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Federal Enforcement/Self-Disclosure: U.S. Environmental Protection Agency Notice of eDisclosure Portal Launch

Arkansas Environmental, Energy, and Water Law Blog

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The United States Environmental Protection Agency ("EPA") published a December 9th Federal Register Notice stating it is:

... modernizing implementation of its self-disclosure policies by creating a centralized web-based "eDisclosure" portal to receive and automatically process self-disclosed civil violations of environmental law.

See 80 Fed. Reg. 76476.

The agency states it is launching the eDisclosure system because it continues to believe strongly in the benefits of its self-disclosure policies, which are stated to provide penalty mitigation and other incentives for companies that self-police, disclose, correct and prevent violations.

EPA in 1995 issued its original policy "Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations" ("Policy"). 60 Fed. Reg. 66706 (Dec. 22, 1995). The Policy provides that voluntary self-disclosure of violations can eliminate the gravity-based component of a penalty (as opposed to the economic benefit component) if nine conditions are met which include:

- Systematic Discovery
- Voluntary Disclosure
- Prompt Disclosure
- Independent Discovery
- Correction and Remediation
- Prevent Recurrence
- No Repeat Violations
- Non-qualifying Violations
- Cooperation

The Arkansas Department of Environmental Quality has a somewhat similar mechanism titled "The Environmental Self-Disclosure Incentive Policy."

In its December 9th notice EPA states that under the automated eDisclosure systems businesses will "quickly be able to get some of their more routine types of disclosure resolved." The agency also notes that the large number of violations that have been self-disclosed has "taxed the agency's ability to promptly resolve all pending disclosures." It states that entities disclosing potential violations through the eDisclosure portal may qualify for one or two types of automated treatment – Category 1 or Category 2.

Category 1 is described as disclosures including:

1. EPCRA violations that meet all Audit Policy conditions; and (2) EPCRA violations that meet all Small Business Compliance Policy conditions. It does not, however, include Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) section 103/EPCRA section 304 chemical release reporting violations or EPCRA violations with significant economic benefit as defined by EPA. For disclosures that qualify for Category 1 treatment, the eDisclosure system automatically will issue an electronic Notice of Determination (eNOD) confirming that the violations are resolved with no assessment of civil penalties, conditioned on the accuracy and completeness of the submitter's disclosure. EPA will spot check Category 1 disclosures to ensure conformance with EPCRA, the Audit Policy, the Small Business Compliance Policy, and eDisclosure requirements.

Category 2 is described as disclosures including:

1. All non-EPCRA violations; (2) EPCRA violations where the discloser can only certify compliance with Audit Policy Conditions 2-9 (i.e., discovery was not systematic); and (3) EPCRA/CERCLA violations excluded from Category 1 above. For disclosures that qualify for Category 2 treatment, the eDisclosure system automatically will issue an Acknowledgement Letter (AL) noting EPA's receipt of the disclosure and promising that EPA will make a determination as to eligibility for penalty mitigation if and when it considers taking enforcement action for environmental violations. EPA will screen Category 2 disclosures for significant concerns such as criminal conduct and potential imminent hazards.

The EPA notice describes the eDisclosure portal and the three step disclosure process.

[Click here to download a copy of the Federal Register Notice.](#)