



Minnesota Environmental Institute

Auditing and Self-Reporting: Protections and Potential Pitfalls of Disclosure

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Audit Program Rule

- Minn Stat 114C.22 AUDITS
- 1995 Pilot Program (4 years)
- 1999 Legislation



Why?

- Many regulatory programs rely on self-reporting
 - Example- Clean Air Act
- Catch non-compliance early
- Underutilized opportunity
- Facilities should be completing self-audits regularly

Missed routine opportunity example:

- Air program: Semi-annual Deviation Reports



Process

Company

- Complete a comprehensive review of permit/rule requirements
- Complete and submit a summary report of findings
- Correct any violations within 90 days OR submit a compliance plan

Process

MPCA

- Review report and compliance plan if applicable
- Discuss report and determine program eligibility
 - Not eligible if:
 - Violations identified resulted in substantial economic benefit
 - There is serious environmental harm
 - There are criminal activities taking place
 - Previous violation with a penalty in the last 3 years
 - Previous enforcement with no penalty within the last year
 - Eligible for 'Green Star' award if
 - Audit for ALL applicable requirements is completed
 - No penalties assessed for violations in the past 2 years

Common Questions

Will a fine be assessed for minor violations?

- Generally not, as long as eligibility criteria is met:
 - No violations with penalties (w/in 3 years)
 - No violations without penalties (w/in 1 year)
 - No significant economic benefit
 - No criminal activity
 - No environmental harm

Common Questions

Are audit findings public information?

- Summary report- Yes as per the Government Data Practices Act
- Full audit data retained by the company
 - Must be turned over to MPCA only if the MPCA alleges/suspects possible criminal activity
 - No other person can use audit findings in legal proceedings if:
 - There has been proper participation in the program
 - The company complies with your corrective action plan

Common Questions

What if violations of local regulations are found?

These are required to be turned in to the governing organization:

Examples:

- County
- Township
- Other state agencies



Case Study A

Violations discovered:

- Failure to obtain permit prior to construction of a new emission unit
- Failure to operate emissions control equipment
- Data reported to MPCA does not match actual collected data

Case Study B

Violations discovered:

- Late reporting
- Periodically missed visible readings on one baghouse stack
- Failure to submit an equipment inspection report



Pitfalls

- Failing to carefully consider criteria
- Failing to look through the ‘regulator’s lens’
- Trying to throw issues in to ‘see what flies...’
- Failure to understand how long corrective measures might take, OR
- Failing to complete corrective measures OR
- Failing to document what steps have been taken to correct violations
- Perpetuating noncompliance (i.e. not making **immediate** changes, as needed)
- Show of bad faith

Tips

- Do not try to ‘slide things through’
- Seek help if needed (proactive communication)
- Consider violations from a regulator’s standpoint
- Consider economic gains that may have occurred as a result of violations
- Carefully review facility’s compliance history in all regulated media (air, hazardous waste, water, etc.)

Resources:

<https://www.pca.state.mn.us/regulations/environmental-audit-program>

Fact sheet

Audit program

Pollution Prevention & Sustainable activities

Check lists

General

Industry specific

Reporting inventory sheet

Minn Stat 114C

Lisa Woog- Current program administrator

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Federal Enforcement Trends

Enforcement cases per year

As of 7/2/2020

Program

(All)

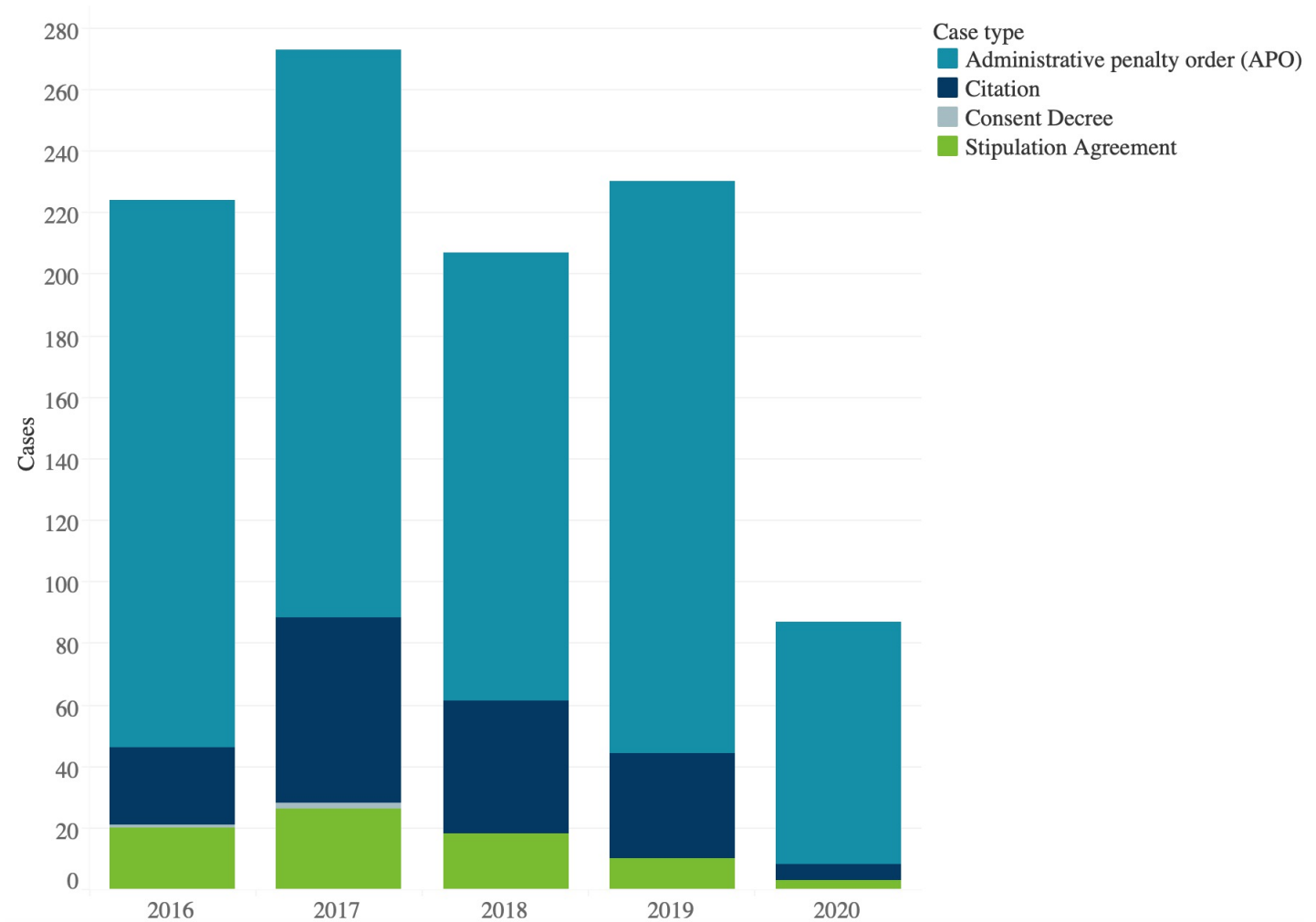
Case type

Administrative penalty order (APO)

Citation

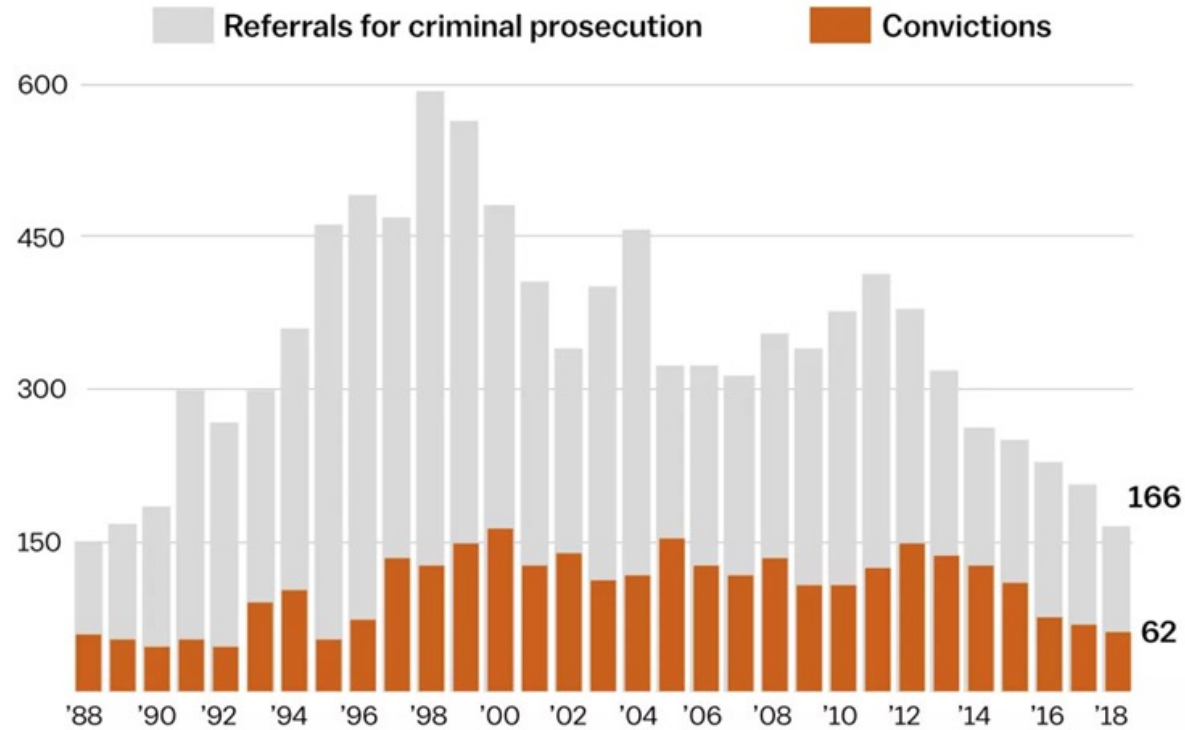
Consent Decree

Stipulation Agreement



EPA enforcement at a record low

Under Trump, the EPA has generated the fewest anti-pollution cases since 1988



H.W. BUSH



CLINTON



W. BUSH



OBAMA



TRUMP

Environmental Improvement Program

Minn. Stat. § 114C.22 Audits

- Relief from civil penalties for qualified and eligible facilities
- Requires reporting and disclosure of violations
- Agreement to institute corrective measures
- Description of steps to prevent future violations
- Major facilities must submit pollution prevention plans

Why an Audit?

- Ensure operations are being conducted in compliance
- Mitigate or eliminate administrative and civil penalties
- Limit potential criminal liability for knowing violations
- Address third party concerns
- Be a good neighbor and corporate citizen
- Protecting businesses assets and good will

Environmental Audits – Performance Schedules

- If corrective actions may take more than 90 days to address issues, a performance schedule must be submitted
- MPCA Commissioner determines reasonableness of schedule
- Protection of trade secret information
- Regulated party may seek review before Office of Administrative Hearings

Environmental Audits – Enforcement Deferral

- Enforcement deferral for 90 days if report meets requirements
- Enforcement deferral until after dates in performance schedules
- If a party meets eligibility criteria penalties are waived if violations identified in audit report are corrected within 90 days or within dates of approved performance schedule
- If criteria are met, the State is precluded from bringing administrative, civil or criminal action

Environmental Audits – Audit Protections May Not Apply in Certain Circumstances

- State reserves some elements of its enforcement authority
- State may at any time bring a criminal action for “knowing” violations under Minn. Stat. § 609.671
- State may bring a civil or administrative action including seeking penalties:
 - If issue was identified with the past three years and included a penalty or within the last year if there was no penalty.
 - Violation constitutes a serious harm or imminent threat.
 - Violation of an administrative or judicial order.
 - Violation resulted in a substantial economic benefit.
 - Violation is part of a legally monitoring or sampling requirement.

Environmental Audits – Other Considerations

- If audit protections do not apply for any of the exceptions, the State must consider the “good faith” of the regulated entity in taking enforcement action and assessing penalties
- State may act on information that it has prior to receipt of audit report
- False statements can be prosecuted under Minn. Stat. § 609.671
- Submission of an audit report does not alter other spill and reporting obligations in federal or state statutes, regulations or permits



Environmental Audits – Access to Documents

- After report is submitted, State may not have access to underlying information (draft, notes and other materials)
- State may seek information on monitoring, testing and sampling data related to spills or releases
- Regulated entity does not waive privileges or confidentiality
- State may seek information to prevent imminent harm or substantial endangerment
- State may conduct a criminal investigation
- Federal enforcement authorities are preserved

Minnesota Reporting and Disclosure Requirements

- Spill Reporting – Water Quality – Minn. Stat. § 115.061
- Excess Air Emissions – Air Quality Minn. Stat. § 116.061
- Regulatory Reporting Requirements – Hazardous Waste, Air Quality, Water Quality
- Permit Reporting Provisions



Other Audit Programs

- U.S. Environmental Protection Audit Policies
- Other States Audit Policies

Role of Counsel in the Audit Process

- Maintaining confidentiality
- Properly asserting privileges
- Review of audit scope, findings and draft report
- Evaluating benefits and risks of making voluntary disclosures under state and federal audit policies
- Advising facilities on the significance of results
- Ensuring prioritization and resolution of issues
- Negotiating with the State for voluntary disclosed violations

Case Study

- Audit Report Arising Out of a Business Transaction



The Future of Auditing in Minnesota

- Incentives to Audit
- Impediments to Audit



Types of Environmental Audit

- Compliance Audit
- Limited Environmental Compliance Assessment (LECA- aka M&A Audit)
- Focused Audit

Types of Environmental Audit

- Compliance Audit
 - Corporate Driven
 - Assess Compliance at Facility or Business Unit
 - Current operations
 - Identify gaps and develop corrective actions

Types of Environmental Audit

- Limited Environmental Compliance Assessment (LECA- aka M&A Audit)
 - Transaction Driven
 - Assess compliance of business- One or many facilities
 - Current AND historical operations
 - Identify non-compliance risks, liabilities and cost

Types of Environmental Audit

- Focused Audit
 - Corporate Driven
 - Assess compliance of specific operations or regulation (e.g. EPCRA, Stormwater, SPCC, RCRA)
 - Current operations
 - Identify gaps and develop corrective actions

Environmental Audit Process

- Pre-Audit
- Site Inspection
- Post-Audit

Environmental Audit Process

- Pre-Audit Preparation
 - Goals- What is to be accomplished?
 - Scope- What is to be covered? By when?
 - Roles- Who is responsible for what? Confidentiality
 - IIF- PPE and procedures
 - Review VDR or Corporate records
 - Document Request
 - Pre-audit Questionnaire (if possible)

Environmental Audit Process

- Site Inspection
 - Key Site manager interviews (Cover story?)
 - Tour/Inspection
 - Processes
 - Practices
 - Hazardous materials storage, use and disposal
 - Review documents
 - Permits
 - Plans
 - Reporting
 - Notes- Facts only, no speculation
 - Closing debrief (Corporate only)
 - Facility response

Environmental Audit Process

- Post-Audit Reporting
 - Verbal debrief with legal team/stakeholders
 - Written report
 - Describe processes
 - Provide findings with citations
 - Gap analysis
 - Maintain in draft form, until Client comment
 - Corrective action plan
 - Quantify and monetize issues
 - Disclosure process/Audit protections?

Role of Consultant in the Audit Process

- Maintaining confidentiality
- Properly asserting privileges
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Terracon

Hessian Attorneys at Law
& McKasy P.A.

**RESPONSIVE.
RESOURCEFUL.
RELIABLE.**

Environmental



Facilities



Geotechnical



Materials