

Regulatory Enforcement

- Amy E. Romig – Plews Shadley Racher & Braun LLP
 - Avoiding Enforcement through Auditing and Self-Disclosure
- John Wellspring – Keramida
 - Preparing for and Managing Compliance Inspections
- Valerie Tachtiris – General Counsel Indiana Department of Environmental Management
 - Navigating IDEM's Enforcement Process



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Plews Shadley
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Avoiding Enforcement Through Self-Disclosure

Presented by: Amy E. Romig

Indiana Chamber of Commerce
Environmental Conference
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Plews Shadley Racher & Braun, LLP

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Why Do an Audit?

- Determine Compliance Status
 - Peace of Mind
 - Selling Point to Customers/Investors/Third Parties
 - Identify Training Needs
 - Audit Itself can be Informative
 - Avoid Unplanned Enforcement
- Civil Penalty Reduction
 - Achieve Compliance with Reduced or No Civil Penalty
 - Limit Likelihood of Criminal Prosecution
 - Agencies Respect Proactive Facilities



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Why You Might Not Want to do an Audit

- Enforcement is still a possibility – but you have more control
- Must be prepared to quickly fix violations
- Possible violations may become public
- Likely agency inspection to follow if you self-disclose pursuant to audit
- Timeframes for self-disclosure after audit are short



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Self Disclosure and Audit Policies

- EPA Audit Policy
 - April 2000, 65 FR 19618 “Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations
 - Incentives for Self-Disclosure
 - Up to 100% reduction of gravity based penalties (75% if not discovered through a systematic discovery process)
 - No Recommendation for Criminal Prosecution
 - No Routine Request for Audit Reports



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Conditions for Penalty Mitigation

1. Systematic Discovery (75% mitigation vs. 100%)
 - 75% Mitigation vs. 100%
2. Voluntary Discovery
 - Not discovered by legally required monitoring
3. Prompt Disclosure
 - EPA = 21 Days
4. Independent Discovery and Disclosure
 - Discovery before EPA or another regulator would have identified through its own investigation



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Conditions for Penalty Mitigation

Correction and Remediation

- Within 60 days

6. Prevent Recurrence

7. No Repeat Violations

8. Not eligible for violations causing serious action harm, imminent and substantial harm, or violations of prior order or agreement

9. Cooperation with Agencies



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How to Self-Disclose

- EPA launched eDisclosure Portal at the end of 2015
 - Large number of self-disclosed violations has caused problems with EPA's ability to resolve pending disclosures
 - eDisclosure Portal streamlines disclosure
 - Two Categories of Disclosures
 - Category 1 – EPCRA
 - Category 2 – Non-EPCRA or EPCRA where only conditions 2-9 are met



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EPA eDisclosure

- EPA Announced Portal Lunch on December 9, 2015 (80 FR 76476)
- Web-based – Must first register with EPA’s Central Data Exchange system
(<http://www.epa.gov/cdx/>)
- Not designed to deal with CBI – must sanitize information submitted online



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EPA eDisclosure

- Must Understand Violations
 - May be under several laws/regulations
 - Practical standpoint – Leave plenty of time if dealing with multiple facilities and multiple violations
- Must Certify Compliance
 - Must certify compliance within 60 days
 - May ask for Extensions



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EPA eDisclosure

- During eDisclosure receive immediate notice if Ineligible for electronic Notice of Determination (category 1) or Acknowledgement Letter (category 2)
- Limited extensions available for Compliance Certification
- eDisclosures are “Spot Checked”



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IDEM Disclosure

- IDEM’s Audit Policy – originally effective April 5, 1999, Revised on February 5, 2010
- Very similar to EPA Policy (9 factors)
- Different self-disclosure policy: 45 Days



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IDEM Disclosure

- Send Disclosure to:

Self-Disclosure and Environmental
Audit Administrator
IDEM
100 North Senate Avenue, IGCN 1301
Indianapolis, IN 46204

- IDEM sends and acknowledgment letter



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IDEM Disclosure

- Voluntary Environmental Audits
 - Covered by Ind. Code §13-28-4 *et seq.*
- Report Not Routinely Requested
- Statute Does Not Apply to:
 - Documents required to be collected by permit or regulation
 - Criminal investigations or proceedings
 - If Failure to apply for required permit within 90 days
 - If compliance efforts not promptly initiated



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IDEM Disclosure

- IDEM may request further information
- IDEM may request entry of Agreed order
- IDEM may follow up with inspections



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Ohio EPA

- Ohio recognizes audit privilege and immunity
 - Ohio Rev. Code §3745.70 *et. seq.*
- Environmental Audit §3745.70 (A):
 - Must be voluntary, thorough, self-evaluation and be documented
 - For the purpose to “improve compliance, or identify, correct, or prevent noncompliance, with environmental law...”



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Ohio Audit Privilege

- Privilege applies to:
 - Contents of Environmental Audit
 - Contents of Communications Necessary to Audit (but employee or contractor must be notified that communication is part of the audit)
 - Ohio Rev. Code §3745.71(A)
- Privilege does not apply to criminal investigations, Ohio Rev. Code §3745.71(C)



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Multi-State Operations

- EPA Self-Disclosure Policy and Audit Privilege applies nationwide
 - EPA framework usually has strictest timeline and detailed factors
- Many other states have forms of immunity, self-disclosure policies, and privileges
 - <https://www.epa.gov/compliance/state-audit-privilege-and-immunity-laws-self-disclosure-laws-and-policies>



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What To Do After The Audit?

- Not Finished
 - Determine Corrective Action Quickly
 - Certify Compliance or Compliance Efforts with Agency
- Distribute Audit summary/findings Amongst Various Facilities to Ensure Compliance (chance at future disclosures may be limited due to “No Repeat Violations” Factor)
- Develop Action Plan
- Report Violation Corrects as Necessary (update EPA self-disclosure)



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REGULATORY ENFORCEMENT; HOW TO PREPARE FOR AND MANAGE A COMPLIANCE INSPECTION

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Discussion Topics

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- Environmental Compliance Inspections; Preparation, Follow-up and Corrective Actions
 - What does an Audit or Inspection Entail?
 - How Does an Audit differ from and Inspection?
 - How To Manage the Audit/Inspection Process
 - Self-Auditing in Preparation for Inspections
 - Audit Scope and Auditor Selection Considerations
 - How To Be Prepared For An Audit or Inspection
 - What To Expect During the Audit or Inspection
 - Implementing Proper Corrective Action

What does an Environmental Self-Audit or Regulatory Inspection Typically Entail?

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- ❑ Observations of plant operations, processes and systems
- ❑ Review of permits, plans and regulatory applicability
- ❑ Review of related practices and procedures
- ❑ Scrutiny of related notifications, reporting, training, inspections and recordkeeping, especially that required by permits and/or applicable regulations
- ❑ Review of Required plans and programs
- ❑ Review of monitoring and testing data and reports
- ❑ Review of historic records and compliance history
- ❑ Review of any agreed/consent order requirements
- ❑ Understanding plant procedures and processes



How a Regulatory Inspection Differs from a Self-Audit?

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- ❑ No advance notice of inspection is typically given
- ❑ Inspectors are assigned by the regulatory agency
- ❑ Inspectors have right of entry and establish the scope of the audit upon arrival
- ❑ Inspectors expect immediate access to environmental records and unlimited access to processes and operations
- ❑ Inspectors provide an inspection summary with indication of inspection type and inspection results
- ❑ Findings are subject to enforcement action, sometimes resulting in administrative enforcement, civil penalty and/or Agreed Order.
- ❑ A Notice of Violation means that the matter was referred for formal enforcement



How to Manage the Audit or Inspection Process

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- ❑ Inform managers, supervisors and key employees that an EHS inspection or audit is scheduled or underway
- ❑ Notify Corporate EHS, EHS Consultant and/or Legal Counsel as needed
- ❑ Consider having EHS advisors (Corporate EHS, EHS Consultant, and/or EHS Attorney) present or available as needed
- ❑ Secure Process Confidentiality Agreements from Auditors as needed
- ❑ Be present during employee interviews to introduce the auditor, explain questions and clarify responses
- ❑ Escort auditors during plant tour and inspections
- ❑ Get duplicates of anything taken: Pictures, Documents, Samples, etc.
- ❑ Correct Minor issues during the course of the audit as able
- ❑ Respond promptly to auditor requests for documents or information



Important Audit and Inspection Considerations

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- ❑ An expectation of no findings may be unreasonable
- ❑ If records are in good order, readily accessible and complete, the audit or inspection can move along efficiently
- ❑ An audit or inspection is a snapshot in time, and generally covers the period from the last audit to present
- ❑ A well maintained facility and records makes for a good impression
- ❑ Challenge your auditor, Use the audit as a learning opportunity
- ❑ No two auditors are the same or will observe the exact same issues
- ❑ It may be helpful to provide the auditor with electronic copies of certain plans, procedures, permits and records in advance of the audit
- ❑ An audit does not provide a guarantee or certification of compliance
- ❑ You typically will not have time during the audit to conduct corrective actions
- ❑ **Do not undertake a self-audit if you do not intend to implement corrective actions**



What is an Environmental Compliance Self-Audit?

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- An Evaluation and verification of the compliance status of a facility; either to a specific standard, group of standards, permit conditions, or corporate policy requirements
 - Can be internal or external
 - Can be comprehensive or limited in scope
 - Can involve corporate or external legal counsel
 - Can form a basis for Voluntary Self-Disclosure and penalty reduction
 - Can create a “Privileged” Audit Report document
 - Is encouraged by EPA and State regulatory agencies by way of policy and statute



Why Are Voluntary EHS Self-Audits Conducted?

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- To satisfy specific requirements or obligations: ISO certification, VPP, ESP, Sustainability Program, continuous improvement, shareholder/stakeholder or other
- To create a benchmark for comparison and trending
- To identify and assess risk of penalty, injury or harm
- To help set EHS priorities or assess EHS need
- As preparation for a facility sale or acquisition
- To support company EHS commitment, and foster adoption of good management practices
- **In Preparation for an Upcoming Environmental Inspection by your Regulator**



Self-Audit Scope: Some Advance Considerations

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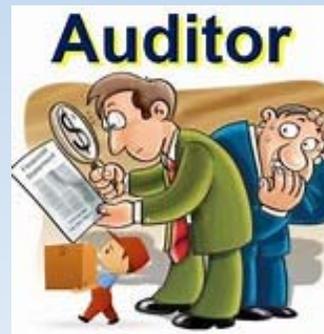
- Defining Audit scope, schedule and timeframe
 - What is going to be reviewed: comprehensive or limited?
 - Should a specific audit protocol or checklist be used?
 - What is the schedule/agenda for the audit activities?
 - Are the audit results to be privileged and confidential?
 - Who should attend opening meeting: Legal? Corporate?
 - Over what period of time should the audit be focused?
 - How many auditors should be involved, and who and for How long?
 - What operations will the auditors need to see or observe?
 - Who might need to be interviewed during the audit?
 - Who should attend the closing meeting and presentation of results?
 - How will the results be documented/reported?



Selecting Auditors for an Audit Team: Some Considerations

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- Independence / Objectivity
- Audit Experience and Expertise
- Qualifications
- Industry/Process familiarity
- Proximity
- Availability
- Cost/ Affordability
- State and Local regulatory knowledge
- Honesty, Integrity
- Organization/Attention to Detail/ Report Writing skills



How to Prepare for a Scheduled Audit or Inspection

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- ❑ Clear your schedule
- ❑ Line up Qualified Tour Guides and Escorts as needed
- ❑ Arrange for Auditor Safety Procedure Orientation and Communicate PPE Requirements by area
- ❑ Schedule time with persons likely needing to be interviewed
- ❑ Arrange Audit Logistics:
 - Meeting rooms,
 - Guest Internet Access,
 - Lunch plans,
 - Access to hard copy files and documents
 - Access to Electronic Documents and Files
- ❑ Send required invites to opening and closing meetings



What to Require of Internal/External Self-Auditor(s)

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- ❑ What should you expect/request of your self-auditor(s)?
 - ❑ A pre-audit document request for permits, plans
 - ❑ A pre-audit questionnaire and/or a list of documents expected to be reviewed onsite
 - ❑ A pre-Audit Conference call to discuss all of the above
 - ❑ A proposed agenda for the audit activities
 - ❑ A full and competent assessment of compliance status and risk
 - ❑ Daily debriefing of all potential findings, compliance issues or areas of concern
 - ❑ Full disclosure of any audit findings and any potential findings at the daily debriefings and closing meeting
 - ❑ A clear and concise draft and final final report of audit findings



How to be Prepared for an Audit or Inspection

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- Have Ready or know how to quickly retrieve the following:
 - Most recent version of permits, applications and related correspondence
 - Most recent official signed versions of plans and written programs
 - Copies of EHS notifications made during the audit period
 - Relevant internal policies, procedures and work instructions
 - Required EHS reports with back-up data, calculations and proof of delivery/receipt
 - EHS records (electronic or hard copy) including training records
 - Monitoring/ testing results
 - Copies of registrations, licenses and certifications
- Have a back-up Contact in case the EHS Manager is unavailable



What to Expect From the Auditor or Inspector During and after the Audit or Inspection

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- Ability to discuss issues of interpretation and provide guidance documents or letters of interpretation to support conclusions
- Clear delineation of regulatory compliance issues versus non-regulatory (good management practice) issues
- Full disclosure of all findings or areas of concern requiring further research
- Assistance with prioritization or risk ranking of findings
- An opportunity to review and comment on a draft of the audit report or Agreed Order before it is made final
- Recommendations on how to correct issues observed
- Clear communication of regulatory basis of each finding including rule or permit condition citation



Implementing Proper Corrective Action

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- Corrective Actions
 - Begin work on corrective actions as soon as the validity of the finding is confirmed
 - Determine need, opportunity or benefit of claiming audit privilege and disclose audit findings accordingly (specific timeframes apply)
 - State environmental audit privilege/ statutes
 - Federal self-policing audit policy
 - Ensure that the corrective action that is chosen will correct or eliminate the issue and close the finding
 - Prioritize and assign corrective action to proper individuals or entities and set appropriate deadlines



Implementing Proper Corrective Action

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- Corrective Actions (Cont.)
 - Close audit findings promptly and within timeframe committed per any agency disclosures or commitments
 - Track corrective actions until closure is complete, and document closure.
 - In the event of an NOV and Enforcement Action, Request a pre-compliance meeting to review and address findings and corrective actions
- Consider root cause analysis for any serious findings or oversights. Apply lessons learned company-wide.



Questions?

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Indiana Department of Environmental Management
Protecting Hoosiers and Our Environment Since 1986

Office of Legal Counsel



Avoiding Enforcement & Making Your Way through IDEM's Enforcement Process

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Deputy General Counsel

Indiana Environmental Conference
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OLC's Role in Enforcement Actions

- Represent IDEM in enforcement negotiations where respondent is represented by counsel and in administrative proceedings before the Office of Environmental Adjudication (OEA)
- Negotiate settlements in joint state/federal enforcement actions
- Assist the Attorney General's Office in representing the agency in federal and state court proceedings



Enforcement Overview

- Key personnel
- Enforcement statistics



IDEM Enforcement Leaders



Office of Air Quality

- Phil Perry, Branch Chief, Compliance and Enforcement
 - David McIver, Section Chief, Enforcement



Office of Land Quality

- Bruce Kizer, Branch Chief, Compliance and Response
 - Nancy Johnston, Section Chief, Enforcement



Office of Water Quality

- Brian Wolff, Branch Chief, Surface Water, Operations, and Enforcement
 - Samantha Groce, Section Chief, Enforcement



Minor Violations

- Violations the agency is able to resolve with the regulated entity without referral to formal enforcement proceedings

Program	2016	2017
 Office of Air Quality	1126	1247
 Office of Land Quality	469	331
 Office of Water Quality	1771	2438
TOTAL	3366	4016



Notices of Violation

Program	2016	2017
 Office of Air Quality	141	158
 Office of Land Quality		
Hazardous Waste	11	25
Solid Waste	18	11
UST/LUST	7	26
CFO	11	14
 Office of Water Quality	74	54
TOTAL	262	288



Avoiding Enforcement

- Compliance assistance
- Environmental Audits
- Self-disclosure



Compliance Technical Assistance Program (CTAP)

- Information provided is confidential and may not be used by other IDEM offices
- Provides a quality assurance guarantee for assistance provided and relied upon
- Can assist with self-disclosures
- Contact information, forms, and program details can be found at www.idem.in.gov/ctap

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Self Disclosure and Environmental Audit Policy

- Policy No. MP-004-R2-NPD*
- Encourages regulated entities to voluntarily discover, disclose, correct, and prevent environmental violations
- Can result in reduction or elimination of gravity-based civil penalties if certain conditions are met
- Even if conditions are not met, IDEM has authority to reduce penalties by up to 50% for good faith
- Good faith means prompt reporting (when not otherwise required) and prompt correction of noncompliance

*Available at: http://www.in.gov/idem/ctap/files/nrpd_mp-004-r2.pdf

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Why Self-Disclose?

- Why should a person or company self-disclose?
 - Reduction or elimination of gravity-based civil penalties
 - Self-disclosure may result in an Agreed Order (AO) without penalties
 - IDEM agreement not to recommend prosecution
 - It is the right thing to do

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Making your way through the Enforcement Process

- First, some perspective
- Know the policies
- Making enforcement easier- communicate & cooperate

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IDEM enforcement staff will work with you

- Priority is prompt return to compliance
- In 2017, IDEM issued 288 Notices of Violation and only three Commissioner's Orders



Compliance and Enforcement Response Policy

- Policy No. MP-005-R1-NPD*
- Sets forth roles of IDEM staff in IDEM's enforcement processes
- Establishes three classes of violations based upon the degree of risk to human health or the environment
- Each class has different standards and processes for enforcement

*Available at: http://www.in.gov/idem/ctap/files/nrpd_mp-005.pdf



Civil Penalty Policy

- Policy No. ENF-99-0002-NPD*
- Penalties are only a deterrent – not our goal
- Gravity-Based component:
 - Largely based on potential for harm and extent of deviation from the rule
 - Multipliers for days of noncompliance

*Available at: http://www.in.gov/idem/ctap/files/nrpd_enf-002.pdf

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Civil Penalty Policy

- Aggravating and Mitigating Factors:
 - Actions before and after the violation
 - History of noncompliance
 - Ability to pay
 - IDEM enforcement costs
 - Other unique factors

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Civil Penalty Policy

- Penalties can be offset using Supplemental Environmental Project
- SEP Policy No. ENF-003-R1-NPD*
- SEP idea library available at:
https://www.in.gov/idem/legal/files/enforcement_sep_idea_library.pdf
- Available in joint state/federal enforcement actions as well

*Available at: http://www.in.gov/idem/ctap/files/nrpd_enf-003-r1.pdf

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Making Enforcement Easier

- Provide all requested documents and information as soon as possible
- Retain a knowledgeable, experienced environmental consultant and/or attorney
- Be well-prepared for settlement conferences, and make a good faith effort to resolve the matter
- Take advantage of available discount for expedited Agreed Order and compliance

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QUESTIONS?



Thank you

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