

SELF-DISCLOSURES: A POTENTIAL DEFENSE AGAINST INCREASED ENFORCEMENT

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Whether your business enterprise is large or small, being cited for a violation of environmental laws, regulations and/or permits can be extremely expensive and disruptive. Such enforcement actions can range anywhere from orders to improve environmental safeguards and policies, perform corrective actions and invest in new equipment, step up permit compliance, or pay significant civil penalties – sometimes as high as six or seven figures.

In more serious cases, shutting down a facility or even criminal prosecution – which can result in incarceration of individuals found guilty of serious environmental crimes – is also possible. Given the complexities of environmental laws, even large and sophisticated manufacturers with dedicated teams of environmental professionals can sometimes run afoul of such requirements.

While the U.S. Environmental Protection Agency (US EPA or the “Agency”) and equivalent state agencies such as the Illinois Environmental Protection Agency (IEPA) have always been diligent enforcers of the numerous environmental laws and regulations on the books, the Biden Administration has made it clear that increased environmental compliance and enforcement will be a cornerstone of its governing philosophy.

Indeed, larger issues such as addressing climate change and environmental justice, two key goals of the Biden agenda, will be supported in part by greater attention and resources being devoted to environmental enforcement. US EPA and other federal agencies with similar or somewhat overlapping jurisdiction, such as OSHA, have been fully mobilized to further both of these policies. In addition, while many federal laws are enforced directly by US EPA, state agencies like IEPA tend to follow the lead of US EPA in enforcing state-delegated federal programs or even state-specific laws and regulations.

The good news, however, is that for the last several decades, US EPA (and many state equivalent agencies) have provid-



ed an “out” for non-compliance issues that are first identified by the manufacturer and are voluntarily self-disclosed to the applicable regulatory agency(ies), before being discovered by the regulators. This policy is formally known as “Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations” (the “Policy”).

The Policy enables current owner/operators and new owners of facilities that timely self-discover environmental violations in the course of a voluntary environmental audit, and meet other requirements (such as prompt disclosure) to self-disclose such violations and thereby reduce or eliminate the typical penalties that EPA might assess if the Agency itself discovered such violations through inspections or other means. After disclosure, the violations must be promptly rectified in order to qualify. The Agency provides a web-based self-disclosure portal that can be used to make the self-disclosure if non-compliance issues are identified in the self-audit.

While many environmental profes-

sionals were concerned for the future of the self-disclosure Policy, the Biden EPA recently reaffirmed its commitment to continuing the Policy with the issuance of new guidance, even while boosting its enforcement efforts in most areas. On February 5, 2021, US EPA released this new guidance document in the form of Frequently-Asked Questions (FAQ) for issues and questions that have arisen since the publication of the Policy 20 years ago, in 2000.

The new Agency FAQs address issues such as whether or not the regulated facility must admit to a violation to self-disclose a potential issue (answer: No, “regulated entities can disclose that they ‘may have’ violated the law”), and if EPA can use the reported violations of a ‘new owner’ of a facility to pursue violations against the previous owner (answer: Yes, EPA “reserves its rights to pursue sellers where the circumstances and equities warrant.”)

Many states environmental protection authorities also provide (through statute, regulation or policy) very similar benefits to self-disclosure of iden-

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tified non-compliance issues. (Illinois' environmental self-disclosure policy is found at Section 42(i) of the Illinois Environmental Protection Act, 415 ILCS 5/1, et seq.)

It should be cautioned, however, that the prerequisites and procedures that must be followed under each of the federal and (where available) state schemes are complex, and require strict adherence to ensure that a voluntary self-disclosure will qualify for the penalty mitigation benefits. Like the federal Policy, most state regulatory agencies require that the violations must be initially discovered through the course of a voluntary environmental self-audit (or other systematic discovery procedure), and some states require disclosure of the audit report itself.

Thus, caution is advised in the drafting of the voluntary audit report, as it may be obtainable by regulatory agencies down the road. Other states may require advanced notice of the intent to perform the audit as a prerequisite for a successful self-disclosure, and some may even require that the audit be per-

formed by a state-approved consultant.

Whether to disclose to the feds, the state, or both, depends on the nature of the violation and statute(s) or regulation(s) at issue, and this decision should be made in consultation with competent environmental legal counsel. It should also be noted that if conduct is discovered that may rise to the level of criminal environmental misconduct (for example, falsifying lab data or reports, or illegally discharging or dumping waste), the self-disclosure policy can still be used to shield the company from criminal charges, but does not shield the individuals who actually committed the environmental crimes.

A complete discussion of the intricacies of the self-disclosure policies of the federal government and applicable states is beyond the scope of this article, so experienced environmental counsel should be consulted before a self-disclosure is attempted – preferably even before the audit is performed, and certainly in the case of suspected criminal environmental conduct.

Over the years, the Policy and the

principles of enforcement leniency in return for self-policing of environmental issues have come under attack from time to time. The publication of the federal FAQs now that the Biden administration is well under way, however, suggests continuing support of the new administration for the encouragement of regulated entities to undertake comprehensive evaluation of their environmental compliance status and improve their systems without need of Agency enforcement.

While successfully using the self-disclosure Policy can be challenging, the opportunity to discover significant environmental violations before the regulators find you (and also possibly get a break on penalties by self-disclosing such violations) is well worth considering for the relatively nominal investment in professional assistance (attorneys and consultants) that is required. ♦

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