

# Management Alert



## The U.S. EPA Intends to Slash Federal Enforcement Programs and End Support of Voluntary Disclosures Under its Audit Policy

The U.S. EPA's Office of Enforcement and Compliance Assurance has issued its draft guidance on the Fiscal Year 2013 enforcement program (*FY 2013 Draft Guidance*). The FY 2013 Draft Guidance identifies EPA's intent to significantly cut back traditional federal enforcement strategies across all major federal environmental programs, and to eliminate the voluntary disclosure program long relied upon by industry to disclose violations discovered during compliance audits.

### Change in Enforcement Focus

Although the tone of the guidance suggests that federal enforcement will continue to be strong, the details underscore a significant change in the EPA's traditional enforcement strategy. The EPA intends to rely less on on-site inspections and more on non-physical investigations in the form of Requests for Information, administrative subpoenas, and electronic monitoring and reporting. The EPA also intends to focus enforcement "in communities that are disproportionately affected by pollution" and other vulnerable communities, mainly urban areas and areas identified as "Environmental Justice" ("EJ") communities.

In addition to focusing on industry in EJ areas, the EPA intends to continue to pursue enforcement initiatives nationwide against: (1) mining and mineral processing activities, (2) concentrated animal feedlot operations; (3) facilities using flares to control emissions; (4) facilities subject to Clean Air Act Leak Detection and Repair ("LDAR") programs, (4) and companies having excess emissions associated with startups, shutdowns and malfunctions ("SSM"). Other industrial enforcement targets include the "usual suspects": (1) facilities that are considered large sources of air pollution (the coal-fired utility, acid, cement, glass and natural gas industries); (2) waste disposal and recycling facilities; (3) manufacturers and users of "high concern chemicals"; and (4) facilities subject to the Clean Air Act Risk Management Program.

### Major Program Emphasis Areas

The EPA announced its focus in the major programs to be as follows:

- **RCRA** enforcement will focus on: financial assurance, surface impoundments, and TSDs; EPA will target corrective action sites that have not made meaningful progress; EPA will scale back UST enforcement and will rely on states to address USTs;
- **TSCA** enforcement will focus on: lead based paint affecting children in schools and housing, reducing exposure to pesticides, and the formaldehyde rule;
- **CAA** enforcement will focus on: the Section 112(r) Risk Management Plan (RMP) program, flares used to control HAPS, compliance with LDAR provisions, and excess emissions during SSM; EPA indicated that other program areas, such as GHG reporting and CFCs, will be "addressed" in settlements of New Source Review and other CAA enforcement cases; EPA indicated that the Regions should focus enforcement efforts on major sources and those that are 80% synthetic

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minors.

- **CWA** enforcement will be directed mainly at municipalities and municipal sewer systems and will focus on keeping raw sewage and contaminated stormwater out of rivers, streams and lakes; Regions 2, 3, 4 and 5 are directed to continue efforts to protect the Chesapeake Bay from water as well as air pollution; EPA indicates that it will target industrial facilities that have spills into waterways;
- **FIFRA** enforcement will focus on: worker safety, fumigants, retail marketing, and container labeling and management;
- **CERCLA** and EPCRA enforcement will be practically nonexistent; EPA is minimizing the Brownfields program, insisting that "CERCLA's self-implementing landowner liability protections" replace the need for the Brownfields program.

## Inspection/Enforcement Numbers

To illustrate the diminished level of federal enforcement identified by the FY 2013 Draft Guidance, EPA indicates that each Region is expected to evaluate 20 facilities for EPCRA Section 313 non-reporting using Requests for Information. Similarly, EPA indicates that nationally there will be 12 inspections of mineral processing facilities, and that each region is to inspect 6 hazardous waste LQGs (even though thousands of LQGs exist). EPA indicates that 90% of TSCA enforcement resources at the Regional level should be spent on lead based paint.

## EPA's Audit Policy

The EPA's *Audit Policy* offers incentives for companies to audit their facilities and to promptly disclose and correct violations. In 2008, the EPA also issued an Interim *New Owner Audit Policy* providing even greater incentives for new owners to audit, self disclose, and promptly correct potential environmental violations. The Executive Summary for the FY 2013 Draft Guidance describes significant changes from the FY 2012 guidance, including specific changes regarding the Audit Policy which can only be described as negating the benefits of self-disclosure to the EPA under the Audit Policy.

The FY 2013 Draft Guidance explains that the Audit Policy "is one of the areas where OECA will reduce its program work to a minimal national presence." The FY 2013 Draft Guidance instructs the EPA Regions to "consult with Headquarters before initiating any new work in response to self-disclosures." The only explanation provided by OECA is that, "Although the Audit Policy/Self-Disclosure program has yielded a significant number of annual disclosures, the environmental benefit from those disclosures is estimated to be significantly less than from traditional enforcement, and the disclosures have generally not focused on the highest priority areas." What this conclusion overlooks, of course, is the fact that issues identified by companies making self disclosures under the Audit Policy and the Interim New Owner Audit Policy would not have been identified by the EPA in the first place under its traditional inspection and enforcement approaches. With the announced cuts to the EPA's traditional enforcement programs, it appears unlikely that the EPA will focus resources to identify potential environmental violations unless the violations are in program areas on which the EPA is focusing.

The EPA is taking comment from the Regions, States and Tribes on the FY 2013 Draft Guidance and related program guidance until March 19, 2012. The process for providing comments is described [here](#).

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