

# **TURA Program Strengthening Ad Hoc Committee: Background Document on Compliance and Enforcement**

December 2020

Updated with Q&A, January 2021

## **Introduction**

The TURA Administrative Council has convened an Ad Hoc Committee with the goal of reviewing TURA experiences since the 2006 amendments and discussing possible improvements to help ensure ongoing progress in toxics use reduction. This document provides background information to inform the Ad Hoc Committee's discussion of compliance and enforcement (C&E) under TURA.

## **Overview**

Facilities subject to TURA are required to report annually on their use of listed chemicals, pay an annual fee, and conduct Toxics Use Reduction planning every two years. The Massachusetts Department of Environmental Protection (MassDEP) is responsible for ensuring compliance with these requirements.

In addition, TUR planners play an important role in compliance. They are responsible for certifying that plans are complete and have been carried out in accordance with the regulations.

MassDEP conducts periodic checks to ensure that TUR planners are completing this responsibility adequately. MassDEP inspectors periodically inspect facilities' TUR plans to ensure they are complete. In addition, MassDEP sometimes conducts desk audits, in which selected facilities are required to submit their entire plan to the Agency for review. Key goals of both inspections and desk audits are to ensure that planning is being done in good faith, and facilities fully understand and are completing all the elements of the planning process.

The need for a "level playing field" – that is, for all facilities and planners to meet TURA requirements -- has been mentioned by planners in past years through the TUR Planners' Association and, more recently, by planners who participated in a set of TUR Plan Strengthening meetings convened by MassDEP.

## **Current TURA Program Enforcement Activities**

As a program, TURA is unique in having multiple elements, including technical assistance, safer alternatives research, and other outreach to help facilities with their TUR efforts. However, enforcement is carried out in a consistent way across all the programs implemented by MassDEP. This includes extensive planning in which decisions are made about the number and type of inspections that will be conducted during the year. The planning includes identification of the types and periodicity of inspections for those programs that have been delegated to MassDEP by EPA for compliance and enforcement, such as requirements related to the Resource Conservation and Recovery Act (RCRA) and Underground Storage Tanks (UST).

Unlike some other states, MassDEP conducts multi-media inspections of facilities, as well as some single-media inspections. These inspections include observations and assessments of facility components as they pertain to applicable regulations.

Once the inspections are completed, enforcement is issued as appropriate. Enforcement is administered according to written MassDEP policies and procedures. In general, enforcement starts with a Notice of Non-Compliance (NON) and no penalty is assessed. Facilities are usually given 30 days to come into compliance. If the facility does not come into compliance or provide a timeline for coming into compliance, higher-level enforcement can be issued and a penalty may be assessed. If an inspection uncovers serious violations, or if a facility has had recent previous violations, higher-level enforcement can be issued immediately with no NON being issued. This broader approach to inspections forms the context in which TUR plan inspections occur.

TURA plans are reviewed as a part of MassDEP's multi-media inspections. If a facility that is being inspected is subject to TUR regulations, inspectors check the TUR Plan for availability on-site and for completeness. Specifically, they go through a checklist to ensure that all required elements of the plan are present. They do not necessarily evaluate the quality of the plan itself, although certain inspectors do conduct such an evaluation. If a facility being inspected is not in the TURA program, the inspectors review the facility's operations to see if they may be subject to TURA requirements.

If the inspectors issue enforcement for a TURA violation, the enforcement document is forwarded to OTA as part of the enforcement process. This provides an opportunity for the facility to receive additional assistance from the program.

Over the ten year period from January 1, 2010 to December 1, 2020, MassDEP conducted 662 full inspections. During this same period, MassDEP issued a total of 174 enforcement actions to facilities subject to TURA. Of these enforcement activities, 145 were lower-level enforcement (for example, NON's) and 29 were high-level enforcement (Administrative Consent Orders with Penalties).

During FY18, MassDEP inspected 66 TURA filers. These inspections, as well as additional screenings, resulted in four enforcement actions for failure to fully comply with reporting and planning requirements, and six NON's for failure to submit complete or timely TURA reports. In addition, in a new compliance assurance technique, MassDEP sent out formal Requests for Information to six facilities believed to have a high likelihood of being subject to the program. One of these proved to be out of compliance, received a NON, and submitted the required reports. Six new companies availed themselves of a TURA self-disclosure policy in FY18, reporting a total of nine chemicals that had never been reported previously.

During FY19, MassDEP inspected 63 TURA filers and screened another 8 facilities to determine if they were subject to TURA. These inspections and screenings resulted in 23 enforcement actions for failure to fully comply with reporting and planning requirements, and 20 NON's for failure to submit complete or timely TURA reports.

Enforcement focused on planners themselves is rare but has occurred in a limited number of cases.

## **Desk Audits**

MassDEP has conducted two desk audits of selected TUR plans since the adoption and implementation of the 2006 amendments. These desk audits are designed to provide an examination of the plans that goes into greater depth than the reviews conducted by inspectors on-site. These examinations cover both completeness and quality of the plans.

The first set of plan reviews indicated that planners needed additional training on certain basic types of information, including the basic elements of TUR planning, especially materials accounting, process flow diagrams, and approaches to evaluating cost of toxics. These findings were used to design new Continuing Education training sessions in 2013, with additional trainings in subsequent years.

In FY19, MassDEP conducted a detailed review of 12 plans. MassDEP sent out formal Requests for Information to these facilities based on facility size, the number of Higher Hazard Substances used, industrial sector, enforcement history, their TUR Planner's qualification and number of plans the TUR Planner prepared in FY19. These facilities were asked to submit their latest TUR Plan for MassDEP review.

In reviewing these plans, MassDEP staff sought to determine whether facilities and planners were carrying out the planning process in accordance with all TURA requirements. They also sought to identify any common areas of weakness among the plans, in order to identify possible ways in which the TURA program could provide better guidance to facilities and planners. The purpose of this effort was to evaluate whether additional compliance support focused on particular aspects of the TURA program would be beneficial to TURA filers, as well as issuing enforcement to those facilities and TUR Planners who did not comply with the TURA regulations.

The FY19 desk audit revealed several major and minor deficiencies in the TUR plans reviewed. Major deficiencies included incomplete economic evaluations, incomplete process characterization (e.g., process flow diagrams missing key information), lack of implementation schedules and lack of material accounting information. Minor deficiencies included missing information in the scope of the plan, discrepancies between the amount of chemical used in various sections of the plan or the TURA report (Form S) and inadequate cost information. MassDEP also noted organizational deficiencies that indicate potentially poor planning practices. Two facilities and two TUR Planners received NON's for deficiencies in their TUR Plans.

The findings of these audits have been used to inform additional education and guidance for planners. MassDEP intends to conduct desk audits on a regular basis going forward.

## **2014-2016 Amnesty and 2017 Self Disclosure Policy**

In 2014-2016, MassDEP offered an amnesty program for facilities that had not complied with all reporting and planning requirements. Facilities that voluntarily filed during the amnesty period received a “warning letter” and were required to pay only one year of past-owed fees, regardless of how many years they had missed.

During the amnesty period, MassDEP continued to perform audits and inspections. If a facility was found to be out of compliance through audit or inspection, the facility was not eligible for amnesty and could potentially receive a NON and a requirement to pay up to three years of missed fees.

122 facilities took advantage of the amnesty to re-enter compliance under TURA.

After the close of the amnesty period, MassDEP updated the TURA self disclosure policy to clarify the number of years of back reports and fees that would be required. For details, see: <https://www.mass.gov/doc/baw-2017-01-tura-self-disclosure-enforcement-policy-january-2017/download>.

## **TURA Standard Operating Procedures for Enforcement**

MassDEP is in the process of creating a number of Standard Operating Procedures (SOPs) for TURA. These are internal resources issued to maintain consistency and quality with MassDEP processes, and to retain valuable in-house knowledge.

Specifically, approximately 12 TURA SOPs are currently being written to memorialize correct procedures and processes, including for Employee Notification Reminders, Information Release Queries, TURA Ongoing Data Revisions, Reporting and Planning Guidance and Chemical List Updates. An SOP is also being written to provide guidance and instruction to TURA staff for determining whether facilities that do not currently file under TURA should be filing.

## **Questions for Discussion**

At the meeting, MassDEP will request Ad Hoc Committee input on the following topics:

- Requests for information/MassDEP audits of company plans
- Planning accomplished in accordance with the regulations
- Quality control for TUR Planners
- Regional inspections/screenings
- Other compliance and enforcement topics

Specific discussion questions include the following:

Requests for Information/Audit of Plans

- Have you received sufficient and helpful information on results of desk audits?
- What types of information were the most helpful?
- What additional information would you like to see?

#### Good Faith Effort

- In your opinion, what are examples of a good faith effort?
- How can MassDEP help the regulated community understand the regulatory process more clearly and fully?

#### Quality Control for Planners

- What measures would you suggest for increasing the quality of TUR Planners' work?
- What guidance or training do you think would be beneficial?

#### Regional Inspections and Screenings

- What experience have you had with MassDEP inspections?
- How could the experience be improved?

#### Other Compliance and Enforcement Issues

- Have you had any experience with the self-disclosure policy?
- Suggestions for how to identify non-filers?
- Suggestions to identify additional chemicals in use at facilities?
- Moving forward, are there any changes you would suggest that MassDEP explore with regard to compliance and enforcement? Should there be additional guidance for planners?

## Appendix: Results of FY19 Desk Audit

12 TUR plans have been reviewed from 12 TURA facilities; below is the number of facilities associated with each specific deficiency:

### Major Deficiencies of plan content:

- Incomplete economic evaluation (4)
- Incomplete process flow diagram (1)
- No cost analysis (current and planned) (7)
- No process flow diagram (1)
- No materials accounting information (1)
- No technical and economic evaluation (1)
- No production unit description (1)
- Process flow diagram is not production unit based (chemical based), and no byproduct and emission data. (1)
- No TUR option implementation schedule (1)
- Missing production unit (1)
- Use production process flow diagram for TUR plan without any chemical input and output (1)

### Minor Deficiencies of plan content

- No chemical use per unit of product (3)
- Missed chemical or production unit in the Scope of Plan section (included in other sections) (1)
- Discrepancy of the amount of chemical used in different section of the plan for the same chemical (process flow diagram, process description, material accounting, and the TURA report - Form S) (3)
- Provided detailed chemical unit price, but no production unit based cost analysis (1)
- CAS # typo (1)

### Organization/Presentation Deficiencies

- No table of contents (1)
- No title or label for the data chart (2)
- Disorganized (shoe box style) (1)
- Submitting un-necessary documents (copy of TURA report, copy of MSDS, copy of product specifications, copy of TURA training material, etc.) (4)
- Data collected for TUR planning is not well presented (4)

## Questions and Answers:

### Follow-up information requested at the December 14, 2020 meeting

In the course of the Ad Hoc Committee's discussion of this topic, members and observers asked several questions that required further research by the agencies. Follow-up information is provided here related to many of these questions. This document will be updated if additional information becomes available.

The discussion itself, including suggestions and ideas provided by those participating in the meeting, is summarized separately in meeting minutes.

#### **Questions about desk audit results:**

**Question:** Do the desk audits represent a cross section of filers (large and small, numerous chemicals vs. only one, newer vs. more experienced TUR planners)?

**Answer:** The 12 facilities that were part of the recent desk audit were selected based on facility size (50 FTE to >500 FTE), number of chemicals used (1 to >20), and the TUR Planner's experience (limited/general, newly certified/over 20 years). However, because of the small sample size, this represents only a subset of TURA filers.

**Question:** Regarding deficiencies identified in desk audits, were the problems coming more from facilities or from planners?

**Answer:** The regulations state that the facility is responsible for plan development, and the TUR Planner is responsible for reviewing the plan to ascertain that it meets the regulatory requirements. Therefore, both parties are responsible for any deficiencies in the plan.

**Question:** Are we finding violations coming from limited practice or general practice TUR Planners? Could we get information on the percentage of violations coming from each group?

**Answer:** We found violations associated with both general and limited TUR planners from the limited sample we examined. The facilities examined thus far are not sufficient for a comprehensive analysis.

**Question:** Regarding major deficiencies identified in plans (e.g. deficiencies in the cost analysis), was there follow-up with those facilities?

**Answer:** Yes, there was follow up communication with several facilities asking for clarifications supporting the audit. Based on the results of the audit, MassDEP issued NONs to two facilities and the facilities' TUR Planners. In addition, MassDEP is preparing a Quick Reference Guide with helpful hints to address key deficiencies found during the desk audit. This will be posted on the TURA webpage as soon as possible.

**Question:** In the desk audits, were people issued a NON for organizational/clerical issues (e.g., lack of table of contents)?

**Answer:** No. MassDEP did not issue NONs to facilities that had only organizational/clerical problems in their TURA Plan.

**Question/comment:** Can you explain more regarding MassDEP follow-up after desk audits and enforcement?

**Answer:** The desk audits were conducted out of the Boston office, and that office issued any enforcement needed based on the reviews. The Boston office followed up with the facility to ascertain that compliance with the regulations was reached. Boston staff then closed out the enforcement in the database.

When there is enforcement issued based on a physical inspection, the enforcement documents are sent from the regional offices and the regional office determines if the violations are subsequently fixed. Once the violations are remedied, the region closes out the enforcement in the database. The enforcement document gives the facility a particular number of days to respond to the enforcement.

**Questions related to enforcement information:**

**Question:** DEP previously distributed information about recent enforcement actions in DEP News. This no longer exists, and filers are instead directed to the EEA Data Portal, which does not include information about the reasons for enforcement actions. Could the TURA Program begin sharing this information again?

**Answer:** MassDEP now uses our portal to provide information on enforcement to the regulated community. The portal can be accessed here:

<https://eeaonline.eea.state.ma.us/portal#!/home>

The TURA program recognizes that sharing summarized enforcement information is valuable for filers and will investigate possible mechanisms for sharing this information.

**Questions related to amnesty:**

**Question:** The Amnesty Program identified approximately 144 companies that came forth, that should have been filing. It was an effective mechanism. Is it possible to bring it back, mostly because of its effectiveness?

**Answer:** MassDEP will take this idea to senior management. MassDEP does have a TURA Self-Disclosure policy in place. The policy is located on the website.