

The Benefits of Voluntary Disclosure

by Margaret Halasnik

Discover. Disclose. Correct. Prevent recurrence. These are the key words in the U.S. Environmental Protection Agency (EPA) Audit Policy. The EPA is currently testing a number of tailored incentives that apply to new owners of regulated companies who identify, voluntarily disclose, and promptly correct environmental violations.

These incentives were described in the “Interim Approach to Applying the Audit Policy to New Owners” (Interim Approach, Federal Register Vol. 73, 44991, August 1, 2008). The incentives include reduction or elimination of fines and potential criminal prosecution and recognition of new owners who perform internal audits and disclose under the Audit Policy.

The tailored incentives stem from several corporate audit agreements negotiated with companies following large mergers or acquisitions, where companies were able to use self-disclosure to wipe the slate clean and start fresh regarding their environmental compliance. The EPA has seen positive results from these agreements.

The main condition of the Audit Policy is that the disclosure must be “voluntary.” The EPA excludes those regulatory programs with built-in audit requirements (e.g., Clean Air Act). If voluntary disclosure is made, many of the legal wrangling and negative publicity that often accompany the violation can be avoided.

After disclosure, the company must be willing to correct the violation in a timely manner, but the work does not stop there. Once corrected, the company must prevent the violation from recurring, otherwise they risk the loss of the civil and criminal protection.

The new owner definition includes three conditions—all of which must be certified by the buyer in order to avail itself of the interim approach benefits: 1) the new owner must not have been responsible for environmental compliance at the facility and did not cause and could not have prevented occurrence of the violation; 2) the violation occurred during the prior owner’s operation of the facility; and 3) neither the buyer nor the seller had the largest ownership share of either company, and the companies did not have a common corporate parent.

Nine-month window

The interim approach defines an owner as “new” only for nine months after the transaction closes. Violations can be disclosed in two ways: via a negotiated audit agreement or by reporting disclosures individually and within 21 days of identification. To qualify for the interim approach, the new owner would have to meet all nine of the following conditions and certify that they meet the three criteria of the New Owner definition:

1 Systematic Discovery Condition: Violation must be discovered through either an environmental compliance audit or environmental management system;

2 Voluntary Discovery Condition: Violation must have been identified voluntarily and not through a federal or state-mandated monitoring program;

3 Prompt Disclosure Condition: Violation must be reported within 21 days pursuant to an Audit Agreement or based on time limits established by law;

4 Discovery and Disclosure Independent of Government or Third Party Plaintiff: Violation was found and was promptly disclosed before a federal, state, or local inspection, other complaint or legal inquiry required reporting;

5 Correction and Remediation: Violation must be corrected within 60 calendar days of discovery, and the new owner must certify that the violation was corrected, and remedy any human or environmental harm;

6 Prevent Recurrence: Violation cannot recur after it has been disclosed and corrected;

7 No Repeat Violation Condition: Violation or one similar to it cannot have been identified at the facility within the past three years;

8 Other Violations Excluded Condition: Violation cannot have resulted in “serious actual harm” or “presented an imminent and substantial endangerment” to human health or the environment or violates the terms of an existing federal, state, or local mandate, and;

9 Cooperation: New owner must provide the EPA with the information it requests to evaluate the applicability of the interim approach with respect to the Audit Policy.

The benefits of voluntary disclosure certainly outweigh the risks. For instance, if left undisclosed and if identified by the Agency during an inspection, fines could range from \$650 to \$1,200 and upwards to \$32,500 and higher per day for some violations. Most companies typically perform Phase I Environmental Site Assessments as part of the due diligence process prior to a company’s acquisition. Regulatory compliance assessments are critical tools in due diligence and the EPA is hoping that information obtained from this review can be used positively. **REN**

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