

**POLICY ON INCENTIVES FOR SELF-POLICING:
ENVIRONMENTAL SELF AUDIT POLICY
ADDENDUM FOR STATE AGENCIES**

Policy ENF-05-001

Effective date: January 1, 2005

I. BACKGROUND AND PURPOSE Since the issuance of the “Clean State” Executive Order (EO) #350 in 1993 state agencies and participating authorities have worked to identify, evaluate and correct matters of environmental noncompliance. On July 23, 2002 the Governor signed Executive Order #438 – creating the State Sustainability Program. That Order requires agencies to create written Sustainability Plans for managing ongoing environmental impacts, reaffirms the Governor’s support of EO #350, and explicitly restates its tracking and reporting requirements as follows:

For compliance matters, agencies shall meet the same reporting requirements contained in Executive Order #350. This shall include the *ongoing identification of any existing and future compliance matters and the reporting of such matters to the Clean State Database* or other reporting systems that serve the same purpose. Such data shall be transparent and available for review by the Attorney General. (EO #438, emphasis added.)

This policy is intended to:

- coordinate the compliance reporting provisions of EO #438 (the Sustainability EO) with current Department policies on self auditing;
- maintain consistent implementation of the reporting policies and protocols adopted under E.O. #350 and #438;
- encourage agencies to use the Clean State data base to its fullest potential as a compliance assurance tool as well as to support its sustainability implementation efforts; and
- acknowledge the particular circumstances of state agencies that may justify penalty forbearance, including agency limitations in committing to long range budgetary obligations and capital improvements, and the required procedural steps to publicly finance such projects

II. APPLICABILITY. This policy applies to agencies participating in the Clean State and State Sustainability Programs, and to matters of environmental noncompliance that meet the discovery, disclosure and correction requirements in the Eligibility section below. This addendum modifies the application of the Department’s Policy on Incentives for Self-Policing: Environmental Audit Policy (“General Audit Policy”: ENF-97-004) for participating state agencies, and should be read together with that policy. Unless altered herein, the provisions of the General Audit Policy apply.

III. STATEMENT OF POLICY

A. INCENTIVES FOR SELF POLICING. When a participating state agency establishes that it satisfies all of the conditions in the Eligibility section below DEP will exercise its enforcement discretion as follows.

1. No Notice of Noncompliance. If the initial enforcement response for the violations would normally be a Notice of Noncompliance (NON), DEP will not issue an NON, or otherwise use the violations to establish a foundation for future enforcement.

2. Penalty Exemption. Once the participating agency satisfies its burden of meeting all conditions for penalty relief in Section III.B below, DEP will not assess a penalty for the violations. DEP reserves the right to collect any economic benefit DEP determines to be significant that may have been realized as a result of the noncompliance, even where an agency has met all conditions for penalty relief in this policy. Qualifying for the penalty relief provided by this policy does not bestow or imply waiver of the obligation to correct or remediate harm caused by any violation of environmental requirements.

3. No Criminal Recommendations DEP will not recommend to the Massachusetts Office of the Attorney General (AG) or other prosecuting authority that criminal charges be brought against a regulated entity where DEP determines that all of the conditions in Section III.B. are satisfied, and where the violation, **in the judgment of the DEP/AG Case Screening Committee**, does not demonstrate or involve:

- prevalent management philosophy or practice that concealed or condoned environmental violations; or
- high-level corporate officials' or managers' willful blindness, as that term is defined in this policy, to the violations, or conscious involvement in the violations after blindness.

Whether or not DEP recommends the agency for criminal prosecution under this section, DEP reserves the right to recommend prosecution for the criminal acts of individual officers, managers or employees. Whether or not DEP recommends the regulated entity for criminal prosecution under this section, the Massachusetts Office of the Attorney General and other prosecuting authority retain independent authority to initiate criminal charges against a regulated entity.

4. No Routine Request for Audit Reports DEP will not routinely request or use an environmental audit report, when conducting an inspection, to initiate an investigation of, or an enforcement action against the regulated entity. However, if DEP has reason to believe, independent of information in an environmental audit report, that a violation has occurred, DEP may seek any information, including environmental audit reports, relevant to identifying violations and determining liability or extent of harm. DEP preserves its rights to inspect a facility after deadlines for correcting noncompliance disclosed through an audit have elapsed, or at any time should it have reasonable cause to believe that an imminent threat or actual harm has occurred and/or is ongoing.

An "Environmental audit" is a systematic, documented and objective review and evaluation performed by an agency, or by a third party, to determine whether a facility is in compliance with all applicable

environmental requirements, and if not, which recommends appropriate and timely action to correct existing violations, and prevent, detect and correct future violations. An "Environmental audit report" means the analysis, conclusions, and recommendations resulting from an environmental audit, but does not include data obtained in, or testimonial evidence concerning, the environmental audit.

B. CONDITIONS FOR PENALTY RELIEF: ELIGIBILITY

1. Systematic Discovery: The violation was discovered through a set of objective, documented, systematic procedures or practices reflecting the agency's efforts to prevent, detect, and correct violations. Systematic discovery may include efforts by state agencies to meet the sustainability goals and management requirements of EO #438 by developing and implementing a Sustainability Plan. A Sustainability Plan developed pursuant to EO #438 and the State Sustainability Planning and Implementation Guide, and which is consistent with the elements constituting Due Diligence listed below will meet the systematic discovery criteria. The agency should be prepared to explain and document its systematic discovery of the violation to DEP, guided by the following Due Diligence elements:

- a) Compliance policies, standards and procedures that identify how employees and agents are to meet the requirements of laws, regulations, permits, certifications and other sources of authority for environmental requirements;
- b) Assignment of overall responsibility for overseeing compliance with policies, standards, and procedures, and assignments of specific responsibility for assuring compliance at each facility or operation;
- c) Mechanisms for systematically assuring that compliance policies, standards and procedures are being carried out, including monitoring and auditing systems reasonably designed to detect and correct violations, periodic evaluation of the overall performance of the compliance management system, and a means for employees or agents to report violations of environmental requirements without fear of retaliation;
- d) Efforts to communicate effectively the agency's standards and procedures to all employees and other agents, including those concerning disclosure of information about chemicals;
- e) Appropriate incentives to managers and employees to perform in accordance with the compliance policies, standards and procedures (e.g., specific responsibilities embodied in job descriptions and sanctions through appropriate disciplinary mechanisms for failure to perform); and
- f) Procedures for reporting releases and for the prompt and appropriate correction of any violations, and any necessary modifications to the regulated entity's program or facility to prevent future violations and releases.
- g) Use of appropriately qualified or, where required, mandated experts (e.g., licensed hazardous waste facility, TRA planner, Licensed Site Professional).

2. Voluntary Discovery: Voluntary discovery shall include discovery by participating state agencies irrespective of the directive to investigate, identify and report such matters in Executive Orders #350 and #438. The violation must be identified voluntarily, and not through a legally mandated monitoring, testing, record-keeping, reporting, sampling or notification requirement prescribed by statute, regulation,

license, permit, judicial or administrative order, consent order or agreement.

3. Prompt Disclosure to the Clean State Database within 21 Days of Discovery: The participating state agency shall fully disclose the violation to DEP in the Clean State database (or other reporting mechanism serving the same purpose which is transparent and available to the Attorney General) within **21 (twenty one) calendar days** after it discovers that the violation occurred or may have occurred. Where a statute or regulation requires reporting in less than twenty one days or in a different manner disclosure shall be made within the time limit and in the manner established by law, followed by entry in the Clean State database or equivalent no later than 21 (twenty one) days after the required disclosure. For example a 72 hour reporting condition under c. 21E and the MCP should be reported under that regulatory scheme, in the manner so specified, followed by entry into the Clean State database.

In situations where the violation is complex and compliance cannot be definitively determined within 21 (twenty one) calendar days of discovery, the agency must notify DEP of the situation through the Clean State database within the 21 (twenty one) day period, and request an extension of time in the database with a brief explanation of why additional time is needed to determine compliance status. DEP will extend the period of time to determine whether noncompliance exists if the circumstances do not present a serious threat, provided that no extension of time for full disclosure shall be longer than 35 (thirty-five) calendar days from discovery.

4. Discovery independent of government or third party: The violation must also be identified and disclosed by the agency prior to:

- the commencement of a federal, state or local agency inspection or investigation, or the issuance by such agency of an information request to the regulated entity;
- notice of a citizen suit;
- the filing of a complaint by a third party;
- the reporting of the violation to DEP (or other government agency) by a "whistleblower" employee, rather than by one authorized to speak on behalf of the agency; or
- discovery of the violation through any other means by an independent regulatory agency (not the disclosing agency).

5. Correction and Remediation within 60 Days of Discovery: The participating agency corrects the violation within **60 (sixty) calendar days** of discovery, certifies in writing through the Clean State database that violations have been corrected, and takes appropriate measures as determined by DEP to remedy any harm to public health, safety and welfare or the environment due to the violation. If DEP determines that an imminent threat to public health, safety or welfare, or the environment results, or could result from the violations, DEP may require correction of violations and remediation of any harm more quickly than 60 (sixty) days from the participating agency's discovery.

If more than sixty calendar days is needed to correct the violation(s), the participating agency must notify DEP in writing through the Clean State database with a correction schedule before the sixty day period has passed, and request an extension of time with a brief explanation of why additional time is needed. If more than ninety days is requested from the date of discovery to correct the violation, the participating agency must notify the appropriate DEP regional Clean State/ Sustainability Coordinator directly by

phone, electronic mail or US mail of the extension request in addition to the request in the Clean State Database. DEP may require an agency to enter into an enforceable agreement (e.g. administrative consent order or judicial consent decree) if the particular agency requires a correction schedule greater than ninety days. Such an enforceable agreement may be particularly appropriate where compliance or remedial measures are complex or a lengthy schedule for attaining and maintaining compliance or remediating harm is necessary. DEP may further require for purposes of this policy that such an enforceable agreement include a stay of the statute of limitations to assure correction and adequate compliance oversight.

6. Prevent re-occurrence: The agency agrees in writing to take steps to prevent a recurrence of the violation, which may include, but not be limited to improvements to its sustainability plan implementation efforts. This commitment shall be provided in the appropriate fields of the Clean State /Sustainability database.

7. No Pattern of Noncompliance evidenced by Higher Level Enforcement: The participating agency has not entered into or received a final higher level enforcement action for the **same or closely related** violation against the participating agency within the prior three years, and the participating agency has not entered into or received a final higher level enforcement action for **different** violations within the prior two years. The Department may waive this condition based upon the diligent good faith actions taken by the agency to implement a system to exercise Due Diligence, improve environmental performance, prevent the violations and take corrective actions to promptly resolve repeat violations.

8. Other Violations Excluded: The violation is not one which, in the sole discretion of DEP:
resulted in significant actual harm, or presented a significant risk of harm to public health, safety or welfare, or the environment;
violates the specific terms of any administrative or judicial order, or consent agreement; or
results from a failure to timely notify the DEP of a release or threat of release of oil and/or hazardous materials.

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