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Confidential Business Information/Environmental Self-Disclosure Incentive Policy: Tracy Rothermel (Arkansas Department of Energy & Environment - Division of Environmental Quality) May 9th Arkansas Environmental Federation Air Seminar Presentation

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Ms. Tracy Rothermel undertook a presentation at the May 9th Arkansas Environmental Federation Air Seminar addressing two key topics:

- Confidential Business Information (“CBI”)
- Environmental Self-Disclosure Incentive Policy (“Policy”)

Tracy serves as General Counsel/Senior Attorney in the Arkansas Department of Energy & Environment – Division of Environmental Quality (“DEQ”) Office of Chief Counsel.

The United States Environmental Protection Agency and many environmental state agencies have statutory/regulatory provisions or policies in place intended to incentivize voluntary disclosure of environmental violations.

DEQ developed its own policy a number of years ago. 100 percent of a gravity-based component of a civil administrative penalty can be mitigated in the event that self-disclosed violations meet a number of criteria specified in the Policy. Economic benefits cannot be mitigated.

Tracy’s presentation reviewed the elements of this Policy, including:

- Definitions which include:
- Civil Penalty
- Disclosure
- Environmental Audit
- Environmental Management System
- Regulated Entity
- Systematic Discovery

The eight conditions that must be met for DEQ to mitigate the gravity-based penalties under the Policy were also discussed, which include:

- Systematic discovery through an environmental audit or an environmental management system
- Voluntary disclosure
- Prompt disclosure
- Discovery must be made independently
- Correct and remediation
- Prevent recurrence
- No repeat violations
- Cooperation

Certain conditions which are not eligible for penalty mitigation were discussed.

The DEQ Policy is especially relevant from an Arkansas enforcement standpoint since DEQ has been delegated most federal environmental programs and, therefore, is often the key enforcer in the state.

The presentation also addressed key issues associated with CBI.

An initial point made was that information must meet the Arkansas Trade Secrets Act definition. Tracy noted that the Arkansas Pollution Control & Ecology Commission Rules require that this definition be met along with the six factors set forth in case law to qualify as a trade secret.

Trade secrets are noted to be defined by the Arkansas Trade Secrets Act and Arkansas Pollution Control & Ecology Commission Rules 18 and 19 as a:

- Formula
- Pattern
- Device
- Method
- Technique
- Process, or
- Rate of production

Each of these are stated to be required to derive:

. . . independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by other persons who can obtain economic value from its disclosure or use; and is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

The six factors dictated by the case law that DEQ uses to evaluate a trade secret claim were reviewed.

Discussion included a key case:

Wal-Mart Stores, Inc. v. P.O. Market, Inc., 347 Ark. 651 (2002).

The process for attempting to obtain CBI status was discussed including submission of an affidavit with this request and what it must contain. In particular, Tracy characterized a particular requirement as a “Magic Sentence” which states:

. . . the applicant agrees to act as an indispensable party and to exercise extraordinary diligence in any legal action arising from the Department’s denial of public access to the documents or information claimed herein to be a trade secret.

The rationale for this requirement is the concern that DEQ can be sued for not disclosing information that was erroneously determined to be a trade secret.

Suggestions for helpful actions in this process were discussed along with actions that are deemed problematic (example including forgetting that emails can be subject to the Freedom of Information Act).

The consequences of mistakes in the submission were also discussed.

Finally, Tracy's slides included "Made-Up Examples" to illustrate these points.

A copy of the [slides](#) and [attachments](#) can be downloaded here.