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Via Electronic Mail (Chapman.apple@epa.gov)

Apple Chapman
Deputy Director, Air Enforcement Division
U.S. Environmental Protection Agency
Mail Code 2242A
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Re: Comments of the American Petroleum Institute in Response to the Environmental Protection Agency's Draft Audit Policy Agreement for New Owners of Oil and Natural Gas Exploration and Production Facilities.

Dear Deputy Director Chapman:

This letter provides comments from the American Petroleum Institute ("API") in response to the U.S. Environmental Protection Agency's ("EPA's" or "the Agency's") request for comments on its proposed changes to EPA's 2000 policy titled "Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations" (the "Audit Policy") for new owners of oil and natural gas exploration and production facilities and, in particular, the Agency's Draft Standard Audit Policy Agreement ("Draft Agreement"). API believes that the Audit Policy is an important tool in furtherance of environmental compliance and appreciates EPA's interest in expanding its use by proposing to adopt a more flexible approach to eligibility and administration.

EPA is correct that the Audit Policy has traditionally been underutilized by new owners of oil and natural gas exploration and production facilities and has correctly identified many of the reasons why new owners of oil and natural gas exploration and production facilities have not used the Audit Policy as extensively as other industries (*e.g.*, infeasibility of deadlines, regulatory complexity). API is concerned, however, that the approach embodied in EPA's Draft Agreement may not only fail to address these issues, it could potentially create new barriers to use of the Audit

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Policy. API raised these concerns and questions with EPA in advance of, and during, EPA's stakeholder meeting on June 28, 2018. We are reiterating these concerns here in sincere hope that we will be able to work with EPA to avoid the inadvertent imposition of additional barriers to use of the Audit Policy. API and its members are committed to helping EPA expand use of the Audit Policy among new owners of oil and natural gas exploration and production facilities.

I. CONCERNS WITH EPA'S PROPOSED APPROACH

API has two fundamental concerns with EPA's proposed changes to the Audit Policy. Our first concern relates to Draft Policy Agreement ("Attachment B"), which appears to require companies seeking penalty mitigation through the Audit Policy to first conduct analyses and corrective actions that are not based on any federal statutory or regulatory requirements. The Attachment B requirements are, in fact, significantly more stringent than what EPA requires under regulations promulgated pursuant to the Clean Air Act ("CAA" or "the Act").

Our second concern is with EPA's apparent intent to require new owners to navigate EPA's audit process in states that operate their own audit programs pursuant to authority delegated under the CAA. Rather than deferring to states authorized to administer the Act, EPA's proposed approach suggests that EPA will impose its own Audit Policy requirements on top of any state audit program requirements. API is concerned that this approach would lead to duplication, inconsistency, and confusion.

More fundamentally, both of these proposed changes appear more likely to further curtail – rather than expand – use of the Audit Policy by new owners of oil and natural gas exploration and production facilities. In order to help EPA avoid such an undesirable outcome, in the subsections below, we provide detailed explanations of API's concerns and recommended changes.

a. Attachment B Creates a Barrier to Use of the Audit Policy

EPA's 2000 Audit Policy encourages companies to voluntarily discover potential violations through self-auditing, disclose them to the EPA, promptly correct them, and prevent their future reoccurrence. In exchange, companies receive a reduction or elimination of civil penalties and a determination by EPA not to recommend criminal prosecution to the U.S. Department of Justice.

In order to obtain penalty mitigation through the audit policy, nine conditions must be met: (1) systematic discovery through an internal or external audit or compliance management program; (2) voluntary discovery of the violation; (3) prompt disclosure to EPA within 21 days of discovery; (4) independent discovery and disclosure; (5) correction and remediation within 60 days from the date of discovery; (6) prevention of recurrence of the violation; (7) the violations are not repeat violations; (8) the violations do not result in serious actual harm, an imminent and substantial

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endangerment, and do not violate an administrative or judicial order or consent agreement; and (9) cooperation by the disclosing entity.

In 2008, EPA tailored its approach to Audit Policy disclosures for "new owners." EPA recognized that environmental audits frequently occur as part of a transfer of ownership over a property or facility. New owners, however, did not sufficiently avail themselves of the program because of uncertainty over EPA's definition of "new owners," apparent inapplicability of some of the policy's conditions, and deadlines that were too short to be used in the context of a transaction. EPA's 2008 Interim Approach to Applying the Audit Policy to New Owners ("Interim Policy") attempted to address these issues by clarifying the eligibility for treatment as a new facility and by clarifying how four of nine Audit Policy eligibility preconditions were to be applied to new owners.[1]

The Interim Policy's specific changes to the Audit Policy's eligibility conditions are not relevant to these comments. What is relevant, however, is that the Interim Policy did not change the fundamental structure of the Audit Policy. Under either the original 2000 Audit Policy or the 2008 Interim Policy, companies are required to discover violations through self-auditing, disclose them to the EPA, promptly correct them, and prevent their future reoccurrence. In order to identify potential violations, the participating company first identifies the standards and requirements applicable to the subject facility and then examines the facility and the company's operation of the facility to assess whether those standards and requirements have been met.

The Draft Agreement, on the other hand, would fundamentally change the structure of the Audit Policy by requiring auditing, disclosure, and corrective actions regardless of whether the company is in violation of any federal regulation under the CAA. To be perfectly clear, this approach would saddle new owners of oil and natural gas exploration and production facilities with an entirely new and onerous requirement in order to use the Audit Policy. Under proposed Attachment B, it would no longer be sufficient for new owners to identify, disclose, correct, and prevent recurrence of "specific violations."[2] Instead, Attachment B would require new owners to conduct modeling, install equipment, and adopt operational and design changes even where the design and operation of the equipment complies with the New Source Performance Standards ("NSPS") and National Emissions Standards for Hazardous Air Pollutants ("NESHAPs") EPA promulgated for that equipment.

Indeed, Attachment B seems to provide a framework for assessing the presence of emissions and the efficacy of emissions controls without identifying the applicable standards for either. In doing

[1] 73 Fed. Reg. 44,991 (August 1, 2008).
[2] See #4 in Audit Policy Interpretive Guidance (Jan. 1997) at https://www.epa.gov/sites/production/files/documents/audpolintepgui-mem.pdf

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so, Attachment B seemingly creates an entirely new standard of compliance that does not bear any relationship to any federal statutory or regulatory requirement applicable to oil and natural gas exploration and production facilities. Instead, the Draft Agreement appears to require participating companies to conduct assessments and corrective actions that are required only under certain state regulations, and/or have been compelled in EPA consent decrees alleging subjective "general duty" violations under CAA Section 112(r)(1). Such assessments and corrective actions may be appropriate in specific states or in certain fact-specific circumstances, but it is not appropriate to require them on an industry-wide basis. While API recognizes that EPA is not attempting to craft new non-regulatory compliance standards for oil and natural gas exploration and production facilities, we remain concerned that Attachment B seems to provide a new industry-wide measurement of compliance that far exceeds what is required under the CAA or EPA's regulations under the CAA.

API also recognizes that the Draft Agreement is designed to provide model language that can be tailored by participating companies and the Agency as they negotiate the provisions of specific audit agreements. Nevertheless, given the Agency's superior leverage in negotiating an audit agreement with a company concerned about potential noncompliance, API remains concerned that putative participants in the Audit Program would not be able to negotiate away EPA's default requirements. Again, API does not believe that EPA is attempting to use the Draft Agreement to introduce a backdoor regulation on the upstream oil and natural gas industry. We do, however, have significant questions about the propriety of assessing compliance based on standards that exceed and are entirely distinct from that which EPA has required in regulations developed through notice-and-comment rulemaking.

The Audit Policy is intended to provide incentives to voluntarily identify and disclose violations of statutory and regulatory requirements. Structuring the Audit Program such that noncompliance with voluntary standards, individual state requirements, subjective general duties, or the terms of a single company's consent agreement are considered "violations," however, creates an intensely problematic implication that EPA is creating a new, more stringent compliance standard through enforcement leverage.

i. Questions About Attachment B

As we have elsewhere stated, API is committed to working with EPA to better understand and improve the Agency's proposed approach. In order to hopefully continue our dialogue with EPA, API is herein identifying the following important questions:

- Why did EPA not base Attachment B on existing federal regulatory requirements?

- Why does EPA believe that the analyses and corrective actions outlined in Attachment B should be required to demonstrate compliance and receive penalty mitigation?
- With what regulation/requirement does Attachment B attempt to measure compliance?
- Does Attachment B reflect an effort to treat generalized and subjective requirements under the CAA Section 112(r)(1) as specific regulatory comments?
- Would Attachment B be used in an enforcement action to demonstrate either an industry-recognized "good air pollution control practice" or a standard necessary to prevent or minimize hazards?
- Is Attachment B intended to help protect companies from future enforcement actions alleging noncompliance with generalized duties under CAA Section 112(r)(1) or otherwise?
- In what way does Attachment B promote EPA's stated goal of expanding use of the Audit Policy new owners in the oil and natural gas exploration and production facilities?
- Which precise types of violations must be corrected in 60-days and which are subject to a negotiated schedule?

ii. *Recommendation for Addressing Concerns with Attachment B*

Attachment B imposes assessment and corrective action requirements that bear no relationship to federal regulations promulgated under the CAA. As such, we recommend that EPA decline to finalize Attachment B and refrain from requiring new owners of oil and natural gas exploration and production facilities to undertake non-regulatory measures in order to avail themselves of potential penalty mitigation under the Audit Policy.

We do not believe that new owners of oil and natural gas exploration and production facilities have underutilized the Audit Policy based on difficulties in identifying the federal regulatory requirements on which to assess their compliance. These requirements are found within a handful of NSPS and NESHAPs and readily identifiable. Identifying them in a model agreement does not save time or ease administration of the Audit Program and would only lead to confusion. To the extent that regulatory applicability becomes complex, that complexity is largely driven by differences in regulations based on jurisdiction or local air quality. This variability is part of the CAA and is not an issue that can, or should, be addressed through the Audit Policy. As such, we do not believe that EPA should provide a new draft agreement to replace Attachment B.

If, however, EPA is committed to providing an amended Attachment B, the Agency should base that document exclusively on federal CAA regulations promulgated for those sources. EPA's

proposed amendments to the National Oil and Natural Gas Federal Implementation Plan ("FIP") for Indian Country provides a comprehensive list of those requirements.[3] We have reproduced the relevant table from the preamble for those proposed FIP amendments.

40 CFR part and subpart	**Title of subpart**	**Potentially affected sources in the oil and natural gas production and natural gas processing segments of the oil and natural gas sector**
40 CFR part 63, subpart DDDDD	National Emission Standards for Hazardous Air Pollutants for Major Sources: Industrial, Commercial, and Institutional Boilers and Process Heaters	Process heaters
40 CFR part 63, subpart ZZZZ	Subpart ZZZZ—National Emissions Standards for Hazardous Air Pollutants for Stationary Reciprocating Internal Combustion Engines	Reciprocating Internal Combustion Engines
40 CFR part 60, subpart IIII	Standards of Performance for Stationary Compression Ignition Internal Combustion Engines	Compression Ignition Internal Combustion Engines
40 CFR part 60, subpart JJJJ	Standards of Performance for Stationary Spark Ignition Internal Combustion Engines	Spark Ignition Internal Combustion Engines
40 CFR part 60, subpart Kb	Standards of Performance for Volatile Organic Liquid Storage Vessels (Including Petroleum Liquid Storage Vessels) for Which Construction, Reconstruction, or Modification Commenced After July 23, 1984	Fuel Storage Tanks

[3] 83 Fed. Reg. 20,775 (May 8, 2018).

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40 CFR part and subpart	Title of subpart	Potentially affected sources in the oil and natural gas production and natural gas processing segments of the oil and natural gas sector
40 CFR part 60, subpart OOOOa	Standards of Performance for Crude Oil and Natural Gas Facilities for which Construction, Modification, or Reconstruction Commenced after September 18, 2015	Storage Vessels, Pneumatic Controllers, Compressors (Reciprocating and Centrifugal), Hydraulically Fractured Oil and Natural Gas Well Completions, Pneumatic Pumps and Fugitive Emissions from Well Sites and Compressor Stations
40 CFR part 63, subpart HH	National Emission Standards for Hazardous Air Pollutants from Oil and Natural Gas Production Facilities	Glycol Dehydrators
40 CFR part 60, subpart KKKK	Standards of Performance for New Stationary Combustion Turbines	Combustion Turbines

b. EPA's Proposed Approach May Undermine Cooperative Federalism and Lead to Duplication and Inefficiency

As noted above, API does not believe that the one-size-fits-all default language in Attachment B appropriately measures compliance with federal CAA regulations applicable to sources at oil and natural gas exploration and production facilities. We are also concerned however, that this approach would unnecessarily intrude into state regulatory programs and the states' own measures of compliance under state audit programs or otherwise. In particular, the Draft Agreement appears to mirror the Colorado Air Pollution Control Division's ("CAPCD's") Storage Tank and Vapor Control Systems Guidelines.[4] Although CAPCD uses these guidelines to assess compliance with Colorado Regulation Number 7, they remain voluntary guidelines. It is inappropriate to convert voluntary guidelines into mandatory requirements in order to demonstrate compliance and obtain

[4] https://www.colorado.gov/pacific/sites/default/files/041918_StorageTank-presentation.pdf

penalty mitigation, and it is particularly inappropriate to impose these requirements outside of Colorado.

Moreover, many states operate their own audit programs offering penalty mitigation for companies that voluntarily discover and disclose potential violations of air regulations. These states operate their audit programs pursuant to authority delegated to them by EPA under the CAA. Given this delegated authority, we are concerned that EPA intends to require new owners to navigate EPA's audit process even in states that operate their own audit programs. Rather than affirmatively deferring to states with audit programs authorized under the CAA, the Draft Agreement states that "a company may choose to enter into a parallel audit agreement with a state that has a state audit policy." This language, while brief, suggests that EPA will impose its own Audit Policy requirements on top of any state audit program requirements. Such an approach would certainly not improve the efficiency or expand the use of the Audit Policy among new owners of oil and natural gas exploration and production facilities. To the contrary, this approach would likely lead to duplication, inconsistency, redundancy, and confusion.

As EPA has elsewhere recognized, states are effective stewards of environmental protection and, as the primary issuers and enforcers of air permits, are often in the best position to assess compliance. Rather than imposing the Agency's own prescriptive audit agreement requirements, EPA should view compliance with state audit programs as compliance with EPA's audit requirements. EPA should also decline to impose penalties and offer the same assurances against future enforcement to companies utilizing state audit programs as it would under its own program. Doing so is well within EPA's enforcement discretion and fully consistent with the Agency's obligation to defer to states that appropriately exercise their enforcement authority.[5] Failure to do so, on the other hand, risks further disincentivizing use of the Audit Policy as companies will face the prospect of navigating state audit programs alongside new proscriptive federal requirements that differ not only from state regulations, but from federal regulations as well.

i. *Recommended Approach in States with Audit Programs*

EPA's Audit Policy should yield to state audit policies in order to avoid duplication, inefficiency, and inconsistency. As such, API recommends that EPA amend the Draft Agreement to include express language directing that, if the company is proceeding under a state audit program, EPA will not require the company to navigate EPA's Audit Program as well. Any audit, corrective action, disclosure, or agreement made pursuant to a state audit program should automatically be deemed sufficient by EPA. EPA should also amend the Draft Agreement to explicitly disclaim

[5] See January 22, 2018 memorandum from Susan Parker Bodine to Regional Administrators; "Interim OECA Guidance on Enhancing Regional-State Planning and Communication on Compliance Assurance Work in Authorized States."

that the Agency will not second-guess state audit policy procedures or outcomes and that EPA will not impose penalties or requirements different from, or in addition to, that which is agreed to by the state. In order to improve the efficiency of the Audit Policy and promote cooperative federalism, EPA should provide the company the same protection from enforcement for disclosed violations that the state provides.

II. ADDITIONAL RECOMMENDATIONS

While API has significant concerns with the Agency's proposed approach to expanding use of the Audit Policy among new owners of oil and natural gas exploration and production facilities, we appreciate EPA's recognition of this problem and support EPA's interest in addressing it. Transactions in the upstream oil and natural gas industry are quite different than transactions involving manufacturing facilities or other industries that utilize the Audit Policy more frequently. Transactions involving manufacturing facilities are much more focused on the infrastructure and equipment, unlike upstream oil and natural gas transactions, the value of which is driven by acreage, reserves, and development rights. To be sure, large amounts of equipment and infrastructure often conveys with an oil and natural gas transaction, but unlike a manufacturing entity, the equipment and infrastructure is typically comprised of a large number of smaller sources spread over a large geographic area - often in areas that may be difficult to reach at certain times of the year.

These differences are the main reason new owners of oil and natural gas exploration and production facilities do not use the Audit Policy as extensively as new owners of manufacturing or other industrial facilities. To utilize the Audit Policy, a new owner of a manufacturing facility must assess stationary sources and other regulated equipment that is typically located in one or a few locations within reasonable proximity of each other. Often those sources were constructed and are operated under permits that identify specific emission limits, operating parameters, and maintenance, monitoring, recordkeeping, and reporting requirements. In contrast, a new owner of oil and natural gas exploration and production facilities wishing to use the Audit Policy must often inventory hundreds of individual pieces of equipment over a vast area. Some of this equipment remains stationary, but often equipment used in oil and natural gas exploration and production moves from site to site or is swapped out from one site to another. Some of this equipment may be individually permitted under Title V, thereby providing new owners a discrete list of emission limits and requirements from which to assess compliance. Much of the smaller sources, however, are not individually permitted under Title V. This is not to say that the equipment is unregulated. As noted in Subsection I.a.ii. above, these sources are extensively regulated and, to the consternation of new owners, the regulatory requirements applicable to these sources can change significantly depending on location.

In proposing this approach, it is clear that EPA understands this complexity and recognizes it as an impediment to utilization of the Audit Policy among new owners of oil and natural gas exploration and production facilities. EPA's Draft Agreement seemingly attempted to simplify the multijurisdictional regulatory complexity by proposing to adopt audit requirements that are so stringent they could be applied anywhere. This complexity, however, is inherent in, and essential to, the CAA's multijurisdictional and air quality-based approach to regulation.

New owners of oil and natural gas production facilities do not want the Audit Policy to be simplified by adopting a single, excessively stringent measure of compliance. Adopting the most aggressive requirements imposed by any state or compelled through a consent decree is not an appropriate means of mitigating the complex multijurisdictional approach required by the CAA.

Rather than adopting a one-size-fits-all approach to remove the regulatory complexity, EPA should provide new owners of oil and natural gas facilities more time to identify, disclose, and correct violations. The Draft Agreement provides a framework for new owners to negotiate with EPA to establish manageable timeframes. This approach is helpful and reflects the flexible approach necessitated by the highly varied nature of transactions in the upstream oil and natural gas facility. This approach, however, does not provide new owners any certainty that they will actually be able to negotiate workable deadlines with EPA. Uncertainty over whether an owner will be able to timely complete the elements required by the Audit Policy could continue to undermine its use among new owners of oil and natural gas exploration and production facilities.

API therefore recommends that EPA balance the need for both flexibility and certainty by establishing certain minimum default deadlines that would apply to new owners of oil and natural gas exploration and production facilities. New owners would then be assured of some reasonable minimum timeframe for conducting audits, disclosures, and corrective actions but would remain free to negotiate with EPA to extend those deadlines. We would also recommend that new owners are allowed a period of time following acquisition to assess the site(s) and their operation to determine an appropriate period to evaluate the compliance status. Because EPA recognizes the variability and complexity in these transactions, the Draft Agreement should continue to direct that EPA will not unreasonably deny requests for longer deadlines.

III. CONCLUSION

Once again, API appreciates the opportunity to provide these initial questions and comments, and further appreciates the opportunity to supplement these comments after EPA makes more information available. API is also grateful that EPA is meaningfully exploring opportunities to provide the upstream oil and natural gas industry compliance assistance through a more flexible application of the Audit Policy. While we have concerns with EPA's proposed approach, we are

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glad to learn that the Agency is committed to addressing industry concerns. If you have questions or wish to discuss further, please feel free to contact me at toddm@api.org or 202.682.8319.

Sincerely,

Matthew Todd

Cc: Susan Bodine, EPA
Bill Wehrum, EPA
Patrick Traylor, EPA
Tim Sullivan, EPA
Christopher Williams, EPA