



EPA Seeks Comment on Whether to Provide Special Incentives to New Owners Who Disclose Environmental Noncompliance Discovered at Newly-Acquired Facilities

On May 14, 2007, the EPA published a Federal Register Notice (“Notice”) seeking comments on whether EPA should offer “tailored incentives” to new owners of regulated entities to encourage the disclosure of environmental noncompliance in exchange for increased leniency by EPA in related enforcement matters. EPA noted that new owners may be “particularly well-situated and highly motivated” to address noncompliance issues in their new facilities and that EPA might be able to further its goal of effecting environmental benefits and increased compliance by offering new owners special incentives to promptly disclose noncompliance. The Notice requests comments on whether EPA should develop a three-year pilot program to test certain policies that would apply in addition to those provided in the April 11, 2000 Final Audit Policy (“Audit Policy”).

The Notice offers the regulated community an opportunity to inform and influence EPA’s consideration of a program that could result in government policies relevant to a variety of corporate transactions. EPA seeks comments on this considered pilot program by July 13, 2007.

Current Audit Policy

The purpose of the existing Audit Policy is to “encourage regulated entities to voluntarily discover, disclose, correct and prevent the recurrence of violations of Federal environmental laws.” Entities voluntarily discovering and disclosing certain noncompliance issues may be eligible for up to 100% mitigation of the gravity-based portion of a civil penalty (*i.e.*, the portion accounting for the seriousness of noncompliance) and EPA will generally refrain from recommending criminal prosecution.

Although the Audit Policy already applies to new owners, it is not tailored to address disincentives that might disproportionately affect new owners who might otherwise take advantage of incentives in the Audit Policy. On April 30, 2007, the EPA issued interpretive guidance on the Audit Policy (“Guidance”), which recognized the unique position of owners of newly-acquired facilities to improve environmental performance and announced the agency’s intention to formally solicit public comment on whether to offer tailored incentives for new owners.

Topics for Comment

The pilot program contemplated by EPA would operate like the Audit Policy to provide for relaxed enforcement against entities that voluntarily disclose noncompliance, but would provide incentives specifically geared towards new owners. The Notice identified three specific incentives that it is considering and seeks comments on each of these options:

Reduced Civil Penalties: Civil penalties would be reduced beyond what is currently allowed under the existing Audit Policy by reducing the economic benefit portion of a civil penalty to acknowledge that new owners may have benefited little, if at all, from the economic benefit of delaying or avoiding measures to address noncompliance.

Different Eligibility Limitations: Under the Audit Policy, violations discovered pursuant to legally mandated monitoring or sampling requirements are not eligible for enforcement mitigation incentives because they were not “voluntarily discovered.” In order to encourage new owners to examine compliance matters at newly-acquired facilities, EPA is considering adjusting Audit Policy eligibility limitations as they apply to new owners. This would be accomplished by extending Audit Policy incentives to new owners who disclose violations that pre-existed the acquisition, even though they were discovered pursuant to non-voluntary monitoring or sampling requirements.

Public Recognition: EPA is considering publishing a list commending new owners that have examined compliance issues and corrected deficiencies.

In addition to comments on the specific incentives that should be offered, EPA is also interested in comments regarding how EPA should determine what entities qualify as a “new owners.” Specific topics for comment include: 1) how an entity may prove that it is a bona-fide “new owner;” 2) how long an entity would continue to qualify as new owner; and 3) whether and to what extent EPA should consider the type of transaction by which the new owner acquired the facility (*e.g.*, whether incentives should apply differently depending on whether the new owner acquired the facility via a merger or acquisition).

At the close of the comment period on July 13, 2007, EPA plans to consider all comments and, if it decides to proceed with this concept, will publish another Federal Register notice seeking comment on a specific proposed pilot program.

If you have any questions regarding the pilot program that EPA is considering, or if you would like to submit comments on this matter, please contact Michael H. Winek at 412-394-6538 or mwinek@bccz.com or Emily T. Lewis at 412-394-5451 or elewis@bccz.com.