

## **EPA Offers Compliance Incentives**

*Chemical Processing, September 2008*

By Lynn L. Bergeson

### **New owners of regulated facilities benefit from temporary policy changes**

The U.S. Environmental Protection Agency's (EPA) recently published "Interim Approach to Applying the Audit Policy to New Owners" (Interim Approach, 73 Fed. Reg. 44991, August 1), which describes how it will apply its April 11, 2000 policy on "Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations." Known as the Audit Policy to new owners of regulated facilities, it's designed to enhance the protection of human health and the environment by encouraging regulated entities to voluntarily discover, promptly disclose, correct and prevent the recurring violations of federal environmental law.

### **Incentives for new owners**

Through the Interim Approach, the EPA will offer incentives to encourage new owners to discover, disclose, correct and prevent recurring violations that began prior to their acquisition of a facility. The tailored incentives include penalty mitigation beyond what the Audit Policy generally provides and modification of certain policy conditions. A "new owner" is defined as making the following self-certifications:

- Prior to the transaction, the owner wasn't responsible for environmental compliance at the facility subject to the disclosure, didn't cause the violations being disclosed and couldn't have prevented them
- The violation originated with the prior owner
- Prior to the transaction, neither buyer nor seller had largest ownership share of the other, and they didn't have a common corporate parent (Id. at 44995).

A new owner has nine months after the transaction closing date to use the Interim Approach and can make disclosures in one of two ways. First, the owner can enter into an audit agreement. The EPA recommends this approach if the circumstances or the complexity of the facility would likely require more time to audit or if a new owner expects to be making more than one disclosure. Second, disclosures can be made individually as violations are discovered, but each must be made within 21 days of discovery or 45 days of closing, whichever is longer. The EPA believes that this may give a new owner more control over, and privacy for, auditing.

The following penalty mitigations are included:

- No penalties for economic benefit or gravity for the period before the acquisition date

- Penalties for economic benefit associated with avoided operation and maintenance costs, but only from the date of acquisition
- Penalties for economic benefit associated with delayed capital expenditures or unfair competitive advantage won't be assessed if the violations are corrected within 60 days of discovery or another reasonable timeframe to which the EPA has agreed

A new owner must meet all nine conditions in the Audit Policy. The EPA will apply five of them differently:

- Systematic Discovery Condition: A pre-closing review isn't required to meet the periodic element of this condition to be considered for full penalty mitigation.
- Voluntary Discovery Condition: Expanded from limited to compliance with Title V of the Clean Air Act, to allow consideration of all violations that would otherwise be ineligible for Audit Policy consideration under this condition.
- Prompt Disclosure Condition: The Audit Policy provides that violations must be disclosed to the EPA in writing within 21 days of discovery. Under the Interim Approach, for violations discovered prior to closing, a new owner has up to 45 days after closing to disclose violations. Violations discovered after closing must be disclosed within 21 days after discovery or 45 days after the transaction closing, whichever is longer.
- Other Violations Excluded Condition: Violations that resulted in serious actual harm or may have presented an imminent and substantial endangerment are ineligible for incentives.
- Cooperation Condition: Modified to clarify that the disclosing entity must cooperate with the EPA and provide such information as is necessary and requested to determine applicability of the Audit Policy, as modified by this Interim Approach.

The EPA didn't alter the remaining four conditions (*i.e.*, Independent Discovery, Correction and Remediation, Prevent Recurrence, and the No Repeat Violations conditions).

New owners who want to take advantage of the Interim Approach should contact the EPA's Office of Enforcement and Compliance Assurance. Although the Interim Approach is effective upon publication, the EPA is currently seeking public comment, due by October 30.

*Lynn Bergeson is managing director of Bergeson & Campbell, P.C., a Washington, D.C.-based law firm that concentrates on chemical industry issues. The views expressed herein are solely those of the author. This column is not intended to provide, nor should be construed as, legal advice.*