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The Undead Is Given New Life – Welcome Resurrection Of EPA's Audit And Self Disclosure Policies

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On May 15, 2018, U.S. EPA announced its intent to renew its emphasis on encouraging the regulated community to voluntarily discover and promptly disclose and correct environmental violations. This was welcome news because this program – which had been very popular with regulated entities since the Agency first rolled out its Audit Policy in 1997 and updated and revised it in 2007 – has been in something of a dormant 'Zombie' status for several years.

The stated purpose of the announcement is to "take steps to enhance and promote: (a) [U.S. EPA's] already highly successful online 'eDisclosure' program; (b) the additional flexibility that is available to new owners who self-disclose violations; and (c) opportunities to increase compliance through use of existing self-disclosure policies or tailored programs." The announcement reminds the regulated community of the potential benefits of the original self-disclosure policy when all of the requirements are met – the most important of which to many entities are: elimination of 100% of the gravity-based civil penalty that otherwise might apply; and allowing U.S. EPA to waive the economic benefit penalty component where the agency deems it insignificant.

In the announcement, U.S. EPA also reaffirms the value – and encourages the use – of the New Owner Audit Policy first published on August 1, 2008. This policy allows for even more flexibility and incentives than the original

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Audit Policy for owners of newly acquired facilities who want to bring them into compliance and get a ‘clean start’ for those facilities. A word of caution about these self-disclosure programs – obtaining their benefits requires strict adherence to the programs’ rules. There are specific requirements that parties must satisfy and relatively tight deadlines that have to be met to qualify for the penalty waiver benefits of both the Audit Policy and New Owner Audit Policy.

As recently as 2015, in its eDisclosure FAQs, the Agency made clear that it was not going to relax those requirements or extend the deadlines for required elements such as disclosure of violations within a specified time after a party learns of them, or return to compliance and certification thereof within a specified time thereafter.

Finally the announcement rolls out U.S. EPA’s plans for a New Owner Clean Air Act Audit Program that is being developed specifically for the oil and natural gas sector. The key to the new program requires Qualifying New Owners to enter into an agreement to audit their facilities' compliance with agreed upon provisions of the Clean Air Act, its implementing regulations, and federally-approved and -enforceable requirements of applicable State Implementation Plans (SIPs). A draft template of this agreement is available for public comment until June 4, 2018.

Among other items, the Qualifying New Owners will be required to assess tank battery vapor control systems as part of the audit. The agency initially plans to make this new program available to upstream exploration and production sites where it has observed significant noncompliance. After years of relegating the Audit Policies to something of a regulatory ‘phantom zone,’ the Agency’s return to active support for its Audit and Self Disclosure Policies is a welcome change for the regulated community.