THOMPSON HINE

Environmental Update

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Where Have All My Disclosed Violations Gone? EPA Inspector General Calls for Increased Scrutiny of eDisclosure Submissions

Key Notes:

- June 2022 EPA Inspector General Report highlights deficiencies with EPA's process of reviewing and processing voluntary disclosures of federal environmental violations.
- EPA agreed with Report findings and recommendations and has already started implementing changes at headquarters and in regions.
- Regulated entities should expect additional scrutiny of voluntary disclosures and should consider how the Report findings and EPA's committed changes may impact decisions on whether to disclose violations.

EPA eDisclosure Overview

For over 20 years, the United States Environmental Protection Agency (EPA) has offered the regulated community the opportunity to voluntarily disclose known or suspected violations of various federal environmental laws and regulations through its "Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations" (Audit Policy). If specified Audit Policy conditions are met, disclosing parties may receive either reduced or no civil penalties related to the harm caused, or economic benefits realized, by the violation(s).

Since 2015, EPA has implemented the Audit Policy disclosure program mostly electronically through its eDisclosure system, a component of EPA's Central Data Exchange (CDX) portal. Audit Policy disclosures are divided into 2 categories: "Category 1" covers violations of the Emergency Planning and Community Right-to-Know Act (EPCRA) that meet all nine Audit Policy conditions. "Category 2" covers non-EPCRA violations and EPCRA violations that do not meet Category 1 criteria. Since 2015, EPA has received over 2,800 self-disclosures through the CDX eDisclosure portal, and since 2016 EPA has received an average of over 540 eDisclosures per year, or almost 1.5 every day of the year.

2022 EPA Inspector General's Report

On June 30, 2022, the EPA office of Inspector General issued a report, and the title speaks for itself as to the Inspector General's findings: "Additional Internal Controls Would Improve the EPA's System for Electronic Disclosure of Environmental Violations" (Report). The Report's primary conclusion is even clearer: "The EPA's Audit Policy Program does not have adequate internal controls to ensure that the process for screening Category 2 disclosures of environmental violations is effective and that significant concerns, such as criminal conduct and potential imminent hazards, are identified and addressed by [the Office of Enforcement and Compliance Assurance] and the EPA regions."

The Report, in part, answers a common question posed by the regulated community: What happens to a voluntary disclosure of potential environmental violations once it reaches EPA? The Report found that half of EPA's 10 regions are not screening Category 2 disclosures at all. Region 5, which covers many Midwest states, reported it does not have staff responsible for eDisclosure screening and does not even have access to the eDisclosure system, but EPA headquarters has stated that the regions are responsible for accessing and screening submissions related to regulated entities under their jurisdiction.

The Report highlights several specific findings and includes four recommendations to address those findings, along with EPA's planned corrective actions for each. The four recommendations are:

1. Develop national guidance that includes a process for screening eDisclosure submissions for significant concerns, such as criminal conduct and potential imminent hazards.
2. Provide eDisclosure-specific training to EPA headquarters and regions to clarify expectations, establish staff responsibilities and communicate best practices.
3. Develop performance measures for the eDisclosure system and a monitoring plan to track its effectiveness.
4. In coordination with EPA regions, assess eDisclosure system functionality to identify and implement improvements.

EPA Response and Next Steps

EPA agreed with all four of the Report's recommendations and set forth corrective actions and a proposed timeline for completion. By September 30, 2022, EPA committed to completing recommendation #2 (e-Disclosure training). EPA's target completion date for recommendations #1, #3 and #4 is September 30, 2023.

For parties who have already submitted eDisclosures or may use the system in the future, the Report suggests that some self-reported violations may receive more internal scrutiny at EPA. For those violations that EPA determines are more "serious," especially those of a potential criminal nature or that cause imminent hazards, the Report will likely lead to an increased likelihood of more immediate agency follow-up. However, it is important to remember that, as stated in the Audit Policy, EPA generally will not recommend criminal prosecution for disclosing entities that meet 8 of the 9 conditions, i.e., all conditions except condition 1, systematic violation discovery through an environmental audit or compliance management system.

Conclusion

What is clear from the Report and EPA's response is that Audit Policy disclosures will remain a valuable and well-regarded tool, both at EPA and for the regulated community, to resolve federal environmental violations that are discovered through a systemic program like environmental audits or an environmental management system. Disclosing parties should also consider the impact the Report may have on how EPA screens and takes action on certain violations. Before disclosing violations to EPA, each situation should be evaluated on its own merits. While the Report's findings and EPA's corrective actions should not lead to a greatly reduced number of disclosures, if EPA implements the recommendations, each region will have a more systematic process for reviewing disclosures.

FOR MORE INFORMATION

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