The EPA's Environmental "Audit Policy Program"

Aug 09 2022

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Practice Area: Environmental Law and Litigation

Previously we discussed two State of Wisconsin environmental regulatory agency programs ("Enviro-Check" and "Green Tier") offered by the Wisconsin Department of Natural Resources [WDNR]) that reduce the risk of environmental enforcement and/or fines and penalties for businesses that voluntarily conduct environmental compliance audits, self-report any non-compliance that is discovered and agree to remedy the non-compliance. At the federal level, the U.S. Environmental Protection Agency (EPA) offers a similar environmental audit program, known as the "Audit Policy Program", which offers up to 75%-100% penalty reductions for those parties that voluntarily conduct environmental compliance audits, promptly report any non-compliance issues and agree to correct the non-compliance.

One may ask, if the state in which one conducts its business is a state like Wisconsin that has its own state environmental audit policy program, when and where is the EPA's "Audit Policy Program" applicable? The EPA's Audit Policy Program is applicable in those states that do not have their own EPA authorized statewide environmental programs. For example, states such as Massachusetts, New Hampshire and New Mexico do not have state authorized Clean Water Act - "National Pollution Discharge Elimination System" (NPDES) programs that have been approved by the EPA. In these states, the EPA is the permitting and enforcement authority for discharges of wastewater and stormwater into waters in those states. Another example includes states, such as Iowa and Alaska, that do not have their own state programs for implementation of the federal Resource, Conservation & Recovery Act (RCRA), which is the federal law that regulates the generation, storage, handling and disposal of hazardous wastes. In these states, the EPA is the authority that administers and enforces the RCRA law, and not the respective states. Consequently, in these states if one is interested in conducting voluntary environmental compliance audits and obtaining potential protection from penalties associated with environmental non-compliance that is discovered during the audit, the EPA's Audit Policy Program requirements are applicable.

Further, even in those states in which the majority of the major environmental programs, such as implementation of the Clean Water Act, the Clean Air Act and RCRA are regulated primarily at the state level, the EPA's Audit Policy Program may be applicable. Like Wisconsin, there can still be a requirement to comply with various federal regulations where the EPA has retained authority to enforce a specific environmental law. An example of this is the requirement to prepare a "Spill, Prevention, Control & Countermeasure (SPCC) Plan" at any facility that has the capacity to store greater than 1,320-gallons of oil in above ground containers or greater than 42,000-gallons of oil in underground containers. EPA is the agency that retains authority to enforce that regulation.

The EPA's Audit Policy Program offers the following reduction in potential penalties if several conditions are met. The reduction amounts include:

1. Reduction of 100% of gravity-based penalties if all nine of the EPA's Audit Policy's conditions are met (see below). However, EPA retains its discretion to collect any economic benefit that may have been realized as a result of the noncompliance.
2. Reduction of gravity-based penalties by 75% where the disclosing entity meets all of the EPA's Audit Policy's conditions except detection of the violation through a systematic discovery process.

The nine conditions referenced above are:

1. Discovery of the violation through a voluntary environmental audit or the implementation of a compliance management system.
2. Voluntary discovery of the violation was not detected as a result of monitoring, sampling or auditing procedure that was required by environmental law.
3. Prompt disclosure in writing to EPA within 21 days of discovery of the non-compliance.
4. The discovery and disclosure of non-compliance occurs prior to EPA or the time in which another regulator would likely have identified the violation through its own investigation or based on information provided by a third-party.
5. Correct and remediate the non-compliance within 60 calendar days from the date of discovery.
6. Preventative actions must be implemented to avoid a recurrence of the non-compliance.
7. Repeat violations are ineligible for penalty reduction (e.g., the same or closely related violations have occurred at the same facility within the past 3 years or have occurred as part of a pattern of non-compliance at multiple facilities owned or operated by the same entity within the past 5 years); if the facility has been newly acquired, the existence of a violation prior to acquisition does not trigger the repeat violations exclusion.
8. Non-compliance that results in serious actual harm, and/or those that may have presented an imminent and substantial endangerment, or those that violate the specific terms of an administrative or judicial order or consent agreement are not eligible for penalty reduction.
9. Cooperation with the EPA by the disclosing entity in correcting the non-compliance is required.

Conducting an environmental compliance audit can be extremely important in identifying environmental non-compliance issues in conjunction with the purchase/sale of a business, particularly if the purchasing entity intends to carry on the same operations as the selling entity, and the purchasing entity will transfer to itself the environmental permit coverage that was previously held by the selling entity. This is of prime importance where operations associated with the business use or store hazardous substances (e.g., cleaning solvents, hydraulic oils), or generate hazardous wastes (e.g., used chlorinated solvents) or universal wastes (e.g., used lead-acid batteries, antifreeze). If an environmental compliance audit is not conducted prior to the purchase, there is the potential that violations of environmental permit conditions and environmental regulatory requirements may not be detected and the purchasing entity may inherit an obligation to correct any non-compliance issues. In these instances, use of a state environmental audit policy program and/or the EPA's Audit Policy can be a proactive way to identify non-compliance issues and remedy them as part of the purchase/sale negotiations without the risk of penalties and fines.

We have experience assisting clients in the process of environmental compliance auditing, including making environmental consultant recommendations, attorney-client privileged auditing services, defining the scope of and oversight of the audit process, review of audit findings, provision of legal interpretations associated with the audit findings, recommendation of actions to achieve compliance, use of agency compliance assistance programs (e.g., WDNR's "Enviro-Check" Program) and negotiations with agencies regarding non-compliance issues.

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