



AHFA  
Environmental/Safety/Health  
Conference - Expo

September 30, 2005

The "Art" of Self-Auditing  
For Environmental  
Compliance



## What is an Environmental Self-Audit?

- A review of the compliance of your facility with state and federal Environmental Laws and regulations
- May be limited in scope or encompass the entire facility

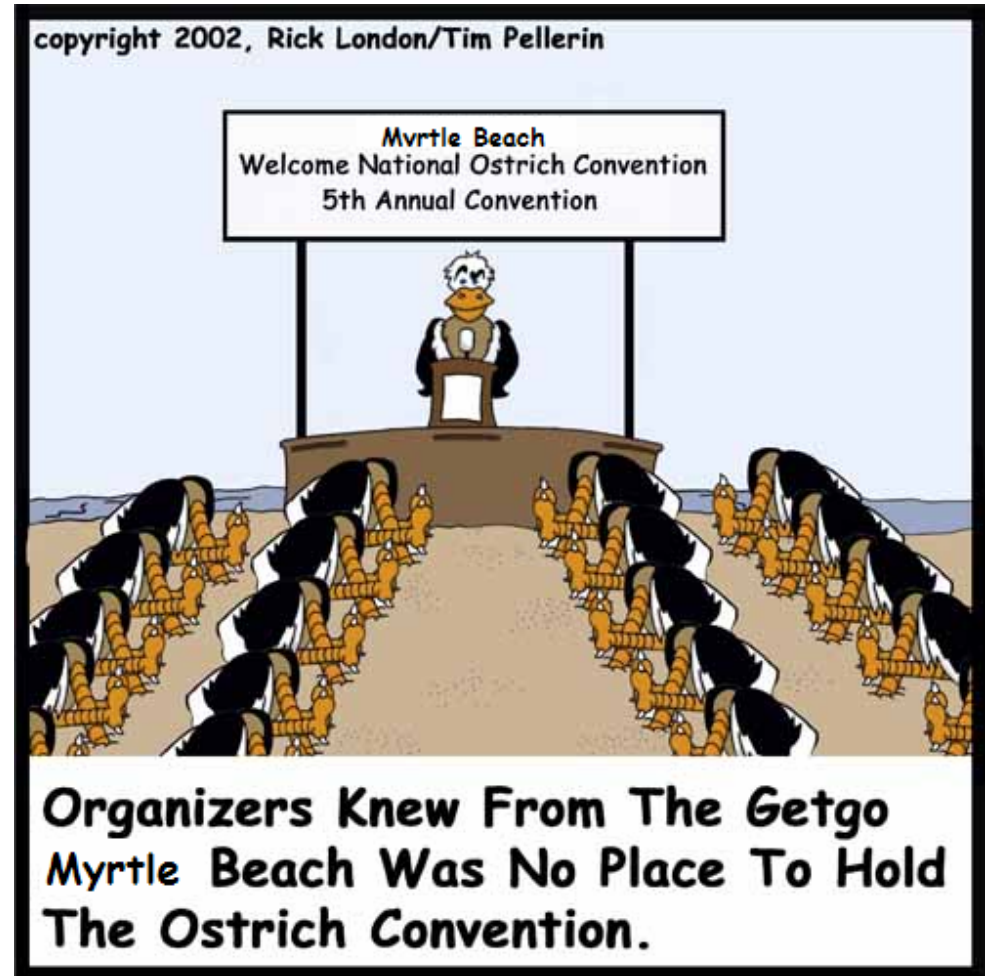


## Why Look for Compliance Violations? *Isn't Ignorance Bliss?*



- Better for you to find the violations than the Inspector!
- Provides an opportunity to fix the problem
- Builds Your Company's reputation with the permitting authority
- If you report the violation, you may be 100% protected from penalties!

## Let's Define What You Have To Do To Successfully Audit and Address Any Compliance Violations



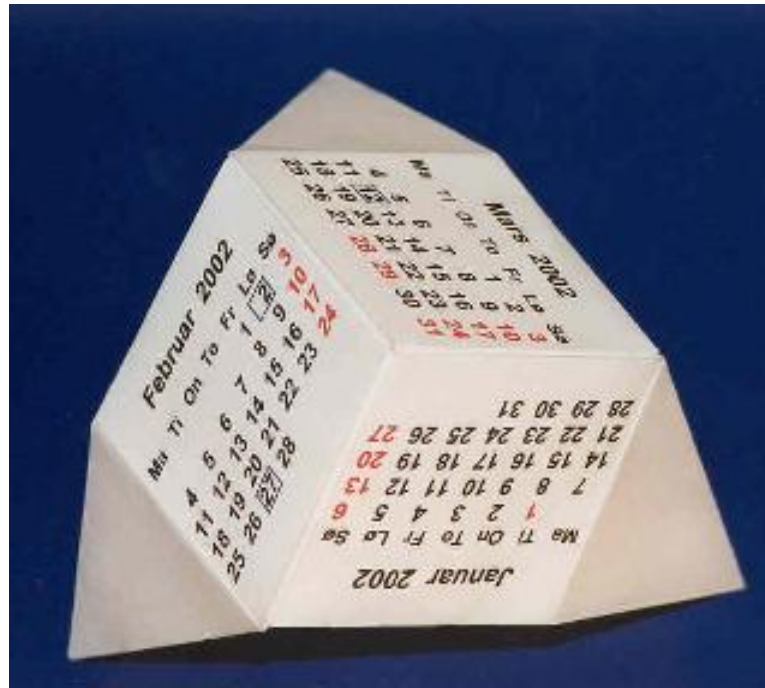
## When Should You *Definitely* Perform an Environmental Self-Audit?



- If you suspect a violation may be present
- Examples:
  - New information (underestimate of production numbers?)
  - Become aware that facility should have been complying with a law but has not been

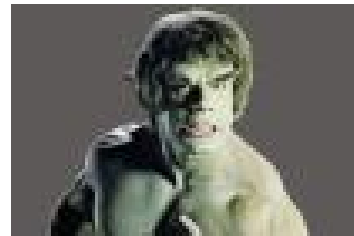
## When Would It Be *Prudent* to Perform An Environmental Self-Audit?

- On a regular schedule, so that all parts of the facility are reviewed at least annually



## Who Can Perform Your Audit?

- Likely Options:
  - In-house environmental professional
  - Environmental consultant
  - In-house or outside environmental lawyer
- Who is right for you?  
Depends on the *type* of audit and *expertise* needed



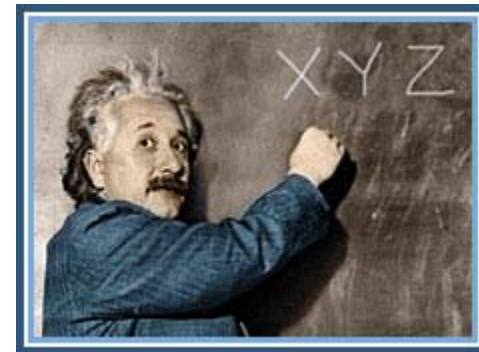
## What Should Be The Scope of Your Audit?

- Either a regularly scheduled part of your facility to audit OR
- If suspect a violation, choose a broad scope to capture entire violation, including review of all years back through statute of limitations period
  - E.g., if the state could review your records and assess violation for the year 2003, you want to make sure you cover that year in your audit



## Auditor Knowledge

- Air Pollution Control
- Water Pollution Control
- Waste Management
- Toxic Substances Control
- SARA/Right-to-Know
- Release Prevention, Control, and Countermeasure Programs



The Following is a  
Brief Overview Only



## Air Pollution Control

- Air Permit Requirements
  - Recordkeeping (log books!) and reporting
- Identify HAP sources
  - Ensure all emission units are permitted
  - List pollutant & quantity emitted
  - Evaluate adherence to MACT compliance plans
  - Plan for future MACT compliance dates
- Identify State TAP emission units
  - Ensure state TAP requirements are met
  - Plan for future TAP requirements (NC)



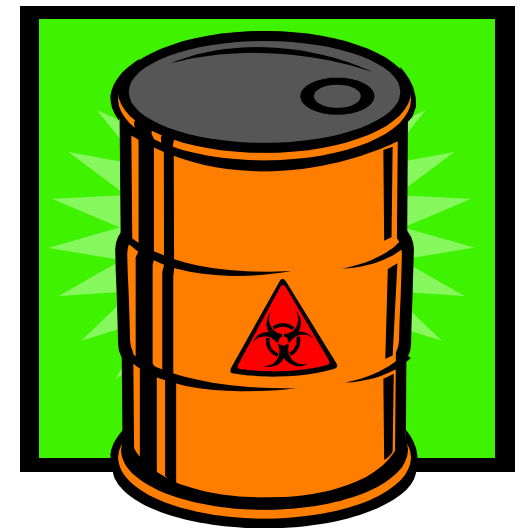
## Water Pollution Control

- Review NPDES permit.
  - applicable requirements, effluent analyses, recordkeeping, & plans
  - Ensure all stormwater outfalls are properly identified
- Assess wastewater discharge.
  - on-site/outfall, POTW, or NPOTW
- Evaluate SPCC and SPPP Plans
  - Updated for facility/personnel changes?
  - Updated for rule changes?
- Assess facility's raw & drinking water
  - source(s), testing, & recordkeeping



## Waste Management

- Inspect containers for proper labeling and integrity.
- Examine storage and inspection logs.
- Evaluate facility contingency plan.
- Review personnel training records.
- Evaluate RCRA waste analysis plan.
- Examine waste manifest records.
- Evaluate facility security measures.
- Assess off site waste management procedures, contacts, & documentation.



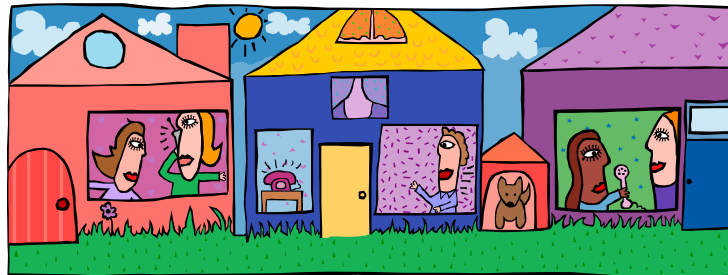
## Toxic Substances Control

- Examine chemical records.
  - shipping, invoices, laboratory, inventory, notifications, disposal
- Determine PCB potential.
  - service, storage, disposal
- Evaluate applicability of TSCA §4 Testing Rules.
- Assess emergency incident and substantial risk procedures.
- Examine reporting & record keeping documents.
  - adverse affects, MSDS, training program
- Evaluate pesticide use.



## Community Safety

- Examine SARA notifications, reports, & documents.
  - release information, MSDS, chemical inventory, agency review
- Evaluate community safety program elements.
  - community awareness & emergency response
- Assess RPCC plan.
  - facility description, storage inventory, release control & prevention
- Evaluate emergency response procedures.
  - facility & agency contacts, PPE, personnel training, incident report



## *Confidentiality and Privilege*

- Any Audit Should Be Marked “Confidential” and Should be Kept Separately From Other Records
- If You Hire an Outside Consultant or Lawyer, the Audit Should Be Performed Under the Attorney-Client Privilege
- Protects You From Providing It to the Permitting Authority, Parties in Litigation, EPA



## What If You Find A Violation?!?!



## Don't Despair: Most States and EPA Have A Self-Reporting Privilege

- Finalize Audit
- Identify the Type of Violation (Federal, State?)
- Identify Which Audit Privilege You Will Avail (State or Federal (EPA))
- Mark Your Calendar to Meet Initial Reporting Deadline
- Identify Other Requirements That Must Be Met



## EPA Self-Audit Privilege: Resources

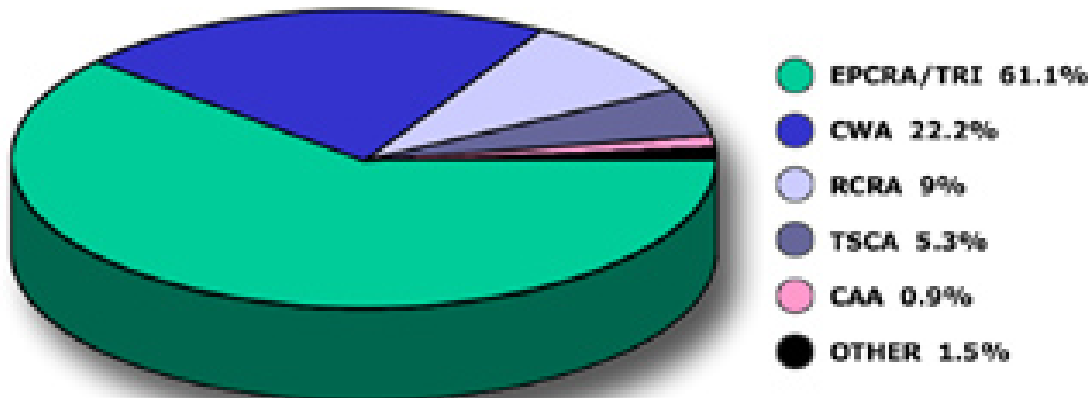


- Audit Privilege Home:  
<http://www.epa.gov/compliance/incentives/auditing/auditpolicy.html>
- The Policy: "[Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations](#)", 65 FR 19,618 (04/11/00)
- Question and Answer Interpretative Document (See web-site)

## EPA Self-Audit Privilege: Practical Use



**Figure 1. Audit Settlement by Statute**



## EPA Self-Audit Privilege: The 9-Step Plan



- **No gravity-based penalties if all nine of the Policy's conditions are met.** EPA retains its discretion to collect any economic benefit that may have been realized as a result of noncompliance.
- **Reduction of gravity-based penalties by 75%** where the disclosing entity meets all of the Policy's conditions except detection of the violation through a systematic discovery process.

## EPA Self-Audit Privilege (cont.)

- **(1) Systematic discovery** of the violation through an environmental audit or the implementation of a compliance management system.
- **(2) Voluntary discovery** of the violation was not detected as a result of a legally required monitoring, sampling or auditing procedure.
- **(3) Prompt disclosure** in writing to EPA within 21 days of discovery or such shorter time as may be required by law. Discovery occurs when any officer, director, employee or agent of the facility has an objectively reasonable basis for believing that a violation has or may have occurred.



## EPA Self-Audit Privilege (cont.)

- **(4) Independent discovery and disclosure** before EPA or another regulator would likely have identified the violation through its own investigation or based on information provided by a third-party.
- **(5) Correction and remediation** within 60 calendar days, in most cases, from the date of discovery.
- **(6) Prevent recurrence** of the violation.



## EPA Self-Audit Privilege (cont.)

- **(7) Repeat violations are ineligible**, that is, the specific (or closely related) violations have occurred at the same facility within the past 3 years or those that have occurred as part of a pattern at multiple facilities owned or operated by the same entity within the past 5 years; if the facility has been newly acquired, the existence of a violation prior to acquisition does not trigger the repeat violations exclusion.
- **(8) Certain types of violations are ineligible** such as those that result in serious actual harm, those that may have presented an imminent and substantial endangerment, and those that violate the specific terms of an administrative or judicial order or consent agreement.
- **(9) Cooperation** by the disclosing entity is required.



## 2 Important Deadlines To Meet

- **Disclosure in writing to EPA within 21 days of discovery** or such shorter time as may be required by law. Discovery occurs when any officer, director, employee or agent of the facility has an **objectively reasonable basis** for believing that a violation has or may have occurred.
- **Correction and remediation within 60 calendar days**, in most cases, from the date of discovery.



## Caution: What Is A “Objectively Reasonable Basis” for Believing There Is A Violation?

- Be mindful of the date you finalize your audit
- Be mindful of your communications with the auditor (If EPA could prove you identified the violation earlier than final date, then problem)

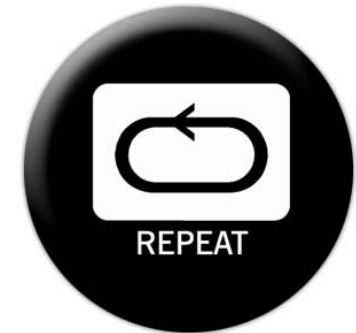


## Most Common Pitfalls



- Missing the 21 day deadline
- No Repeat Violations
- Voluntary discovery (not through any legal requirement)

## No Repeat Violations



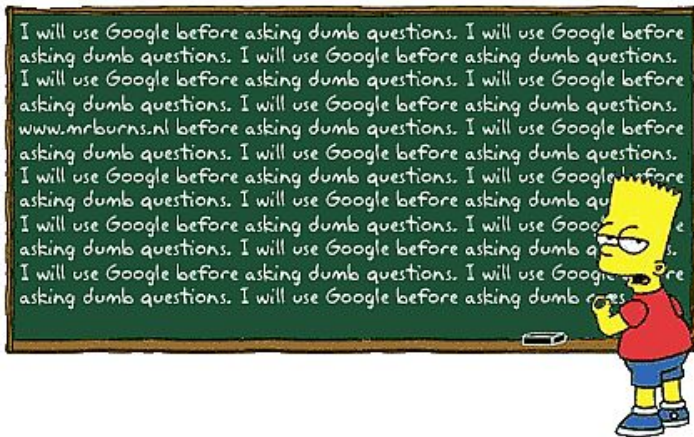
- Rule: No specific (or closely related) violations have occurred at the *same* facility within the past 3 years or those that have occurred as part of a pattern at *multiple* facilities owned or operated by the same entity within the past 5 years
- Exception: If the facility has been newly acquired, the existence of a violation prior to acquisition does not trigger the repeat violations exclusion.

## No Repeat Violations: How You Get Into Trouble...



- What is a “similar violation”? Might not be exactly the same violation but violation of same law.
- Interpretation of “multiple facilities”—Consider how your corporation is structured and whether you might be penalized for facilities not in your control
- Scope of audit: If too narrow, then might have to report twice if find same violations for previous years in a separate audit or if you realize the same situation caused the violation of another law you did not previously report

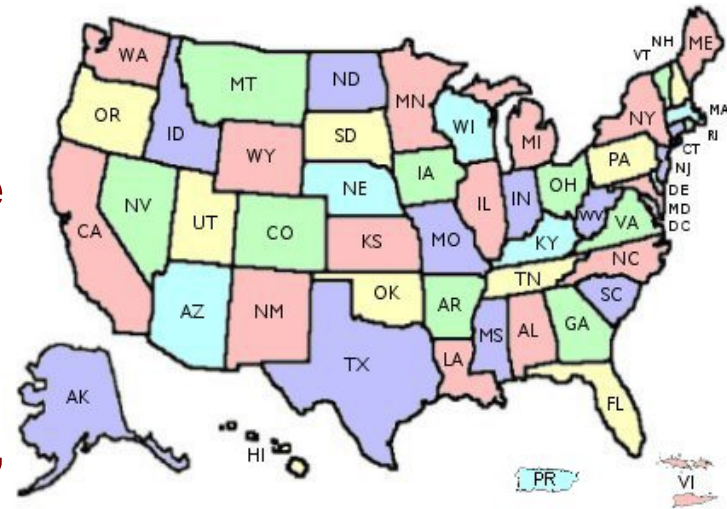
## EPA Process After Submitting Initial Notification



- Reviews initial notification letter and remedy for violation
- May send a questionnaire for some violations (e.g., EPCRA) or call
- Issues a written determination concerning whether you can avail the privilege and your penalty status (may be a letter, consent order, or other administrative order)

## State Audit Privileges

- Approximately 26 states have a statute Others have policies
- Facilities should use for violations of state laws
- Most states have them but procedures, reporting deadlines, and protection varies
- In most states, the policy provides immunity under state laws with certain specified conditions and gives immunity from fines and in some cases criminal penalties.



- Companies may be required to implement pollution prevention and/or an environmental management system

## State Audit Privileges

### Privilege only

Arkansas

Indiana

Illinois

Mississippi

Oregon

### Immunity only

Rhode Island

### Privilege and Immunity

Alaska

Arizona

Colorado

Idaho

Iowa

Kansas

Kentucky

Michigan

Minnesota

Montana

Nebraska

Nevada

New

Hampshire

Ohio

South Carolina

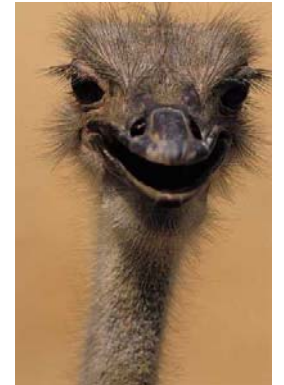
South Dakota

Texas

Utah

Virginia

Wyoming



## Audit Privilege: States In This Region

- North Carolina: Policy in Guidance Document
- Virginia: Statute
- South Carolina: Statute



## North Carolina's Audit Guidance Policy

- Adopted in 1995, revised in 2000
- In Guidance form but not statute
- Provides a waiver of administrative or civil penalties EXCEPT when economic benefit derived
- DENR will refrain from conducting criminal investigations

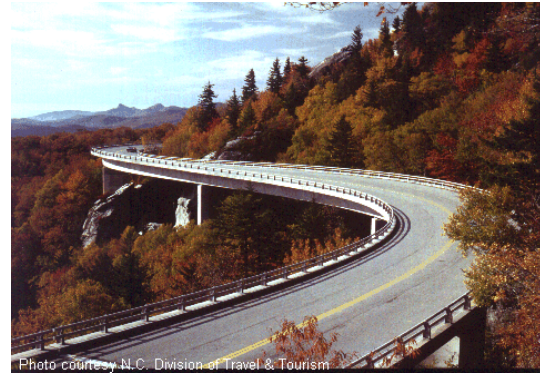


Photo courtesy N.C. Division of Travel & Tourism

- **Conditions:**
  - Noncompliance was not due to lack of effort to comply
  - No knowing/reckless noncompliance
  - No significant harm to environment
  - Disclosure is voluntary and immediate
  - Immediate action to correct the violation

## Virginia's Audit Statute: Voluntary Environmental Assessment Privilege

- VAC 10.1-1199
- Conditions:
  - Discovery voluntary
  - Prompt disclosure
  - Violation is corrected promptly





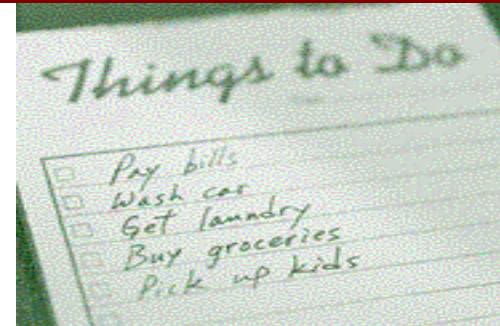
## South Carolina's Audit Statute

- SC Code 48-57-10, *et seq.*
- Pertains only to violations discovered pursuant to an Environmental Audits
- Audit report is privileged and not admissible as evidence in a civil or administrative penalty action
- Does not apply to criminal proceedings
- 10-day notification requirement from completion of audit



## Summary: Your Audit To-Do List

- 1- Determine Your Audit Needs
    - Scope
      - Years, Laws, Parts of Facility
    - Purpose/Need
    - Players
  - 2-Obtain results: Any Violations?
  - 3-Identify Audit Privilege Law that applies
- Seek Advice of Attorney (recommended)
  - Identify requirements of relevant Audit Privilege
  - Timely report
  - Fulfill Other Requirements of Privilege, including correction of violation





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**Any  
Questions?**

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