

Management Alert

EPA Expands Environmental Compliance Audit Incentives to Owners of Newly Acquired Facilities

The United States Environmental Protection Agency (EPA) has announced tailored incentives to encourage owners of newly acquired facilities to discover, self-disclose, correct and prevent recurrence of environmental violations. The “Interim Approach to Applying the Audit Policy to New Owners” (“Interim Approach”) was released by EPA on August 1, 2008.¹ It is an expansion of the EPA Audit Policy issued in 2000 (“Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations”).² The Interim Approach is effective immediately on an interim basis, and EPA will be accepting comments until October 30, 2008.

EPA believes new owners have a unique opportunity to make a “clean start” at their facilities by addressing environmental issues, and that the Interim Approach will result in high quality environmental improvements more quickly and effectively than might otherwise occur. Only “appropriate” new owners can take advantage of the incentives; an eligible new owner must certify that prior to the transaction, it did not have responsibility for environmental compliance at the acquired facility, did not

cause the subject violations, and was not substantially related, from an ownership or corporate standpoint, to the seller of the facility.

The Interim Approach provides that new owners who enter into an audit agreement with EPA or voluntarily disclose environmental violations within nine months following acquisition are eligible for penalty mitigation beyond what the EPA Audit Policy provides, as follows:

- (1) No penalties assessed against the new owner for the period before the date of acquisition;
- (2) Penalties for economic benefit associated with avoided operation and maintenance costs will be assessed against the new owner, but only from the date of acquisition; and
- (3) No penalties for economic benefit associated with delayed capital expenditures or with unfair competitive advantage assessed against the new owner if the violations are corrected within 60 days of discovery or another reasonable timeframe to which EPA has agreed (i.e., in accordance with the Audit Policy).

¹ 73 FR 44991.

² 60 FR 66706 (1995); revised at 65 FR 19618 (2000). Since 1995, more than 3,500 companies have disclosed and resolved violations at nearly 10,000 facilities under the Audit Policy.

In addition to penalty mitigation, EPA has modified five of the nine conditions under the Audit Policy, recognizing that certain existing conditions must be applied differently in the new owner context:

Systematic Discovery: EPA will allow disclosures based on the one-time acquisition audit (i.e., the “periodic” element of this condition is waived);

Voluntary Discovery: EPA will allow consideration of all violations which would otherwise be ineligible for Audit Policy consideration because they are already required to be identified through a legally mandated monitoring, sampling or auditing protocol, as long as new owners enter into an audit agreement or disclose violations before the first instance when the monitoring, sampling or auditing is required;

Prompt Disclosure: EPA has modified the 21-day timeframe for “prompt disclosure” for new owners; for violations discovered pre-closing, a new owner has up to 45 days after closing to disclose violations, and for violations discovered post-closing, a new owner has the longer of 21 days after discovery or within 45 days after closing to make its disclosure;

Violations Causing Serious Actual Harm Or Imminent And Substantial Endangerment: Absent a fatality, community evacuation or other seriously injurious or catastrophic event, EPA will allow such violations that began before the new owner acquired the facility to be eligible under the Interim Approach (the Audit Policy excludes such violations); and

Cooperation Condition: EPA is clarifying the cooperation condition of the Audit Policy to make clear that the new owner must cooperate with EPA in determining whether all Audit Policy conditions as modified by the Interim Approach have been met.

One obvious issue raised by the Interim Approach is that it does not mitigate the liability of the former owners whose non-compliance is being disclosed by the new owner. EPA specifically declined to extend the incentives to former owners, on the basis that they had the opportunity to address violations before the sale. The liability exposure of the seller is an important consideration in structuring purchase and sale transactions and associated agreements, including indemnification provisions and so called “no hunt” and “no tell” clauses.

In a related development, EPA has announced a pilot project that allows regulated facilities nationwide to self-disclose certain environmental violations in a secure environment on the EPA’s website. Under the pilot, facilities located in Arkansas, Louisiana, New Mexico, Oklahoma and Texas will be able to disclose violations of all environmental laws, while facilities in other states will be able to make disclosures regarding compliance with the Emergency Planning and Community Right-to-Know Act.

For more information, please contact the Seyfarth Shaw attorney with whom you work, or any member of the Seyfarth Environmental, Safety and Toxic Torts Group (www.seyfarth.com/Environmental).

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