Exclusive: Proposed policy would allow industries to self-audit pollution-generating activities

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Photo courtesy Hudson Riverkeeper

Industries that use pesticides, treat wastewater and store hazardous chemicals could have penalties for breaking pollution laws reduced or waived if they agree to self-report violations under a policy being considered by New York's leading environmental regulator.

Any entity that enters into an agreement with the state Department of Environmental Conservation to self-audit would also "not be prioritized for inspection during the audit period," stated a draft of the proposed policy obtained by the Gotham Gazette.

The DEC regulates sources of air and water pollution, including private industry, agricultural uses, and municipal facilities like waste transfer stations and sewage treatment plants. It is responsible for enforcing over 40 New York State environmental laws and over 50 federal laws, including provisions of the Clean Air and Clean Water acts. The agency would also be charged with regulating hydraulic fracturing in the Marcellus Shale.

The self-audit policy, described in a draft document dated May 14, would apply to any private business or public entity, including federal, state and municipal agencies and facilities, which are regulated under state environmental law.

A self-audit, however, “is not required for disclosure and may not be warranted in certain circumstances,” the document states. Environmental violations involving suspected criminal conduct would not be eligible for a penalty waiver.

Further, the DEC would conduct an inspection if it receives “a complaint concerning the regulated entity or have reason to believe that a violation has occurred resulting in serious actual harm.”

DEC Executive Deputy Commissioner Marc Gerstman said the goal of the proposed policy was to promote compliance with environmental laws.

“Nobody is being given a free ride or a ticket to pollute,” he said. Instead, the policy encourages companies to come forward when something goes awry. “If a company has a violation that they want to disclose, [they] have some comfort level that we will not impose penalties.”

The draft of the policy was distributed in the DEC’s central and regional offices for internal review. DEC officials also said the agency had “held stakeholder meetings with environmental groups, municipalities and businesses to get their input on developing a self-audit policy.” More meetings were planned, they said.

The federal Environmental Protection Agency would also have to clear the new policy. A spokeswoman for the agency said they were unaware of the proposed policy. The DEC said it had attempted to contact the EPA and would discuss it with their federal partner before it is finalized.

Read the draft DEC document below

Too unwieldy to implement?

The proposed policy has already stirred up some concern among current DEC employees who worry that it will be too unwieldy to implement given the agency's resource constraints. One worker who has conducted inspections and reviewed the document told the Gazette that “the glaring issue is who is going to review all these audits.”

“We don't have resources to keep up with normal enforcement,” said the employee, who was not allowed to speak about the policy publicly and spoke on the condition of anonymity. “If the audit policy becomes a priority, then enforcement becomes secondary.”

Since 2008, the agency has lost almost 800 employees, bringing staffing levels to their lowest point in over twenty years. Meanwhile, federal financial support for the DEC has steadily declined and the agency has become more reliant on New York State tax dollars and revenue from fees and penalties.

“Resource limitations” and “the high volume of activities potentially affecting human health and the environment as well as practical constraints” in part led the agency to develop the proposed self-audit policy and other “auxiliary strategies,” the draft document stated.

DEC spokeswoman Emily DeSantis said the policy would alleviate some pressure on personnel. “As more entities within the regulated community adopt approaches to assess environmental performance on their own, the policy will allow DEC to focus its enforcement efforts on the truly bad actors,” she said.

The Debate Over Self-Audit Agreements

Environmental self-audit and voluntary compliance policies have been used by both the federal government and sporadically at the state level since the early 1990s. The DEC’s newly proposed self-auditing program would greatly expand the agency's current use of self-reported information, representing a major shift in the state’s approach to environmental protection.

The proposed policy enables companies and other entities to enter into self-audit “agreements”

with the DEC. These agreements can be comprehensive, covering all environmental laws and regulations applicable to a facility, or limited to a portion of those requirements. Companies and other regulated entities that commit through a self-audit agreement to minimize their impact using “environmental management practices and pollution prevention systems” would be offered a variety of incentives.

The incentives are still being developed but they could include public recognition of the company’s efforts and access to technical assistance services, according to the draft document. Perhaps more importantly, they could include additional assistance with penalties and timeframes for correcting violations.

Some critics argue that such self-auditing programs could lead to less frequent inspections, erode defined missions for state regulators and provide a shield for polluters against environmental enforcement and public oversight. Others said enforcement should be the focus of regulatory efforts.

Robert Sweeney, the Democratic chair of the state Assembly’s environmental conservation committee, said he was skeptical of the proposed policy, which he had not seen until it was provided to him by the Gazette.

“A better option would be to consider beefing up enforcement, which would pay for itself,” he said. In a subsequent email, he added: “It may be old-fashioned, but to keep people honest you need cops on the beat.”

Self-audit agreements could also deal a blow to transparency and acountability, said Bill Wolfe, director of the New Jersey office of Public Employees for Environmental Responsibility. “There are no public hearingsâ€¦ no discoverable documents,” he said. “The audit becomes a way to stay private.”

But others saw a benefit to the policy. Richard Schrader, the New York State legislative director for the National Resources Defense Council, said a self-audit policy “make sense as one of the tools for environmental compliance.” But he said such a policy requires “great care and caution â€¦ [It] can’t be a substitute for ensuring that the DEC has adequate enforcement staff, and they still have to pursue full-compliance in an aggressive fashion.”

Darren Suarez, the government affairs director for the Business Council of New York State, said self-audit agreements could be beneficial to both the companies themselves and to “the goal of reducing degradation to the environment.”

“A self-audit helps to identify areas where an institution may not be handling materials as well as they would want to,” he said, and later added: “If they can come into compliance, that’s the big incentive.”

DEC spokeswoman DeSantis said the program would encourage “comprehensive company-wide audits and best management practices, designed to identify and correct violations without fear of significant penalties.”

“In the end, companies and municipalities that have strong systems in place to ensure environmental compliance will prevent violations down the line,” she said.

Learning From Experience

A “voluntary compliance” policy was previously attempted by the DEC in the mid-1990’s under then-Commissioner Michael Zagata. But one retired DEC staffer with knowledge of the enforcement process said the agency’s personnel grew reticent to follow up on reports of violations after the policy was in place.

Paul Gallay, a DEC attorney from 1990 to 2000 and now president of Hudson Riverkeeper, said of the Zagata period: “The hidden message was, â€ We don’t have to enforce the way we used to.’”

Zagata, who is now the president and CEO of the Ruffed Grouse Society in Pennsylvania, said he could not remember if there was a written policy with clear parameters. But he said that voluntary compliance was something he was trying to push as a philosophy throughout the agency.

"Voluntary compliance, with the understanding that if you don't do it, there's a stick on the other side of the fence, is doable," he said, but added that the agency would still need enough workers to verify noncompliance.

DEC administrative hearing records for a case settled in 2005 involving a gas station with registration and safety violations reference a backlog of enforcement cases due to the agency's "voluntary compliance" program.

The case, which focused on the gas station's underground tanks, took over a decade to resolve and hinged on whether the tanks were being tested for leaking that could seep into wells or other underground water sources.

"Although the tanks were due for testing in October 1992, DEC staff did not inspect the facility or take action to bring it into compliance with the testing requirement until June 2002," hearing records stated. "This was part of an ongoing effort by DEC staff to reduce a backlog of overdue registrations and tank tests that had accumulated while the Department was pursuing a policy of voluntary compliance."

Other states' experiences

As New York weighs a possible self-auditing policy, New Jersey is also re-visiting the idea after an earlier proposal was struck down. Meanwhile, the Massachusetts Department of Environmental Protection has used a form of self-auditing in its Waste-Site Clean-Up program since 1993; it has considered expanding the policy into wetlands management but has not made a final determination.

Public Employees for Environmental Responsibility released a 2008 press release charging that the "failure rate" among companies who self-audited using private licensed consultants was found after a state review to be 70 percent (21 of 30 sites).

Paul Locke, director of response and remediation for the Bureau of Waste Site Clean-Up at the Massachusettes DEP, rejected the criticism. "That is not representative of the universe of submittals of site clean-ups that we get," he said.

He argued that privatizing aspects of environmental auditing and oversight can be appropriate in contexts where licensed professionals are engaged in well-defined tasks. “You have to set up the system so that they are checking in along the way -- you have multiple checks and balances. It’s not as clear-cut as the Wild West of self-auditing,” he said.

Kyla Bennett, who runs the New England PEER office and worked for the EPA for ten years, said she believes there is an inherent conflict of interest in allowing private companies to pay for environmental audit services as opposed to relying on public enforcement.

“Is it a risk? Absolutelyâ€¦. You can skew things in one direction or another. It happens all the time. The Massachusetts DEP doesn’t have the money to go after licensed professionals, let alone go after violators,” she said.

Stretching Resources

The policy draft says self-auditing will “supplement” existing DEC environmental enforcement activities. How well environmental enforcement is currently working and the DEC’s ability to keep up with inspections has been a subject of scrutiny , especially given the DEC’s loss of staff.

Commissioner Joseph Martens told the Gazette in March that the DEC will not see an increase in staff “anytime soon,” due to the state’s fiscal situation. The draft’s reference to DEC’s resource limitations raises the issue of how the agency has searched to find ways to meet state and federal mandates.

A DEC employee with knowledge of the state’s petroleum bulk storage program, which regulates oil storage facilities of over 1,100 gallons typically found in gas stations, medium to large industrial businesses and public buildings, said private contractors have been brought in to help with the inspection backlog because the program is so shortstaffed.

The program is run in conjunction with the federal EPA. The employee, who was not allowed to speak publicly about the program and did so on the condition of anonymity, explained: “This year, over 24,000 PBS sites have overdue tank registrations. Historically we would send out notice of violation letters and attempt to get a penalty. DEC would get responses and that would be the ones we would work on. The ones who did not respond was a low priority. Think of the

volume. No way can the DEC handle that volume effectively, not then and not now. We are trying to prioritize the volume of non-compliance. But I see this as a failure in the [PBS] regulation and its attempt to prevent oil spills."

The DEC disputed the employee's claim, saying that only 4,600 PBS registrations were more than 90 days overdue. Fewer than 600 are less than 90 days overdue. The DEC said most of the overdue regustrations were heating oil tanks, "which are generally overdue because they have been sold or have changed management companies."

"DEC has and continues to promote compliance and do enforcement as necessary for these overdue registrations," said DeSantis, the agency spokeswoman. "This enforcement is done every year and has been ongoing since 1997 when we had more than 8,000 facilities overdue for registration."

The DEC has acknowledged that they stopped performing effluent sampling as a regular part of the State Pollutant Discharge Elimination System inspection program in fiscal year 2010-2011 after significant staff loss. Any facility that discharges into surface water needs a permit, including manufacturers, power plants and sewage treatment plants. The DEC uses self-reported data from regulated pollution sources as part of the SPDES program.

According to Environmental Advocates, a watchdog group that monitors the DEC, in 1990, the DEC sampled effluent 1,113 times to verify polluters' reports.

In 2008, the DEC took 112 samples, a 94 percent decrease. The DEC said the sampling is not required by law. "This information continues to be self-reported by the permitees," the agency previously told the Gazette.

Conclusion

The New York DEC is completing an internal review of the self-audit policy before introducing it more broadly. The agency has not indicated whether the policy would be tested out in one division first, or if it would apply to all of DEC's enforcement work. New York State Legislative approval for adoption of the policy is not required. The DEC's Gerstman noted that the agency is "coordinating with the federal EPA as a partner."

Suarez, of the Business Council, said the right questions to be asking are “what do you ultimately want to see and how do we get there? And (can this) allow businesses to stay here?”

Hudson Riverkeeper’s Gallay said there was a way to balance environmental law with business interests while also enforcing penalties. “When I worked for the DEC, we took great pride in bringing companies back into environmental compliance and economic health. You don’t need penalty forgiveness policies to do that,” he said.

The DEC has sole discretion to select eligible businesses and other entities for participation in self-audit agreements, the draft document states, and to exclude “bad actors” that have a history of non-compliance. Regulated entities that own or operate multiple facilities can still be eligible even if one of their facilities is under investigation.