

Appendix C

Voluntary Environmental Self-Policing and Self-Disclosure Interim Policy Statement

AGENCY: Environmental Protection Agency (EPA).

ACTION: Interim policy statement and request for comment.

SUMMARY: The Environmental Protection Agency (EPA) announces and requests comment on an interim policy to provide incentives for regulated entities that conduct voluntary compliance evaluations and also disclose and correct violations. These incentives include eliminating or substantially reducing the gravity component of civil penalties and not referring cases for criminal prosecution where specified conditions are met. The policy also states that EPA will not request voluntary audit reports to trigger enforcement investigations. This interim policy was developed in close consultation with EPA's regional offices and the Department of Justice, and will be applied uniformly by the Agency's enforcement programs.

DATES: This interim policy statement is effective as interim guidance 15 days after publication, in order to give the Agency time to coordinate implementation of the policy throughout EPA Headquarters and the Regions. EPA urges interested parties to comment on this interim policy in writing. Comments must be received by EPA at the address below by June 2, 1995.

ADDRESSES: Submit three copies of comments to the U.S. EPA Air Docket, Mail Code 6102, 401 M Street, SW, Washington, D.C. 20460, attention: Docket #C-94-01.

FOR FURTHER INFORMATION

CONTACT: Additional documentation relating to the development of this interim policy is contained in the environmental auditing public docket. Documents from the docket may be requested by calling (202) 260-7548, requesting an index to docket #C-94-01, and faxing document requests to (202) 260-4400. Hours of operation are 8 a.m. to 5:30 p.m., Monday through Friday, except legal holidays. Additional contacts are Geoff Garver or Brian Riedel, at (202) 564-4187.

SUPPLEMENTARY INFORMATION:

I. Background

A. Introduction One of the Environmental Protection Agency's most important responsibilities is obtaining compliance with federal laws that protect public health and safeguard the environment. That goal can be achieved only with the voluntary cooperation of thousands of businesses and other regulated entities subject to these requirements. Today, EPA is announcing incentives for those who take responsibility for voluntarily evaluating, disclosing and correcting violations. These incentives, developed after nine months of public meetings and empirical analysis, are set forth in detail below and take effect in 15 days. At the same time, EPA expects to continue a dialogue with stakeholders and consider further refinements to this interim policy. The incentives that EPA is offering fall into three distinct categories.

First, the Agency will completely eliminate gravity-based (or "punitive") penalties for companies or public agencies that voluntarily identify, disclose and correct violations according to the conditions outlined in this policy. EPA will also reduce punitive penalties by up to 750.000000 or [[Page 16876]] companies that meet most, but not all, of these conditions. Second, EPA will not recommend to the Department of Justice that criminal charges be brought against a company acting in good faith to identify, disclose, and correct violations, so long as no serious actual harm has occurred. Finally, the Agency will not request voluntary environmental audits to trigger enforcement investigations.

The incentives offered in this policy have been structured above all to protect human health and the environment. For example, even where the conditions for mitigated enforcement are met, EPA will reserve the right to collect full civil penalties for criminal conduct, violations that present an imminent and substantial endangerment or result in serious actual harm, or repeat violations. Sources will not be allowed to gain an economic advantage over their competitors by delaying their investment in compliance. Nor will EPA hesitate to bring a criminal action against individuals responsible for criminal conduct. EPA is considering additional incentives for voluntary compliance beyond the benefits offered in the policy today. On April 7, 1995, the Agency will announce 12 Environmental Leadership Program (ELP) pilot projects with companies and public agencies to test criteria for auditing and certification of voluntary compliance programs. If successful, standards developed through Environmental Leadership could lead to reduced inspections and public recognition for companies or agencies with state-of-the-art compliance programs. In keeping with the President's announcement on March 16, 1995, EPA also will shortly be announcing additional compliance incentives for small businesses.

The Agency is especially interested in comments relating to whether this interim policy appropriately defines the criteria for determining whether a self-audit, self-evaluation or disclosure is voluntary; whether the interim policy adequately preserves the Agency's authority to assess a gravity penalty component in appropriate cases; and whether, and according to what criteria, the Agency should

consider giving credit against the economic benefit component of a penalty for state-of-the-art environmental management systems.

B. Public Process In May 1994, the Administrator asked the Office of Enforcement and Compliance Assurance to determine whether additional incentives are needed to encourage voluntary disclosure and correction of violations uncovered during environmental audits and self-evaluations. In developing this interim policy, the Agency held a major two-day public meeting in July 1994 announced in the Federal Register on June 20, 1994 (59 FR 31914); published a Restatement of Policies Related to Environmental Auditing in the Federal Register on July 28, 1994 (59 FR 38455); considered over 80 written comments submitted to the environmental auditing policy docket; held a focus group meeting in San Francisco on January 19, 1995 with key stakeholders from industry, trade groups, State environmental commissions, State attorneys general offices, district attorneys' offices, environmental and public interest groups, and professional environmental auditing groups; and held a public comment session in San Francisco on January 20, 1995.

In addition to considering opinion from stakeholders, EPA conducted its own analysis of relevant facts. For example, the Agency considered EPA and other Federal policies relating to environmental auditing, self-disclosure, and correction, as well as incentives suggested by State and local policies and legislation, and by applications submitted for the ELP pilot program. The Agency also considered relevant surveys on auditing practices and incentives.

C. Purpose This interim policy is intended to promote environmental compliance by providing greater certainty as to EPA's enforcement response to voluntary self-evaluations, and voluntary disclosure and prompt correction of violations. The policy further provides guidance for States and local authorities in encouraging this behavior among regulated entities.

Federal laws and regulations set minimum standards for protecting human health and achieving environmental protection goals such as clean air and clean water. EPA will continue to uphold these laws through vigorous enforcement actions that appropriately penalize violators. Penalties help ensure a level playing field by ensuring that violators do not obtain an unfair economic advantage over their competitors who made the necessary investment in compliance. Penalties also promote protection of the environment and public health by encouraging adoption of pollution prevention and recycling practices that limit exposure to liability for pollutant discharges and deterring future violations by the violator and others.

At the same time, the Agency recognizes that we cannot achieve maximum compliance without the cooperation of a regulated community willing to act responsibly by detecting, disclosing, and correcting violations. Already, regulated entities have many compelling incentives to implement environmental management/auditing systems, as noted in EPA's 1986 auditing policy. Indeed, recent surveys show that the vast majority of large companies engage in environmental auditing and/or have environmental management systems in

place. Nonetheless, EPA has concluded that the additional incentives in this interim policy will further promote the regulated community's commitment to adopting systems for maximizing compliance.

D. Principles for Voluntary Compliance The interim policy that EPA is announcing today is based on seven principles:

1. Self-policing by regulated entities can play a crucial role in finding, fixing and preventing violations.
2. Violations discovered through self-policing should be disclosed and promptly corrected.
3. Regulated entities that self-police and that voluntarily disclose and self-correct violations in accordance with this policy should be assessed penalties that are consistently and predictably lower than penalties for those who do not.
4. Regulated entities that self-police and voluntarily disclose and self-correct violations in accordance with this policy should also not be recommended for criminal prosecution.
5. Providing predictable incentives for voluntary disclosure and correction of violations identified through self-policing offers a positive alternative to across-the-board privileges and immunities that could be used to shield criminal misconduct, drive up litigation costs and create an atmosphere of distrust between regulators, industry and local communities.
6. EPA should not seek voluntary environmental audit information to trigger an investigation of a civil or criminal violation of environmental laws.
7. To preserve a level playing field, EPA should recover any economic benefit realized from violations of environmental law.

E. Relationship to Emerging Standards EPA also recognizes the development of and growing reliance on international voluntary environmental management standards in the U.S. and other [[Page 16877]] countries. These standards, if properly crafted and implemented, can provide a powerful tool for organizations to improve their overall compliance with environmental requirements and move beyond compliance through innovative approaches to pollution prevention. In addition to issuing this interim policy, EPA will continue to pursue a dialogue with interested parties and to pilot policy approaches through programs such as the ELP to determine how EPA can make use of and encourage these standards.

II. Interim Policy

A. Definitions For purposes of this interim policy, the following definitions apply: "Environmental auditing" has the definition given to it in EPA's 1986 policy on environmental auditing, i.e., "a systematic, documented, periodic and objective review by regulated entities of facility operations and practices related to meeting environmental requirements."

"Environmental audit report" means all documentation of information relating to an environmental audit, but not including the factual information underlying or testimonial evidence relating to such information.

"Regulated entity" means any entity, including a federal, state, and municipal facility, regulated under the federal environmental laws that EPA administers.

"Self-evaluation" means an assessment, not necessarily meeting all the criteria of a full environmental audit, by a regulated entity of its compliance with one or more environmental requirements.

"Voluntary" means not required by statute, regulation, permit, order, or agreement.

B. Conditions The conditions for reducing civil penalties and not making criminal referrals in accordance with Sections II.C. and II.D. of this interim policy are as follows:

Voluntary self-policing. The regulated entity discovers a violation through a voluntary environmental audit or voluntary self evaluation appropriate to the size and nature of the regulated entity; and Voluntary disclosure. The regulated entity fully and voluntarily discloses the violation in writing to all appropriate federal, state and local agencies as soon as it is discovered (including a reasonable time to determine that a violation exists), and prior to (1) the commencement of a federal, state or local agency inspection, investigation or information request; (2) notice of a citizen suit; (3) legal complaint by a third party; or (4) the regulated entity's knowledge that the discovery of the violation by a regulatory agency or third party was imminent; and Prompt correction. The regulated entity corrects the violation either within 60 days of discovering the violation or, if more time is needed, as expeditiously as practicable; and Remediation of imminent and substantial endangerment. The regulated entity expeditiously remedies any condition that has created or may create an imminent and substantial endangerment to human health or the environment; and Remediation of harm and prevention of repeat violations. The regulated entity implements appropriate measures to remedy any environmental harm due to the violation and to prevent a recurrence of the violation; and No lack of appropriate preventive measures. The violation does not indicate that the regulated entity has failed to take appropriate steps to avoid repeat or recurring violations; and Cooperation. The regulated entity cooperates as required by EPA and provides such information as is reasonably necessary and required by EPA to determine applicability of this policy. Cooperation may include providing all requested documents and access to employees and assistance in any further investigations into the violation.

Where appropriate, EPA may require that to satisfy any of these conditions, a regulated entity must enter into a written agreement, administrative consent order or judicial consent decree, particularly where compliance or remedial measures are complex or a lengthy schedule for attaining and maintaining compliance or remediating harm is required.

C. Reduce Civil Penalties for Voluntarily Disclosed and Promptly Corrected Violations

Incentive

Regulated entities will be eligible for the following reductions in civil penalties:

- a. EPA will eliminate all of the gravity component of the penalty for violations by regulated entities that meet conditions 1 through 7 outlined in Section II.B., except for violations involving (i) criminal conduct by the regulated entity or any of its employees, or (ii) an imminent and substantial endangerment, or serious actual harm, to human health or the environment.
- b. EPA may mitigate up to 75% of the unadjusted gravity component of the penalty, taking into account any of conditions 1-7 in Section II.B. that are met, in the following cases:
 - (i) cases in which most but not all of the conditions in Section II.B. are met; or
 - (ii) cases involving an imminent and substantial endangerment, but not serious actual harm, in which all the conditions in Section II.B. are met; or
 - (iii) cases involving the disclosure of criminal conduct in which all the conditions in Section II.B. are met.
- c. EPA will retain its full discretion to recover any economic benefit gained as a result of noncompliance to preserve a "level playing field" in which violators do not gain a competitive advantage through noncompliance. However, EPA may forgive the entire penalty for violations which meet conditions 1 through 7 outlined in Section II.B. and, in EPA's discretion, do not merit any penalty due to the insignificant amount of any economic benefit.

Discussion

- a. Providing a clear and significant reduction in civil penalties for companies that assume responsibility for finding, disclosing and correcting violations will create a strong incentive for regulated entities to prevent or fix violations before EPA expends enforcement resources. The policy states clearly the conditions under which EPA will forgive all or part of the gravity component of a penalty for voluntary disclosure and correction
- b. The policy appropriately preserves the concept of recovering economic benefit, except where it is insignificant, as recommended by a broad spectrum of commenters, including industry commenters;
- c. Retaining EPA's discretion to collect the gravity component of the penalty in appropriate cases, such as where a violation involves criminal conduct, or imminent and substantial endangerment, will help to deter the most egregious environmental violations. At the same time, by preserving flexibility to reduce the gravity element by up to 75% for good faith efforts to disclose and promptly comply even in those cases, the policy will retain an appropriate compliance incentive.

D. Limit Criminal Referrals for Voluntary Disclosure and Correction of Violations Incentive

EPA will not recommend to the Department of Justice that criminal [[Page 16878]] charges be brought against a regulated entity where EPA determines that conditions 1-7 in Section II.B. above for reduction of civil penalties are met, and the violation does not demonstrate or involve (1) a prevalent corporate management philosophy or practice that concealed or condoned environmental violations; (2) high-level corporate officials' or managers' conscious involvement in or willful blindness to the violation; or (3) serious actual harm to human health or the environment. This policy does not apply to criminal acts of individual managers or employees. Where EPA determines pursuant to this Section that a criminal referral to the Department of Justice is unwarranted, EPA may nonetheless proceed with civil enforcement in accordance with Section II.C. of this policy or other applicable enforcement response and penalty policies.

Discussion

The policy will promote candid and thorough self-policing by providing greater certainty as to how EPA will exercise its criminal investigative discretion to encourage voluntary disclosure and prompt correction by regulated entities.

E. Eliminate Routine Requests for Audit Reports in Pre-Enforcement Proceedings Incentive

EPA will not request a voluntary environmental audit report to trigger a civil or criminal investigation. For example, EPA will not request an audit in routine inspections. Once the Agency has reason to believe a violation has been committed, EPA may seek through an investigation or enforcement action any information relevant to identifying violations or determining liability or extent of harm.

Discussion

- a. This policy makes clear that EPA will not routinely request audit reports. At the same time, the policy in no way limits the right of regulated entities to claim common law privileges (e.g., attorney client and work product) as appropriate. EPA believes that this clarification, along with the other incentives in this interim policy, should greatly reduce any perception that environmental audits may be used unfairly in environmental enforcement.
- b. With respect to federal facilities, although federal facility environmental audit reports may be accessible to the public under the Freedom of Information Act (FOIA) in certain circumstances, EPA cannot utilize FOIA to request information from other federal agencies. Thus, EPA will apply this policy on requests for audit reports to federal (and state and municipal) facilities the same as it does for other regulated entities.

F. Applicability

This interim policy applies to violations under all of the federal environmental statutes that EPA administers and supersedes (unless otherwise noted) any conflicting or inconsistent provisions in the media-specific penalty or enforcement response policies and EPA's 1986 Environmental Auditing Policy Statement. Existing enforcement policies will continue to apply in conjunction

with this interim policy, except where inconsistent with this policy. In addition, where appropriate, EPA's Supplemental Environmental Project Policy may at EPA's discretion be applied in conjunction with this policy.

III. Favor These Incentives Over Broad Privileges and Immunities

This interim policy offers a positive alternative to across-the-board privileges and immunities that could be used to shield criminal misconduct, drive up litigation costs and create an atmosphere of distrust between regulators, industry and local communities.

A. Discussion

Penalty immunity provisions for voluntary disclosures of violations can give lawbreakers an economic advantage over their law-abiding competitors. It makes sense to give substantial penalty reductions for those who come forward with their violations and promptly correct them, but to maintain a level playing field, the federal and state governments must be able to recoup the economic benefit of violations.

A principal rationale for environmental audit privileges and penalty immunities for voluntary disclosures is to reduce the exposure of regulated entities that conduct self-evaluations and act on the findings by immediately correcting violations. EPA has addressed this concern with the incentives for disclosure and correction outlined above.

Privilege runs counter to efforts to open up environmental decision making and encourage public participation in matters that affect people's homes, workplaces and communities.

An environmental audit privilege could be misused to shield bad actors or to frustrate access to crucial factual information.

Environmental audit privileges and penalty immunities could encourage increased litigation as opposing lawyers battle over what is privileged or immune from penalties and what is not. Litigation over the scope of the privileges and immunities could burden our already taxed judicial system, drain government and private resources, and in some cases prevent quick action to address environmental emergencies.

The Supreme Court has noted, "privileges are not lightly created nor expansively construed for they are in derogation of the search for the truth." *United States v. Nixon*, 418 U.S. 683, 710 (1974). Moreover, the self-evaluation privilege has regularly and uniformly been rejected by the courts in cases where documents were sought by a governmental agency.

IV. Consequences for States

EPA recognizes that states are important partners in federal enforcement, and that it is desirable to create a climate in which states can be innovative. At the same time, EPA is required to establish a certain minimum consistency in federal

enforcement, so that the sanctions a business faces for violating federal law do not depend on where the business is located.

Accordingly, to maintain national consistency:

- A. EPA will scrutinize enforcement more closely in states with audit privilege and/or penalty immunity laws and may find it necessary to increase federal enforcement where environmental self-evaluation privileges or penalty immunities prevent a state from obtaining: information needed to establish criminal liability; facts needed to establish the nature and extent of a violation; appropriate penalties for imminent and substantial endangerment or serious harm to human health or the environment, or from recovering economic benefit; appropriate sanctions or penalties for criminal conduct and repeat violations; or prompt correction of violations, and expeditious remediation of those that involve imminent and substantial endangerment to human health or the environment.
- B. EPA will bring to the state's attention any provisions of state audit privilege and/or penalty immunity statutes that raise any of the concerns outlined above, and will work with the state to address those concerns and ensure that federal requirements are satisfied. [[Page 16879]]

V. Limitations on Applicability of This Policy

This interim policy sets forth internal guidelines which amend EPA's penalty policies in situations involving voluntary self-policing, disclosure and correction. In conjunction with the applicable penalty policy, these guidelines will aid EPA personnel in proposing appropriate penalties or negotiating settlements in administrative and judicial enforcement actions. The interim policy also serves to structure the Agency's enforcement authority and states the Agency's view as to the proper allocation of its enforcement resources. Deviations from these guidelines, where merited, are authorized so long as the reasons for the deviations are documented.

This interim policy is not final agency action, but is intended solely as guidance. It is not intended, nor can it be relied upon, to create any rights enforceable by any party in litigation with the United States. EPA officials may decide to follow the guidance provided in this interim policy or to act at variance with the guidance based on analysis of case-specific facts and circumstances. Application of this policy to the facts of any individual case is at the sole discretion of EPA and is not subject to review by any court. In addition, the policy has no effect on the calculation of any cleanup costs, remedial costs, natural resources damages or emergency response costs associated with a violation. EPA reserves the right to change this interim policy at any time without public notice.