Legal Opinion Letter

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FUTURE OF EPA'S AUDIT PROGRAM REMAINS REGRETFULLY UNCERTAIN

by
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Since 1995, the U.S. Environmental Protection Agency ("EPA") has sought to encourage greater compliance with environmental regulations through its *Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations.*[1] Under this Audit Policy ("the Policy"), EPA will reduce or waive penalties under certain conditions for facilities that voluntarily discover, promptly disclose, and promptly correct violations of federal environmental requirements. The Policy generally has been well received by industry, and EPA acknowledges that it receives a significant number of disclosures each year as a result.[2]

Recently, however, EPA's Office of Enforcement and Compliance Assurance ("OECA") announced plans to curtail processing of self-disclosures to a "minimal national presence."[3] According to EPA, this and other "disinvestments" are intended to address anticipated budgetary constraints in Fiscal Year 2013, and beyond, and to ensure that "limited resources remain available to focus on our highest priorities—the pollution problems that pose the greatest threat to human health and the environment."[4] OECA proposed to reduce or eliminate its participation in certain programmatic areas, relying instead on the EPA Regions to obtain needed compliance information through investigations, requests for information, subpoenas, show cause letters, or other actions.

OECA's proposal is particularly baffling given its strong endorsement of the Policy in 2011:

> *EPA encourages the use of these policies, particularly when use results in actions that reduce, treat, or eliminate pollution in the environment or improve facility environmental management practices (EMPs).*[5]

Yet a year later, OECA finds environmental benefits from self-disclosures to be "significantly less than from traditional enforcement." Most self-disclosures to date have involved reporting and recordkeeping under the Emergency Planning and Community Right-to-Know Act ("EPCRA"), whereas EPA seeks to focus on higher priority threats to health and the environment, such as emissions from coal-fired power plants.

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[1] *See* 60 Fed. Reg. 66,706 (Dec. 22, 1995).

[2] Over 1,000 disclosures were initiated each year from FY 2006 through FY 2010, according to EPA's Compliance and Enforcement Annual Results Charts, which are based on data from EPA's Integrated Compliance Information System ("ICIS").

[3] U.S. Environmental Protection Agency, *FY 2013 Office of Enforcement and Compliance Assurance (OECA) Draft National Program Manager (NPM) Guidance*, p. 14 (Feb. 10, 2012).

[4] *FY 2013 Draft EPA NPM Guidance Summaries for States*.

[5] *See FY 2012 Office of Enforcement and Compliance Assurance (OECA) Final National Program Manager (NPM) Guidance*, p. 75 (Apr. 30, 2012).

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OECA's position is disingenuous, because the emphasis on reporting and recordkeeping self-disclosures is an artifact of the Policy's limitations. First, violations that cause serious harm or that may pose imminent and substantial endangerment to human health or the environment *are not eligible for consideration.* The Policy also does not apply to repeat violations at a facility within a three-year span or a pattern of noncompliance at multiple facilities over a five-year span.

Disclosures required by law, regulation, or permit, or discovered by a third-party, also do not qualify. In addition, self-disclosure must occur within 21 days of discovery of the violation. Moreover, reporting and recordkeeping requirements disclosed under the Audit Policy fulfill two very important policy objectives: (1) facilitating compliance with, and enforcement of, environmental requirements; and (2) ensuring public access to environmental information under "government in the sunshine" principles. Reports under EPCRA §§ 311 and 312, or under the Clean Air Act § 112(r) accidental release prevention requirements, provide critical information to first responders, and should be encouraged self-disclosures.

In many ways, the scope or severity of violations reported by self-disclosures is beside the point. Enforcement always is limited by the availability and allocation of finite resources. There is no guarantee that many of these violations would be discovered, and thus, self-disclosures are a net environmental benefit regardless of the amount of pollutants or penalties at issue. OECA's claim also is ironic given that EPA often prosecutes the same or similar low-priority incidents or seeks to use them as aggravating factors in larger cases. More importantly, the Agency is unlikely to achieve its savings goals through letters of inquiry, subpoenas, etc., as these tend to be more adversarial, rather protracted, and more costly interactions.

Self-disclosures can reduce costly litigation expenses to both EPA and to the disclosing company. For example, violations reported through the Agency's Electronic Self-Disclosure ("E-disclosure") process have been expeditiously resolved in a matter of months, based on our experience.[6] OECA also is giving short shrift to the improvements in environmental management practices and procedures that often result from pre-disclosure reviews and audits, or the implementation of regular internal audits.

Following a comment period for the EPA Regions, states, and tribes, OECA released its final programmatic guidance on April 24, 2012, with a modest change in tone. OECA now acknowledges that the Audit Policy helped EPA increase its understanding of environmental compliance and "that internal reviews of compliance have become more widely adopted by the regulated community, as part of good management." Nevertheless, OECA continues to believe it can reduce investments in the Audit Policy without undermining incentives for environmental self-disclosures. One approach under consideration is a self-implementing Audit Policy.[7]

Many questions remain, including what OECA intends by a "self-implementing" policy and how such a policy will be implemented in the face of reduced budgetary resources. Cutting back on self-disclosure programs hardly makes sound policy sense in such an environment. Instead, EPA should consider how to *expand* the Audit Program.

Currently, E-disclosures are limited to violations of EPCRA, except for facilities in EPA Region 6, which can use the system to disclose violations of other federally enforceable statutes. An expansion of the E-disclosure system to all EPA regions, with related self-disclosure protections, would seem to be a more effective way for EPA to husband its scarce enforcement resources and maximize compliance. Indeed, we believe the Agency should place a greater emphasis on compliance incentives like voluntary disclosures. Leaving aside the benefit of a program that encourages the implementation of management systems and promotes prompt discovery and correction of environmental violations, our experience has been that companies using the Audit Policy come away with a much more positive impression of EPA than under most other circumstances. Such companies are more likely to self-disclose in the future if permitted by the Policy.

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[6] *See* Electronic Self-Disclosure Under the EPA Audit Policy.

[7] *FY 2013 Office of Enforcement and Compliance Assurance (OECA) National Program Manager (NPM) Guidance*, p. 15 (Apr. 24, 2012).