

ENVIRONMENTAL AND ENERGY LAW

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IN THIS ISSUE

Joel D. Eagle of Thompson Hine analyzes U.S. EPA's recently issued Frequently Asked Questions guidance document regarding EPA's environmental audit self-policing policies, where EPA reaffirms its use of these policies and clarifies several common issues with self-disclosures.

U.S. EPA Reaffirms Commitment to Environmental Self-Disclosure Audit Policy with Updated FAQ

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Joel D. Eagle is a partner in the Environmental practice group at Thompson Hine LLP. Joel represents public and private entities in the industrial, commercial and manufacturing sectors, where he focuses his practice on all aspects of environmental law including regulatory compliance counseling and litigation involving CERCLA and state cleanup laws, water and air pollution control, EPA and California Air Resources Board mobile source emission regulations, hazardous waste management and chemical regulation. Joel also counsels clients in environmental due diligence and contract negotiation for the sale and purchase of businesses and industrial properties. He can be reached at Joel.Eagle@ThompsonHine.com.

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Key Notes:

- The U.S. EPA recently released an updated FAQ document that answers 49 questions covering its General Audit Policy Program, New Owner Policy, Small Business Compliance Policy and eDisclosures pursuant to its “eDisclosure Portal,” first launched in 2015.
- The 2021 FAQ supersedes 1997 and 2015 guidance and FAQ documents based on some new interpretations or because some FAQs are no longer relevant.
- While the 2021 FAQ seeks to clarify common issues encountered in implementing the Audit Policies, the language of the FAQs and the actual Audit Policies are frequently subject to reasonable interpretation and should always be considered on a case-by-case basis.

On February 5, 2021, the U.S. EPA released an updated Frequently Asked Questions guidance document (2021 FAQ) regarding its *Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations Self-Policing Audit Policy* and related policies (*Interim Approach to Applying the Audit Policy to New Owners and Small Business Compliance Policy*) (together, the “Audit Policies”). This *Environmental Update* provides an overview of how the 2021 FAQ may impact interpretation and

application of the Audit Policies. While its issuance in the early days of the Biden Administration demonstrates EPA’s continued commitment to the Audit Policies program, the agency announced its “Renewed Emphasis on Self-Disclosed Violation Policies” in May 2018, suggesting that the 2021 FAQ is part of a broader agency policy decision.

Audit Policies Overview

EPA’s primary goal with the Audit Policies is to encourage proactive, voluntary environmental compliance audits to identify and promptly disclose and correct potential violations of federal laws and regulations. To qualify for 100% mitigation of “gravity-based” penalties – “economic benefit” penalties are not expressly subject to mitigation but are less commonly sought – regulated entities must meet each of the Audit Policy’s nine conditions. The required conditions include, among other things, discovering the potential violations during a systemic, and voluntary, compliance audit, disclosing the potential violations to EPA within 21 days of discovery, correcting/remediating the potential violations within 60 days of discovery, and committing to take steps to prevent recurrence of the potential violations.

2021 FAQ Highlights

The 2021 FAQ includes policy explanations and clarifications as to how EPA intends to implement the Audit Policies. It is important

to remember that, as with previous Audit Policy guidance and the Audit Policies themselves, specific language is often subject to reasonable interpretation that must be evaluated for each circumstance. While not a new development, EPA confirms in the 2021 FAQ that regulated entities may state that they “may have” a violation rather than affirmatively admitting to a violation (FAQ #8).

The 2021 FAQ discusses whether Clean Air Act Title V and Clean Water Act National Pollutant Discharge Elimination System (NPDES) violations may meet the “voluntary” discovery condition, but the guidance in the 2021 FAQ is not crystal clear, particularly in the context of Title V.

For example, FAQ #5 asks when Title V violations (in general) may be considered “voluntary” under the Audit Policies. The answers, however, focus only on violations discovered before or during Title V permit applications and don’t address Title V issues outside of the application context. EPA states that if the disclosure is made “well in advance of, and not prompted by, the Title V application process,” the disclosure may be “voluntary.” Also, violations disclosed after submission of a Title V application, but before compliance certification requirements in the permit take effect, may still be “voluntary” if the violations were new or unforeseeable at the time of the permit application. For non-application potential violations, regulated entities should consider the Audit Policies themselves and other

arguments in evaluating whether to self-disclose.

FAQ #6 affirms that the only exception to the rule that discovery of NPDES violations is not “voluntary” is found in the New Owner Policy, where penalty mitigation might apply if the new owner corrects the violations as soon as possible and makes appropriate disclosures before auditing is required by law.

In FAQs #22-30, EPA addresses eligibility under the New Owner Audit Policy. These FAQs do not shed much new light on how EPA interprets the New Owner Audit Policy, but recite some of the most common questions that arise, such as the definition of a “new owner” (FAQ #23), new owner applicability in stock transactions (FAQ #25), and penalty mitigation for discovery of violations at newly-acquired facilities where the acquiring company also had a similar pattern of violations at existing facilities (FAQ #30).

EPA answers questions regarding its eDisclosure system, the electronic portal EPA launched in 2015 to receive all self-disclosures except those by new owners and disclosures containing Confidential Business Information (CBI). FAQs #31-44 address topics including disclosures made after 21 days from discovery, where EPA states that a company may choose to upload additional information to explain late disclosures or request extensions even if the automated system flags the disclosure as untimely, and that EPA may consider such disclosure as

part of a “good faith” evaluation if it later seeks enforcement.

EPA also provides some statistics regarding implementation of the Audit Policies since inception. For example, of the almost 28,000 facilities that have disclosed noncompliance under the Audit Policies from 1995-2020, penalty mitigation was denied less than 12 times based on serious actual harm or imminent and substantial endangerment (a disqualifying condition in the Audit Policies). Also, EPA denied penalty mitigation in less than 1% of all disclosures based on the “no repeat violations” condition due to a “corporate pattern” of noncompliance, which it says it analyzes by focusing on *when* a violation occurred rather than *where*. In other words, EPA emphasizes that if the violations are discovered and disclosed during the same audit process, even across multiple facilities, it would view this as a single event for evaluating patterns in future disclosures of similar violations.

environmental management or compliance system. Thompson Hine will continue to monitor and review any further EPA updates and provide guidance on related issues.

Conclusion

The 2021 FAQ reaffirms EPA’s nearly 30-year policy of encouraging voluntary environmental compliance audits and prompt disclosure and correction of federal violations. While not breaking much new substantive ground, the 2021 FAQ supersedes previous EPA guidance on the Audit Policies and should be consulted to further evaluate potential self-disclosure opportunities. Use of the Audit Policies may greatly mitigate potential penalties and should be considered as part of an entity’s

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