approach to applying the Audit Policy, the new owner would have to meet all nine of the following conditions, as tailored for new owners, as well as certify to the criteria of the new owner definition.

1. Systematic Discovery Condition (Condition D.1.)

The Systematic Discovery condition of the Audit Policy provides that violations be discovered through either an environmental audit or a compliance management system (CMS), if disclosing entities are to receive 100 percent mitigation of gravity-based penalties (if a violation is discovered outside such a review, and meets all the other Audit Policy conditions, 75 percent mitigation is available). The Audit Policy definition of "Environmental Audit" is a systematic, documented, periodic and objective review by regulated entities of facility operations and practices related to meeting environmental requirements. A "Compliance Management System" encompasses the regulated entity's documented systematic efforts, appropriate to the size and nature of its business to prevent, detect, and correct violations. For the full definitions of "Environmental Audit" and "CMS," see section II.B. of the Audit Policy at 65 FR 19625.

a. Interim Approach to Systematic Discovery Condition in the New Owner Context

In the new owner context, EPA recognizes that pre-closing due diligence may meet all the elements of the Audit Policy definition of "Environmental Audit," with the exception of the periodic review element. EPA recognizes that a new owner's pre-closing due diligence

⁵ The "Audit Policy Interpretive Guidance," issued on January 15, 1997, can be found at <http://www.epa.gov/compliance/resources/policies/civil/rcra/audpolintepgui-mem.pdf>. The 1997 Interpretive Guidance was developed to answer frequently asked questions regarding the implementation of the original Audit Policy issued in 1995 (60 FR 66,706 (December 22, 1995)). The 2007 Frequently Asked Questions document describes the differences between the original Audit Policy and the 2000 Policy and is intended to supplement the 1997 Interpretive Guidance.

review is by its nature a one-time event, and will waive the element of the Systematic Discovery condition that calls for that review to be “periodic.” In all other aspects, for new owner disclosures, EPA will apply the Systematic Discovery condition and standards in the usual manner.

b. Discussion of Systematic Discovery

In the First Notice, EPA asked for comment on whether the Agency should require that new owners have performed a certain level of pre-transaction due diligence to qualify for new owner benefits. Public comments on this issue reflected the fact that mergers and acquisitions vary widely in size, type and circumstance. Many commenters asserted that the level of environmental due diligence review a prospective buyer can perform is largely determined by the size, scope, speed and circumstances of negotiations, and can range from in-depth inquiries to scenarios where very little information can be gathered. Commenters indicated that a buyer’s pre-purchase information on regulatory compliance is often imperfect and incomplete. Commenters asserted that any pre-condition from EPA that a certain level of due diligence must have been performed to make disclosures as a new owner would simply inhibit such disclosures from buyers, rather than encourage more due diligence. In addition, commenters posited that, aside from the fact that some buyers may simply be unable to perform the requisite due diligence, many would be concerned about how EPA might interpret the sufficiency of their efforts, and thus dissuaded from making disclosures. Some commenters recommended requiring the CERCLA “all appropriate inquiry” standard for prospective purchasers. However, that standard, with its emphasis on identifying contamination, was developed for a different situation.

EPA does not see a compelling reason to layer more or different review conditions onto the Audit Policy standards that currently exist. The Agency has concerns about the resources that would be needed to analyze and verify whether any new standard of review had been met. Moreover, EPA does not wish to deviate from the original intent of the Audit Policy and this condition. The only circumstance that warrants a different approach in the new owner context is that a prospective buyer would not have had an opportunity to perform periodic reviews of a facility it does not yet own. For that reason, EPA will not require that a new owner’s pre-closing review meet the “periodic” element in order to

be considered for full penalty mitigation.

2. Voluntary Discovery Condition (Condition D.2.)

The Voluntary Discovery condition of the Audit Policy provides that the disclosed violation must have been identified voluntarily, and not through a legally mandated monitoring, sampling, or auditing procedure that is required by statute, regulation, permit, judicial or administrative order, or consent agreement. The Audit Policy provides three examples of discovery which would not be “voluntary” such that they would be ineligible for penalty mitigation: emissions violations detected through a required emissions monitor; violations of a National Pollutant Discharge Elimination System (NPDES) discharge limit found through prescribed monitoring; and violations found through a compliance audit required to be performed by the terms of a consent order or settlement agreement.⁶

Generally, Clean Air Act violations discovered during activities supporting Title V certification requirements are not eligible for penalty mitigation under the Policy based on the Voluntary Discovery condition.⁷ The Answer to Question 2 of EPA’s 2007 Frequently Asked Questions document described a limited exception to this condition for new owners. Clean Air Act violations discovered at newly acquired facilities as part of the new owner’s reexamination of facility compliance under Title V are considered voluntarily discovered for purposes of the Audit Policy, provided that the new owner either discloses the violation in writing or enters into an audit agreement with EPA before the new owner’s first annual compliance certification under new ownership.

a. Interim Approach to Voluntary Discovery Condition

Under the Interim Approach, EPA is expanding its interpretation of the Voluntary Discovery condition of the Audit Policy in the new owner context, previously limited to compliance with Title V of the Clean Air Act, to allow consideration of all violations which would otherwise be ineligible for Audit Policy consideration under this condition. EPA wants to encourage new

owners to broadly examine facility compliance and facility operations, correct violations found, and upgrade deficient equipment and practices, as soon as possible. Thus, for new owners that undertake such efforts and either disclose violations or enter into an audit agreement with an auditing and disclosure schedule, before the first instance when the monitoring, sampling or auditing is required, the disclosures would not be disqualified from Audit Policy consideration because of the Voluntary Discovery condition.

Providing this limited window for disclosure, prior to the first required instance of monitoring, sampling, or auditing, would provide a one-time “catch-up” period for new owners to use the Audit Policy for violations found through activities that are already required. For example, an entity could perform its Annual Comprehensive Site Compliance Evaluation required by the NPDES General Industrial Stormwater Permits and Stormwater Pollution Prevention Plans (SWPPP) prior to its due date, and discover and disclose violations for Audit Policy consideration. Of course, this eligibility for Audit Policy consideration would not affect the new owner’s independent obligation to make appropriate and timely notifications and reports to regulatory authorities.

b. Discussion of Voluntary Discovery

In the First Notice, EPA asked for comment on whether the Agency should allow Audit Policy consideration of violations that might otherwise be excluded when the disclosures come from new owners. Most commenters supported the idea of allowing new owners to be eligible for penalty mitigation consideration for “non-voluntarily” discovered violations by expanding the Agency’s interpretation of the Voluntary Discovery condition to other statutes and regulations, beyond the Clean Air Act Title V scenario described in EPA’s 2007 Frequently Asked Questions document. While voluntary discovery is fundamental to EPA’s Audit Policy, the approach to new owners is aimed at encouraging new owners’ quick and thorough scrutiny of all operations and required practices, and providing this opportunity may make new owners proactive in checking for compliance issues as soon as possible. Thus, the Agency is willing to give new owners this limited “catch-up” period to monitor, sample and audit, and will allow otherwise ineligible violations to receive Audit Policy consideration, if the new owner (a) promptly discloses the violations or (b) enters into an audit

⁶ The Audit Policy’s Voluntary Discovery exclusion does not apply to violations that are discovered pursuant to audits that are conducted as part of a comprehensive environmental management system (EMS) required under a settlement agreement. See 65 FR at 19621 (April 11, 2000).

⁷ See supra note 2.

agreement with an auditing and disclosure schedule before the date the monitoring, sampling, or auditing would be required.

3. Prompt Disclosure Condition (Condition D.3.)

The Audit Policy provides that the regulated entity fully must disclose the specific violation in writing to EPA within 21 days (or within such shorter time as may be required by law) after the entity discovered that the violation has, or may have, occurred. The Audit Policy defines discovery as the time at which there is an objectively reasonable basis for believing that a violation has, or may have, occurred.

The preamble of the Audit Policy states that, in the acquisitions context, EPA will consider extending the prompt disclosure period on a case-by-case basis. It also states that the 21-day disclosure period will begin on the date of discovery by the acquiring entity, but in no case will the period begin earlier than the date of acquisition. See 65 FR at 19622.

As EPA currently implements the Audit Policy, if an entity enters into an audit agreement with the Agency, "the clock stops" with regard to the Prompt Disclosure condition for any violations discovered thereafter and disclosed in accordance with the agreement.

a. Interim Approach to Prompt Disclosure Condition

Under the Interim Approach, EPA will allow limited flexibility in applying the Prompt Disclosure condition in the new owner context. For violations discovered pre-closing, prompt disclosure to EPA would have to be made within 45 days after the transaction closing to be considered for new owner incentives. For violations discovered post-closing, the new owner would have to disclose violations within 21 days after discovery or within 45 days after the transaction closing, whichever time period is longer. If a new owner has entered into an audit agreement with EPA, violations discovered and disclosed pursuant to that agreement would be governed by the disclosure schedule in the agreement. Of course, if a statute or regulation requires that a violation be reported or disclosed more quickly than the time frames above, disclosures must be made within the time limit established by law.

b. Discussion of Prompt Disclosure

Although EPA did not, in the First Notice, specifically ask for comment on the Prompt Disclosure condition, several commenters requested that

violations discovered in pre-acquisition due diligence be considered promptly disclosed if disclosures were made between 30 and 60 days after closing. Commenters described the many immediate and competing priorities that may distract from focusing corporate attention on a decision to make voluntary disclosures to a regulatory agency. Commenters noted that without adequate time for the new management to consider whether to self-disclose the issues found in pre-transaction due diligence reviews, the default decision may be to not engage with EPA, but rather to quietly fix problems found. EPA recognizes that the time period immediately following a transaction closing may be quite turbulent and that, notwithstanding the fact that the new owner had information about violations before acquisition, it may be a particularly difficult time to make speedy decisions about coming forward to EPA. To encourage new owners to decide to disclose due diligence findings, and in the spirit of the 2000 Audit Policy preamble language discussed above, the Agency will now allow new owners up to 45 days after acquisition to disclose and meet the Prompt Disclosure condition.

A few commenters requested that the post-closing timeframes for disclosure be extended from 21 days. With one exception, EPA does not see a compelling reason to change current implementation of the Audit Policy, since it provides adequate timeframes for regulated entities to meet the prompt disclosure condition. Any new owner concerned about its ability to meet the Prompt Disclosure condition can enter into an audit agreement during the first nine months after acquisition and "the clock will stop" with regard to prompt disclosure for violations discovered thereafter and disclosed in accordance with the agreement. EPA is willing to appropriately tailor timeframes and expectations for auditing and reporting to the new owner's particular situation (e.g., number and complexity of facilities, scope of audit).

However, if the new owner chooses not to enter into an audit agreement during the nine months after acquisition, disclosures would have to be made promptly either within 21 days of discovery or within 45 days of the closing, whichever is later. Otherwise, if EPA held that all violations found post-transaction had to be disclosed within 21 days, any problems found soon after closing would need to be disclosed earlier than the violations already discovered in pre-acquisition due diligence. To avoid this unintended result, EPA will allow the new owner to

make disclosures by whichever date is later. For example, if a new owner discovered a violation a week after acquisition, prompt disclosure can be made within 45 days of the closing.

4. Discovery and Disclosure Independent of Government or Third Party Plaintiff Condition (Condition D.4.)

The Audit Policy states that violations must be discovered and identified before EPA or another government agency likely would have identified the problem. This condition provides that regulated entities must take the initiative to find violations on their own and disclose them promptly instead of waiting for an indication of pending enforcement action or third-party complaint. The Audit Policy lists the circumstances under which discovery and disclosure will not be considered independent. Discovery and disclosure must be made before the beginning of a federal, state or local agency inspection, investigation or information request; notice of a citizen suit; the filing of a complaint by a third party; the reporting of the violation to EPA (or other government agency) by a "whistleblower" employee; or imminent discovery of the violation by a regulatory agency. However, where EPA determines that a facility did not know it was under civil investigation, and EPA determines that the entity is otherwise acting in good faith, the Agency may exercise its discretion to reduce or waive civil penalties under the Audit Policy.

EPA encourages multi-facility auditing and does not intend that the "independent discovery" condition preclude the availability of the Audit Policy when multiple facilities are involved. Thus, for entities that own or operate multiple facilities, the fact that one facility is already the subject of an investigation, inspection, information request or third-party complaint does not preclude the Agency from exercising its discretion to make the Audit Policy available for violations self-discovered at other facilities owned or operated by the same regulated entity.

a. Interim Approach to Independent Discovery Condition

EPA is not changing its current interpretations of the Discovery and Disclosure Independent of Government or Third Party Plaintiff condition as applied to new owner disclosures.

b. Discussion of Independent Discovery

Although EPA did not, in the First Notice, specifically ask for comment on the Independent Discovery condition,

one commenter suggested that disclosures of violations found during due diligence that were raised by third parties or governmental agencies should not be disqualified from Audit Policy consideration under this condition. The Agency disagrees. For example, in a matter involving a new owner, it is possible that potential violations have already been reported by the seller or included by the seller in a report to a regulatory agency, especially when the seller had been under an obligation to perform monitoring, sampling, or auditing. Because the new owner's disclosure of those violations would not have occurred prior to "imminent discovery" by the government or the commencement of a government investigation, EPA would be unable to apply Audit Policy penalty mitigation. Also, if a government agency has initiated an investigation and the facility's prior owner were aware of this, such issues would be considered "known," and the new owner would not receive Audit Policy consideration and new owner benefits. An underlying objective of the Audit Policy is to conserve government resources and those of citizen plaintiffs by encouraging the regulated community to self-police. That objective would be thwarted, in part, if the Agency conferred Audit Policy benefits on a new owner on notice that its facility is already under investigation. While EPA does not want to expend its limited resources to conduct fact-finding on the extent to which a new owner was aware of a pending civil investigation prior to disclosure, the Agency may exercise its discretion to waive or reduce penalties for new owners if EPA determines that (1) the new owner did not know that its newly acquired facility was under investigation and (2) the new owner is otherwise acting in good faith.

The Agency, of course, encourages the cooperative and speedy resolution of known violations. Even if the violation was ineligible for the Audit Policy, the Agency will generally consider the willingness of a new owner to address and correct problems a positive factor in determining the appropriateness of any EPA enforcement response, penalty assessment or resolution.

5. Correction and Remediation Condition (Condition D.5.)

Under the Audit Policy, the regulated entity must correct the disclosed violation within 60 calendar days from the date of discovery, certify in writing that the violation has been corrected, and take appropriate measures as required by law to remedy any

environmental or human harm due to the violation.

In both the 2000 Audit Policy and the 2007 Frequently Asked Questions document, EPA recognizes that not all violations can be corrected in the 60-day time frame. EPA may allow for an extension of time for corrections that require significant expenditures, involve technically complex issues, or involve decisions for which an entity seeks or is required to obtain EPA, state or local input or approval. If more than 60 days will be needed to correct the violation, the entity must notify EPA in writing before the end of the 60-day period.

a. Interim Approach to Correction and Remediation Condition

EPA is not changing its current interpretation of the Correction and Remediation condition in the context of new owner disclosures.

Where violations are discovered by the new owner prior to acquisition, EPA will consider the date of the transaction closing as the date of discovery, for purposes of interpreting the Correction and Remediation condition. Thus, for violations found before the new owner owned the facility, correction would need to be completed within 60 days from the date of the acquisition closing, although EPA may agree to a longer period of time if appropriate and warranted.

b. Discussion of Correction and Remediation

Although EPA did not, in the First Notice, specifically ask for comment on the Correction and Remediation condition, many commenters discussed it. While some commenters sought extensions to 90 or 120 days from the 60-day prompt correction period, other commenters supported maintaining the Agency's current interpretation, and some commenters from the regulated community acknowledged that violations frequently can be handled case-by-case under today's existing disclosure process (e.g., under the Audit Policy). One commenter urged that, in designing any tailored incentives for new owners, the Agency take care that any new owner approach not be used by the disclosing entity as a means to delay compliance.

One of EPA's primary goals in developing the approach to new owners is to secure pollutant reductions and environmental improvements as quickly as possible, and a blanket extension of the 60-day correction period would undercut that aim. However, especially in the context of an audit agreement involving complex facilities and technical issues, the Agency is willing

to consider tailoring a compliance schedule appropriate for the situation and circumstances.

One commenter requested that EPA issue enforcement discretion letters to allow the continued operation of noncompliant facilities while they wait for "completion of required acts." EPA's standing policy on enforcement discretion only allows the Agency to approve such a "no action assurance" in extremely unusual circumstances where it is clearly necessary to serve the public interest and where no other mechanism can adequately address the situation.⁸ In the scenario described, an appropriate approach already exists, since under EPA's current application of the Audit Policy the Agency recognizes that not all violations can be corrected within 60 days of discovery. EPA may allow an extension for corrections that require significant expenditures, involve technically complex issues, or involve decisions for which an entity seeks or is required to obtain EPA or state input or approval (e.g., permits). While the Agency may consider a permit application adequate to address timing under the correction condition under the Audit Policy, ultimately any resolution of the underlying violation will be conditioned on the timely and full achievement of compliance, and that caveat will be clearly stated in any settlement or resolution documents. Where a violation cannot be fully corrected until a permit is received by the new owner, EPA may require the new owner to implement interim measures or controls as part of the settlement document.

6. Prevent Recurrence (Condition D.6.)

Under the Prevent Recurrence condition, the disclosing entity must agree in writing to take steps to prevent a recurrence of the violation after it has been disclosed and corrected. Preventative steps may include, but are not limited to, improvements to the entity's environmental auditing efforts or compliance management system.

a. Interim Approach to Prevent Recurrence Condition

EPA is not changing the Prevent Recurrence condition of the Audit Policy as applied to new owner disclosures.

⁸ See "Processing Requests for Use of Enforcement Discretion," Memorandum from Steven A. Herman (March 3, 1995), which can be found on the Internet at <http://www.epa.gov/compliance/resources/policies/civil/io/prorreq-hermn-mem.pdf>.

b. Discussion of Prevention of Recurrence

No comments were received on the Prevent Recurrence condition. A fundamental goal of the Audit Policy is to create incentives for regulated entities to not only look for and correct environmental violations, but to put systems and practices in place to prevent the recurrence of the violation disclosed. EPA will continue to apply this condition to require new owners to agree take steps to prevent the recurrence of violations disclosed. An underpinning of the significant penalty mitigation offered under the Audit Policy is the assurance from the disclosing entity that the problem that gave rise to the violation has in fact been fully addressed, and EPA sees no reason to propose a different approach for new owners.

7. No Repeat Violations Condition (Condition D.7.)

Condition 7 of the Audit Policy provides that repeat violations are not eligible for Audit Policy benefits. Specifically, under the No Repeat Violations condition, the same or closely-related violation must have not occurred at the same facility within the past three years. For purposes of this condition, the term "violation" includes any violation subject to a federal, state or local civil judicial or administrative order, consent agreement, conviction or plea agreement. Recognizing that minor violations are sometimes settled without a formal action in court or in an administrative enforcement proceeding, the term also covers any act or omission for which the regulated entity has received a penalty reduction. When the facility is part of a multi-facility organization, the Audit Policy is not available if the same or closely-related violation occurred as part of a pattern of violations at one or more of these facilities within the last five years.

As articulated in the preamble to the Audit Policy, "[i]f a facility has been newly acquired, the existence of a violation prior to the acquisition does not trigger the repeat violations exclusion" as to the new owner. See 65 FR at 19623 (April 11, 2000). Most recently, in the Answer to Question 5 of EPA's 2007 Frequently Asked Questions document, the Agency stated that new owners that undertake examinations of newly acquired facilities generally will be eligible under the No Repeat Violations condition of the Audit Policy irrespective of the new owner's history of violations at other facilities that were not recently acquired.

a. Interim Approach to No Repeat Violations Condition

EPA is not changing its current interpretations of the No Repeat Violations condition as applied to new owner disclosures.

b. Discussion of No Repeat Violations

Several comments discussed the Repeat Violations condition, and all support the Agency's current interpretation. The Repeat Violations exclusion benefits both the public and law-abiding entities by ensuring that penalties are not waived for those entities that have previously been on notice of violations, and failed to prevent repeat violations.

8. Other Violations Excluded Condition (Condition D.8.)

The Audit Policy provides that certain violations are not eligible for the incentives available under the Policy. In order to be eligible for Audit Policy consideration, the violation cannot be one which (a) resulted in serious actual harm, or may have presented an imminent and substantial endangerment, to human health or the environment, or (b) violates the specific terms of any judicial or administrative order, or consent agreement.

a. Interim Approach to Exclusion of Violations Condition for Violations Which Resulted in Serious Actual Harm or May Have Presented an Imminent and Substantial Endangerment

Under EPA's Interim Approach, absent a fatality, community evacuation, or other seriously injurious or catastrophic event, where the violation that gave rise to serious actual harm or imminent and substantial endangerment began before the new owner acquired the facility, EPA will not exclude new owners' disclosures of such violations from Audit Policy consideration because of the Other Violations Excluded condition.

This eligibility for Audit Policy consideration and penalty mitigation would not affect either the new owner's independent obligation to notify appropriate regulatory authorities in the event of a release or the new owner's liability for the violation and its correction. In all circumstances, EPA reserves its authority and ability to take enforcement action to abate any endangerment or address violations, including the issuance of appropriate orders.

b. Discussion of Serious Actual Harm and Imminent and Substantial Endangerment

Although EPA did not, in the First Notice, specifically ask for comment on the Other Violations Excluded condition, the Agency received several comments about allowing Audit Policy consideration for violations that may have caused "serious actual harm." Commenters contended that unless EPA were more flexible in implementing this condition, the Agency would not receive disclosures of significant violations, since a new owner could not be confident of receiving any Audit Policy consideration.

The incentives for new owners are specifically aimed at encouraging the disclosure and correction of these potentially more serious violations. EPA's goal is to motivate new owners to find and disclose violations, which will, once corrected, result in significant environmental protection and benefit. For example, EPA wants to encourage new owners to identify and correct New Source Review violations, and put in place the required environmental controls avoided by previous owners.

EPA recognizes that such significant violations may meet the threshold of what results in serious actual harm or may have presented an imminent and substantial, and that the Audit Policy specifically excludes such violations. EPA's waiver, absent catastrophic events, of part (a) of Condition D.8. in the new owner context, is intended to allow and invite new owner disclosures of significant violations which began before acquisition, without either undermining the Agency's ability to invoke its imminent and substantial endangerment authorities to address similar violations, or compromising EPA's ability to allege that similar violations resulted in serious actual harm.

The Agency believes the specific goals and equities of the new owner context warrant the decision to create an exception for the Interim Approach to allow the disclosure of serious violations by new owners, with the caveats described above in section II.D.8.a. However, EPA seeks further comment on creating this exception.

9. Cooperation (Condition D.9.)

Under the Audit Policy, the regulated entity must cooperate as required by EPA and provide the Agency with the information it needs to determine Policy applicability. With respect to this condition, EPA looks only to whether an entity cooperated with the Agency in the consideration of the entity's request

for treatment under the Audit Policy, not whether the entity has cooperated with the Agency in past matters or whether the entity is in litigation with the Agency on other matters.

a. Interim Approach to Cooperation Condition

EPA is modifying the Cooperation condition of the Audit Policy only to make clear that the disclosing entity must cooperate with EPA and provide such information as is necessary and requested by EPA to determine the applicability of the Audit Policy, as modified by this Interim Approach. In particular, EPA may ask an entity seeking new owner benefits to provide information to support its submission that it is a "new owner" as defined under Section II.A.

b. Discussion of Cooperation

No comments were requested or received concerning the Cooperation condition. However, because the Interim Approach applies only to "new owners" and modifies certain conditions of the Audit Policy, the Agency wants to make clear that regulated entities seeking treatment under the Interim Approach will be expected to cooperate by providing information as necessary and requested by EPA to determine whether such entities are entitled to new owner benefits. In all other respects, EPA will continue to apply the Cooperation condition, as articulated in the Audit Policy and EPA's Answer to Question 7 of the 2007 Frequently Asked Questions document, to violations disclosed pursuant to the Interim Approach. *See* 65 FR at 19623.

E. Other Issues Related to the Interim Approach

1. Consideration of Indemnification Agreements

Most commenters did not recommend that the Agency take indemnification agreements into account in designing its approach to new owners' disclosures. They noted the confidential nature of such agreements, and urged that EPA not try to investigate arrangements for risk allocation between a buyer and seller that are properly determined by the marketplace. Many commenters asserted that the analysis of such indemnification agreements would be complex, costly and time-consuming. As EPA's focus is on the effective use of scarce government resources to achieve compliance and significant environmental benefits, the Agency does not intend to scrutinize or consider indemnification agreements a new owner may have arranged.

2. Effect on Merger and Acquisition (M&A) Activity

EPA does not believe there is a high probability that implementing an Interim Approach to resolving Audit Policy disclosures from new owners would have a noticeable effect on merger and acquisition activity. The Agency did receive comments suggesting that encouraging new owners to disclose violations might lead sellers to either avoid buyers likely to audit and disclose, or to include "no-tell" clauses in their transaction or indemnity agreements, making indemnification contingent on the new owner refraining from any disclosures of environmental or other violations to the government.

However, EPA also received comments asserting that consideration of environmental compliance liabilities, as opposed to environmental contamination and clean-up liabilities, is generally not a driving force in, or important element of, M&A transactions. In addition, the Agency received comments suggesting that such incentives for new owners might have a beneficial effect on negotiations, encouraging prospective sellers to address violations before closing, or giving prospective buyers leverage to negotiate for the seller to correct violations found during due diligence. If sellers were to include "no tell" clauses in their transaction or indemnity agreements, such clauses may well be avoidable as contrary to the public interest.

3. Approach to Sellers

EPA received comments urging it to provide enforcement protection to the prior owners of facilities whose new owners have disclosed noncompliance under the Audit Policy. However, EPA does not believe that this would be appropriate. Moreover, the Agency does not intend to allow sellers the same penalty mitigation benefits as new owners, as requested by some commenters, or to require joint disclosures from buyer and seller. A seller that did not discover, disclose and correct violations when it operated a facility should not be a beneficiary of the Audit Policy, simply because the facility's new owner decides to undertake such actions. The opportunity to properly operate the facility and to address noncompliance, including through use of the Audit Policy, was available to the seller while it operated the facility. Resolving the violations with the new owners should provide the appropriate environmental controls and improvements necessary to reduce pollution and ensure ongoing

compliance at the facility. Nevertheless, the Agency reserves its rights to pursue sellers where the circumstances and equities warrant.

4. Recognition as an Incentive

Some commenters supported the idea of recognition from EPA as an incentive to motivate disclosures from new owners, but others noted the potential for publicity to be misunderstood or misinterpreted. Some types of recognition suggested, such as logos and public promotions, seemed more appropriate for an Agency award program. Other ideas, such as access to an ombudsman who would keep internal lists of participants and seek to resolve company disputes with regulators, seemed unsuitable as recognition for having used the Audit Policy to disclose and resolve violations, notwithstanding the Agency's appreciation of a new owner's choice to come forward. Some commenters suggested making recognition optional, or letting the new owners choose the sort of recognition to receive, but these concepts pose sufficient implementation difficulties to make them unattractive options for the Agency. EPA does recognize the voluntary nature of the new owner's choice to come forward to the government and will seek to appropriately reflect that in Agency statements concerning the disclosure and correction of violations by new owners.

5. State and Local Coordination

Commenters noted that lack of coordination or inconsistencies with state programs, and state audit policies where they exist, may dissuade new owners from coming forward to EPA, and that new owners might choose instead to deal with states, especially where states are authorized to implement federal regulatory programs. EPA recognizes that state and local regulatory agencies are partners in implementing the enforcement and compliance assurance program, and has established ways of coordinating and working together with our state and local partners. When consistent with EPA's policies on protecting confidential and sensitive information, the Agency will share with state and local agencies information relating to the disclosure of violations of federally-authorized, approved or delegated programs. Whether a new owner should make a disclosure to EPA, the state, or both, depends on the type of regulation violated, availability of a state audit program, whether multiple facilities located in different states are involved,

and the scope of legal relief sought by the entity. Federal liability can only be resolved by EPA.

6. Confidentiality

Various commenters expressed concern about the confidentiality of both audit and transaction documents. The Agency does not believe these concerns are warranted. First, it is generally not EPA's intention to request documents related to the transaction, since the Agency has no plans to review or analyze them. Second, since 1986, the Agency has had a policy to refrain from routine requests for audit reports in the context of disclosures of civil violations, except in the rare event that the information is necessary to determine whether the conditions of the Audit Policy have been met. This Policy was re-affirmed in the 2000 Audit Policy, and EPA will not alter this practice in the context of disclosures from new owners. Third, EPA has long-standing policies of not publicly disclosing any information that might interfere with settlement negotiations⁹ and of withholding Audit Policy self-disclosures from release prior to resolution of the disclosures.¹⁰

F. How Should a New Owner Self-Disclose or Request an Audit Agreement?

New Owners should contact either Philip Milton ((202) 564-5029, milton.philip@epa.gov) or Caroline Makepeace ((202) 564-6012 or makepeace.caroline@epa.gov) of EPA's Office of Enforcement and Compliance Assurance, Office of Civil Enforcement, Special Litigation and Projects Division regarding disclosures or audit agreements.

G. Applicability

This Interim Approach applies to settlement of claims for civil penalties for any violations under all of the federal environmental statutes that EPA administers. EPA has issued documents addressing several applicability issues pertaining to the Audit Policy. New owners considering whether to take advantage of the Interim Approach should review those documents as well

as the 2000 Audit Policy to see whether they address any relevant questions. The 2000 Audit Policy and related documents are available on the Internet at <http://www.epa.gov/compliance/incentives/auditing/auditpolicy.html>. Additional guidance for implementing the Policy in the context of criminal violations can be found at <http://www.epa.gov/compliance/resources/policies/incentives/auditing/auditcrimvio-mem.PDF>.

To the extent that the Interim Approach's conditions or criteria differ from the 2000 Audit Policy, the 2007 Frequently Asked Questions, or the 1997 Interpretive Guidance, the Interim Approach will, in the new owner context, supersede any inconsistent provisions. All other provisions of the 2000 Audit Policy and the two other documents will continue to apply to self-disclosing new owners.

The Interim Approach is intended to inform the public and regulated entities of the Agency's current enforcement approach to new owners disclosing violations under the Audit Policy. As is the case with all Agency policies, application of the Audit Policy and this Interim Approach is subject to EPA's enforcement discretion and is not binding on the public or EPA. See also Section II.G. of the 2000 Audit Policy for discussion of the Audit Policy's applicability (65 FR 19626).

H. Approach to Assessment of Interim Approach

1. Measures to Assess Interim Approach

The Agency intends to assess the effectiveness of the Interim Approach on an ongoing basis and will measure the following indicators:

- Number of new owner disclosures resolved.
- Pounds of pollutants estimated to be reduced, treated or eliminated.
- Dollars invested in improved environmental performance or improved environmental management practices.

In addition, to help the Agency assess the Interim Approach and identify where opportunities may exist to improve it, EPA intends to observe the number of recently acquired facilities whose new owners chose not to make "new owner" disclosures under the Audit Policy. Within a relevant universe of mergers and acquisitions transactions (i.e., facilities under new ownership which are subject to environmental regulations and requirements), EPA will identify facilities whose new owners did not audit and disclose to EPA, and cross-reference these newly acquired facilities with other already available

enforcement data (e.g., history of violations, unresolved violations, last inspections, type of permitted activity, priority area).

2. Discussion of Measures and Assessment

Commenters were supportive of testing and assessing the effectiveness of a tailored approach to new owners, but not of limiting the effort in scope or size, or to any particular industrial sector. Some commenters urged a focus on only compliance measures (e.g., number of violations corrected, number of violators in compliance, number and type of disclosures), while other commenters discussed pollution reductions as the best measure of success, albeit acknowledging that such reductions can be difficult to quantify. Some commenters recommended that the Agency define criteria for significant environmental improvement.

The measures described above focus on both increases in compliance and benefits to the environment, tracking not only the number of new owner disclosures resolved but also how much was expended to correct them, and how much of an effect on pollution those corrections had. In addition, since the Agency is interested in an accurate assessment of how much the Interim Approach may motivate new owners to come forward to EPA, the Agency intends to track new owners that did not take advantage of the Audit Policy. EPA will look at a relevant sub-set of ongoing mergers and acquisitions activity (i.e., facilities under new ownership which are subject to environmental regulations and requirements) and may narrow the scope of inquiry further, to focus on facilities that have significant environmental regulatory obligations, or on facilities in certain sectors. Such an effort may help give EPA a sense of the sorts of enforcement issues the Agency may be "missing" in the effort to promote disclosures and compliance.

EPA may also identify some of the non-disclosing facilities which changed ownership nine months or more before as potential "facilities of interest," where the analysis of available enforcement data indicates there may be compliance issues, or significant gaps in EPA's understanding of a facility's compliance status. While such facilities may potentially be ripe or appropriate for an inspection or enforcement attention, EPA has not established any new enforcement priority focused on M&A transactions or recently acquired facilities. EPA does expect, however, that awareness that the Agency will be tracking disclosures after relevant transactions may favorably affect the

⁹ See "Restrictions on Communicating with Outside Parties Regarding Enforcement Actions," Memorandum from Granta Y. Nakayama (March 8, 2006), which can be found on the Internet at <http://www.epa.gov/compliance/resources/policies/civil/io/commrestrictions-nakayamamemo030806.pdf>.

¹⁰ See "Confidentiality of Information Received under the Agency's Self-Disclosure Policy," Memorandum from Steven A. Herman (January 16, 1997), which can be found on the Internet at <http://www.epa.gov/compliance/resources/policies/incentives/auditing/sahmemo.pdf>.

tipping point of the new owner's internal risk analysis in favor of auditing and disclosing. EPA's tracking is intended to help inform the Agency's assessment of the effectiveness of the Interim Approach and may at some point serve as a scoping element for enforcement planning.

III. Public Process

EPA seeks public comment on the Interim Approach described in this Notice, and asks that comments be specifically aimed at improving the overall design and specific elements of the Interim Approach, as well as at addressing any relevant issues or considerations which may not appear to be reflected. The public comment docket will be open for a period of 90 days. The Agency will concurrently begin applying the Interim Approach, as EPA believes the most efficient way to effectively test this strategy, and learn from practical experience, is to implement it on an interim basis.

EPA will be reviewing public comment as it is received and will continue its dialogue with stakeholders on whether refinements to the Interim Approach are needed. In addition, the Agency will place into the public docket copies of agreements resolving violations disclosed by new owners under the Interim Approach. EPA intends to assess the effectiveness of the Interim Approach on a continual basis. Based on public comment and after the Agency has gained sufficient experience in implementing the Interim Approach, EPA will decide to finalize, revise or discontinue these tailored incentives for new owners.

EPA encourages parties of all interests, including state, tribal and local government, industry, not-for-profit organizations, municipalities, public interest groups and private citizens to comment, so that the Agency can hear from as broad a spectrum of stakeholders as possible.

IV. What Should I Consider as I Prepare My Comments for EPA?

1. *Submitting CBI.* Do not submit CBI to EPA through <http://www.regulations.gov> or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD-ROM that you mail to EPA, mark the outside of the disk or CD-ROM as CBI and then identify electronically within the disk or CD-ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI

must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for Preparing Your Comments.* When submitting comments, remember to:

- Identify the Notice and Request for Comments by docket number and other identifying information (subject heading, **Federal Register** date and page number).
- Follow directions—The Agency may ask you to respond to specific questions.
- Explain why you agree or disagree; suggest alternatives and language.
- Describe any assumptions and provide any technical information and/or data that you used.
- If possible, provide any pertinent information about the context for your comments (e.g., the size and type of acquisition transaction you have in mind).
- If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.
- Provide specific examples to illustrate your concerns, and suggest alternatives.
- Explain your views as clearly as possible.
- Submit your comments on time.

Dated: July 25, 2008.

Granta Y. Nakayama,

Assistant Administrator, Office of Enforcement and Compliance Assurance.

[FR Doc. E8-17715 Filed 7-31-08; 8:45 am]

BILLING CODE 6560-50-P

FEDERAL COMMUNICATIONS COMMISSION

[CG Docket No. 03-123; DA 08-1673]

Notice of Certification of State Telecommunications Relay Service (TRS) Programs

AGENCY: Federal Communications Commission.

ACTION: Notice.

SUMMARY: In this document, the Consumer & Governmental Affairs Bureau (Bureau) grants certification of fifty states', two territories', and the District of Columbia's TRS programs. The current certification for state TRS programs expires this year. This action certifies state TRS programs for the next five years, pursuant to the Commission's rules.

DATES: Certifications effective July 26, 2008, through July 25, 2013.

FOR FURTHER INFORMATION CONTACT:

Diane Mason, (202) 418-7126 (voice), (202) 418-7828 (TTY), or e-mail: Diane.Mason@fcc.gov.

SUPPLEMENTARY INFORMATION: This is a summary of the Bureau's public notice DA 08-1673, released July 16, 2008, in CG Docket No. 03-123. The full text of document DA 08-1673 is available for public inspection and copying during regular business hours at the FCC Reference Information Center, Portals II, 445 12th Street, SW., Room CY-A257, Washington, DC 20554. It also may be purchased from the Commission's duplicating contractor at Portals II, 445 12th Street, SW., Room CY-B402, Washington, DC 20554; the contractor's Web site, <http://www.bcpweb.com>; or by calling (800) 378-3160.

To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the Consumer & Governmental Affairs Bureau at (202) 418-0530 (voice) or (202) 418-0432 (TTY). Document DA 08-1673 can also be downloaded in Word or Portable Document Format (PDF) at: <http://www.fcc.gov/cgb/dro/trs.html>. In addition, the applications for certification may be viewed on the Bureau's Disability Rights Office Web site at http://www.fcc.gov/cgb/dro/trs_by_state.html.

Synopsis

The applications for certification of TRS programs of the states, territories, and the District of Columbia listed below (hereinafter, "states") have been granted, pursuant to Title IV of the Americans with Disabilities Act (ADA), 47 U.S.C. 225(f)(2), and 47 CFR 64.606(b). On the basis of the state applications, the Bureau has determined that:

(1) The TRS program of the states meet or exceed all operational, technical, and functional minimum standards contained in 47 CFR 64.604;

(2) The TRS programs of the listed states make available adequate procedures and remedies for enforcing the requirements of the state program; and

(3) The TRS programs of the listed states in no way conflict with federal law.

The Bureau also has determined that, where applicable, the intrastate funding mechanisms of the listed states are labeled in a manner that promotes national understanding of TRS and does not offend the public, consistent with 47 CFR 64.606(d).

Because the Commission may adopt changes to the rules governing relay