

EPA Audit Policy Now Available to Post-Acquisition Compliance Audits by New Owners of Regulated Facilities

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In an effort to broaden the use of its 1990 Audit Policy (Audit Policy), the U.S. Environmental Protection Agency (EPA) has expanded the applicability of the policy to include post-acquisition compliance audits of newly acquired facilities. As of August 1, 2008, EPA will be providing incentives such as penalty forgiveness or reductions to new owners of existing regulated facilities under its Interim Approach to Applying the Audit Policy to New Owners (Interim Approach). EPA intends to motivate new owners to conduct compliance audits of the newly acquired facilities and “to disclose, correct and prevent the recurrence of violations.”

Under the Interim Approach, new owners of facilities who voluntarily disclose environmental violations under EPA’s existing Audit Policy within nine months following the acquisition of the facilities will receive penalty forgiveness or reductions beyond what the Audit Policy generally provides. Such penalty mitigation includes:

- (1) No penalties for economic benefit or gravity for the period before the date of acquisition;
- (2) Penalties for economic benefit associated with violations will only be assessed against a new owner from the date of the acquisition; and
- (3) Penalties for economic benefit associated with delayed capital expenditures or with unfair competitive advantage will not be assessed against the new owner if violations are corrected within 60 days of the date of discovery or another reasonable time frame to which EPA has agreed.

In addition to penalty mitigation, EPA has modified several conditions under the Audit Policy for new owners in order to allow the policy to apply to violations that would otherwise be ineligible. EPA recognizes that pre-closing due diligence may meet the elements of “Environmental Audit” under the Audit Policy with the exception of being periodic, and therefore waives the requirement that audits be part of an audit program with respect to new owners. Furthermore, under the Audit Policy, any disclosed violation must have been identified voluntarily, and not through a legally mandated monitoring, sampling, or auditing procedure that is required by law. However, under the Interim Approach, violations discovered at newly acquired facilities as part of the new owner’s

reexamination of facility compliance under permits (such as Title V air permits) before it is legally required are considered voluntarily discovered for purposes of the Audit Policy.

New owners are also afforded flexibility in satisfying the Prompt Disclosure condition of the Audit Policy. For violations discovered pre-closing, prompt disclosure under the Audit Policy can be made up to 45 days after the transaction's closing (as opposed to the usual 21 days within discovery of the violation) to be eligible for coverage by the Audit Policy. For post-closing violations, a new owner would have to disclose such violations within 45 days after the closing or within 21 days of the discovery, whichever time period is longer, to receive Audit Policy coverage.

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