Environmental Auditing and Penalty Mitigation under the Trump Administration

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For companies that are subject to environmental regulation, the Trump Administration's U.S. Environmental Protection Agency ("EPA" or "the Agency") Audit Policy presents an opportunity to reduce enforcement risks while improving compliance. The policy appears to be focused more on improving compliance through cooperative mechanisms, such as compliance assistance programs and voluntary self-disclosure, as opposed to a more adversarial and time-consuming enforcement-driven approach. Examples of this revised approach to environmental compliance include new policies aimed at limiting reliance on aggressive interpretations of statutory and regulatory requirements in enforcement actions, the reversal of Biden-era criminal enforcement initiatives, and multiple instances in which EPA has extended compliance deadlines for rules that the regulated community have deemed infeasible, excessively costly, or impermissible.

This shifting focus is not entirely new. Similar shifts away from more heavy-handed enforcement occurred during the G. W. Bush administration as well as during President Trump's first term. Under each of these prior administrations' more cooperative approach to environmental compliance, EPA was less likely to bring aggressive enforcement actions against companies for compliance issues that were unforeseen, impossible to prevent, or which otherwise did not endanger human health or the environment. And as a result of this lower risk of heavy-handed EPA enforcement, many companies were more willing to critically examine the environmental compliance status of their operations and voluntarily self-disclose violations to EPA in order to eliminate enforcement risks and substantially reduce the potential for, and size of, monetary penalties.

The companies that significantly abated their penalties and enforcement risks in this manner did so through the use of EPA's Audit Policy. EPA's Audit Policy has been in place since the early 2000s, but was updated during the first Trump Administration to reflect the Agency's "emphasis on encouraging regulated entities to voluntarily discover, promptly disclose, expeditiously correct, and take steps to prevent the recurrence of environmental violations."

There are significant benefits to facilities that utilize the Audit Policy. These real and meaningful benefits include:

- Elimination of 100% of the gravity-based civil penalty that otherwise might apply (in the vast majority of Audit Policy disclosures, EPA will only seek to recover the "economic benefit" portion of a potential penalty);
- Waiver of the economic benefit component of a potential penalty where EPA deems it insignificant; and

- Additional clarity by defining allowable violation correction time periods.

With these developments in mind, understanding the EPA's self-disclosure framework and the practical considerations in using the Audit Policy is critical for companies seeking to balance compliance and enforcement risk.

Background on EPA's Self-Disclosure Policies

Audit Policy - Issued in 2000, EPA's Audit Policy encourages companies to voluntarily discover potential violations through self-auditing, disclose them to the EPA, promptly correct them, and prevent their future recurrence. In exchange, companies receive a reduction or elimination of civil penalties and a determination by EPA not to recommend criminal prosecution to the U.S. Department of Justice.

There are nine conditions for penalty mitigation: (1) systematic discovery through an internal or external audit or compliance management program; (2) voluntary discovery of the violation; (3) disclosure to EPA within 21 days of discovery; (4) independent discovery and disclosure; (5) correction and remediation within 60 days from the date of discovery; (6) prevention of recurrence of the violation; (7) the violations are not repeat violations; (8) the violations do not result in serious actual harm, an imminent and substantial endangerment, and do not violate an administrative or judicial order or consent agreement; and (9) cooperation by the disclosing entity.

"New Owner" Audit Policy – EPA's Audit Policy also has a component specifically for new owners ("New Owner Policy") that offers tailored benefits and incentives for those companies who wish for a fresh start at a newly acquired facility. The New Owner Policy encourages new owners of facilities to assess potential violations and address environmental noncompliance that began prior to acquisition by offering additional penalty mitigation.

By proactively addressing environmental noncompliance that began pre-acquisition, new owners may:

- Enter into audit agreements incorporating disclosure reporting more appropriate to their unique situation;
- Have the economic benefit penalties waived that might have otherwise applied to delayed expenditures; and
- Enjoy more generous treatment of violations discovered through monitoring/sampling already legally required (such as pursuant to the Clean Air Act).

Considerations When Using the Audit Policy

Although the current EPA appears inclined to simplify and streamline use of the Audit Policy, the Audit Policy is not entirely devoid of prescriptive procedures, hard deadlines, or other mandates. Before undertaking an environmental compliance audit for the purpose of potentially submitting a self-disclosure to EPA, companies should first determine the scope of the proposed audit, evaluate whether they qualify as a "new owner" under the New Owner Audit Policy, and consider whether it is necessary to enter into an Audit Agreement with EPA.

Also, while the Audit Policy can significantly reduce enforcement risk, there remains some level of risk inherent in the self-scrutiny of environmental compliance. Companies should therefore remain mindful of mechanisms to protect themselves more fully from liability and to obtain maximum

penalty mitigation. For instance, companies should consider having the audit process managed by counsel to preserve the confidentiality of findings, conclusions, and pending decisions on corrective actions under “Attorney/Client Privilege.” The scope and conduct of the audit should also be well-defined and systematic, including documentation of findings and timely review of conclusions to ensure that violations are promptly disclosed within the 21-day time requirement of the Audit Policy. An audit should be structured and documented appropriately to help facilitate disclosures that maximize the timeframes to implement remedies.

Companies should also be strategic about which potential noncompliance issues to disclose to EPA and which potential issues need only be corrected on a going-forward basis. Different compliance issues present different enforcement risks and different opportunities to mitigate that risk through disclosure.

Companies should also be mindful that, under many environmental statutes, EPA shares permitting and enforcement authority with state agencies. Determining what potential noncompliance issues to disclose—and to whom—can often depend on whether the state has an audit policy, how that policy is implemented, knowledge about the enforcement posture of the state regulators, and the company’s relationship with permitting authorities.

How Kelley Drye Can Help

Kelley Drye’s attorneys are seasoned practitioners in the federal and state environmental laws and regulations applicable to heavy industrial and manufacturing facilities.

We have conducted dozens of environmental audits at many different types of industrial and manufacturing facilities, such as steel mills, chemical manufacturers, engine manufacturers, electronic manufacturers, leather tanners, and food production facilities, as well as in other industries. Our Audit Policy experience also includes audits conducted pursuant to transactions as well as the development and implementation of systematic environmental compliance audit programs.

Our team has extensive experience facilitating disclosures to EPA and negotiating penalty mitigation through the EPA’s Audit Policy. In addition to our substantive knowledge of environmental laws and regulations, our longstanding experience representing manufacturers, heavy industry, and mineral extraction companies also has made us trusted advocates at the EPA and state agencies. We have strong, well-established relationships at both EPA Headquarters and the regional offices that we can leverage to aid companies in securing flexibility and favorable treatment under the Audit Policy.

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For more information about this client advisory or if you would like to discuss how to structure an effective environmental audit or compliance management program, please contact Wayne D'Angelo or Joseph Green.