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Environmental LAW

DEC's proposed environmental self-audit policy

The New York State Department of Environmental Conservation is working on a new Self-Audit Policy to encourage environmental compliance. The draft policy is being finalized and is expected to be issued in the near future. The policy would apply to private industry, agricultural producers and municipalities.

The purpose of the policy is to “encourage compliance with environmental laws and prevent pollution by reducing or waiving civil penalties for certain violations discovered by a regulated entity through self-audit, compliance assistance or pollution prevention activities.” The key is that the regulated entity must promptly disclose the violation to DEC and address the matter in short order. The new policy adopts portions of, but would supersede, DEC’s Small Business Self-Disclosure Policy.

DEC is responsible for enforcing myriad state and federal environmental laws and regulations through record-keeping, inspection and enforcement. However, budgetary impacts over the last several years have significantly reduced the DEC’s staff at regional offices across the state.

Similarly, federal funding for state and local enforcement has been cut by national budget shortfalls. Consequently, according to the draft policy, DEC has concluded that “the high volume of activities potentially affecting human health and the environment as well as practical constraints, including resource limitations, compel the Department to evaluate and implement auxiliary strategies to address compliance with the Environmental Conservation Law (ECL).”

DEC has also determined that pollution prevention through improved environmental compliance may increase the competitive status of New York business.

The policy contains two main elements. First, under the Self-Audit Policy, an entity can voluntarily report violations of environmental laws to DEC to seek a reduction or waiver of applicable penalties associated with the violation. In addition, the policy provides a prospective process for entities that enter a Self-Audit Agreement with DEC. The self-auditing process

would allow entities to access environmental compliance and performance programs offered by the state, potential incentives, additional penalty reduction opportunities and recognition as part of the state’s New York Environmental Leaders Program.

There are important limitations that will apply once the policy is formally issued. First, it is a policy and is not a statute or regulation which is binding on DEC and the state. The policy will not apply to: criminal violations of environmental laws; violations discovered by DEC inspection processes such as record-keeping review or information requests; or violations which result in serious actual harm or carry a threat of imminent substantial danger to the public or the environment.

Similarly, certain high priority violations under the federal Clean Water Act, Resource Conservation and Recovery Act, and Clean Air Act would not be subject to the policy. In addition, DEC has complete discretion to determine whether entities are eligible for the self-audit program and can exclude entities that have a poor compliance history.

The policy would authorize DEC to exclude entities with history of non-compliance within the last five years for the same or a similar violation, or those with a history of being uncooperative in addressing violations.

The policy applies to environmental violations discovered by an eligible entity in the course of a self-audit or by DEC, federal, state or local agencies in the course of compliance assistance and pollution prevention matters. In order to qualify for the Self-Audit Policy, the regulated entity must voluntarily disclose the violation within any applicable time period under the subject environmental law or by 30 calendar days “after the business knew or should have known of the violation, unless an alternate time frame is established as part of a facility audit agreement.”

The policy provides for contact with the DEC regional attorney who will assign a project attorney to assess eligibility for the policy. Although DEC has the discretion to extend the time period for reporting, the reporting must be made prior to any DEC, fed-

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eral or local inspection or investigation or any reporting by a whistle-blower.

In the event that the violation is timely disclosed, the entity must also take steps to promptly address the matter in accordance with applicable environmental law and as directed by the DEC. The policy includes a Return to Compliance Form to be executed and submitted by the regulated entity, which lists the following items: violation (with statutory or regulatory reference); detection method; detection date; corrective action and compliance date. In general, the policy calls for the violation to be addressed within 60 days after disclosure to DEC, unless a separate time period is established pursuant to a Self-Audit Agreement entered by the party.

DEC has the discretion to extend the time period for compliance as it deems appropriate. Significantly, under the policy, DEC will require the entity to remediate "any environmental harm associated with the violation and implement procedures to prevent further violations."

A significant benefit of the proposed self-audit policy is a waiver of a portion of the penalties associated with violation of an environmental law. Most environmental laws provide for penalties including components for gravity of the violation and the economic benefit of non-compliance. If an entity qualifies for the policy, DEC will waive the gravity component of the penalty calculation.

In addition, if an entity undertakes environmental audits and environmental management systems during the company operations or in accordance with an environmental audit agreement, DEC may consider additional penalty mitigation. In particular, DEC may waive the economic benefit component of an environmental penalty where it is de minimus (under \$10,000) or where DEC determines that the waiver is appropriate.

In the event that an entity receives penalty mitigation under the Self-Audit Policy, it must determine future compliance measures associated with the violation at issue and guarantee that the corrective measures will be implemented. Future environmental performance can be attained through a wide variety of mechanisms including environmental compliance systems, environmental management tools and pollution prevention steps.

Although the Self-Audit Policy still needs to be formally issued, DEC views the policy as a means to attain environmental compliance in an era of rapidly shrinking budgets and staffing, along with an incentive for improved environmental performance. While environmental compliance is certainly a cornerstone of DEC's mission, the policy appears to offer a method to address modest environmental violations and prevent future problems.

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