

U.S. EPA FINALIZES NEW OWNER CLEAN AIR ACT AUDIT PROGRAM TAILORED FOR THE OIL AND NATURAL GAS SECTOR

To Our Clients and Friends:

On March 29, 2019, the U.S. Environmental Protection Agency finalized the New Owner Clean Air Act Audit Program (the “Program”) for the oil and natural gas sector. Under the Program, new owners of upstream exploration and production sites can seek complete civil penalty mitigation in exchange for auditing their sites for Clean Air Act violations, disclosing any violations, and correcting those violations on an agreed timeline.[1]

Opting into the Program. New owners of upstream sites seeking to participate in the program must notify EPA within nine months after acquiring new facilities. Buyers then must consult with the EPA to determine the scope of the audit, including the number of facilities covered. Although EPA strongly encourages new owners to conduct a comprehensive Clean Air Act audit of all applicable statutory and regulatory requirements, the agency has expressed a willingness to entertain proposals for more targeted Clean Air Act compliance audits.[2]

Terms of the Program. In announcing the program, EPA provided a template audit agreement outlining the audit process. The template agreement requires, for example, participating new owners to follow an EPA-designed systematic process for estimating vapor control system pressures and vapor flow rates to control devices, and to correct any violations discovered during this process within 180 days of each respective violation’s discovery.[3] Violations discovered outside of the scope of the predesigned process for vapor control systems must be corrected within 60 days of their discovery.

Benefits of the Program. Taken as a whole, the requirements of the template audit process may, unlike previous audit policies, require participating new owners to go beyond the requirements of applicable regulations in order to mitigate emissions from storage tanks.[4] Significantly, however, new owners that enter into, and fulfill, all obligations under the template agreement are provided with complete relief from civil penalties. In taking this approach, EPA acknowledged that it was providing for penalty mitigation over and beyond the approach used in preexisting audit guidance (which only allows for mitigation of the “gravity” component of a civil penalty, not the entire civil penalty).

Risk Mitigation. EPA’s new audit program provides the upstream oil and gas sector with an option to mitigate enforcement risk by proactively addressing vapor control design issues targeted by a recent EPA enforcement initiative. EPA’s FY19 enforcement goals include an initiative specifically aimed at reducing emissions from storage vessels at upstream sites allegedly resulting from insufficient vapor controls. Under this initiative, EPA already has settled enforcement cases at facilities in Colorado,

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Oklahoma, Ohio, West Virginia, and Pennsylvania. In one case, the estimated cost of upgrades to vapor control systems and storage vessels resulting from EPA's efforts was \$60 million.

Given the potential for substantial civil penalties, the Program may still be an attractive option for new owners seeking to avoid civil penalties or enforcement in spite of the Program's emissions mitigation requirements.

[1] The Program is distinct from, and does not alter, preexisting EPA policies incentivizing industry actors to self-audit their potential pollution (e.g., EPA's Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations, 65 Fed. Reg. 19,618 (Apr. 11, 2000)). Industry members that prefer the incentive schemes of prior audit policies may still avail themselves of such policies.

[2] EPA, *Oil and Gas New Owner Program Questions and Answers* (Mar. 29, 2019), available at <https://www.epa.gov/compliance/oil-and-gas-new-owner-program-questions-and-answers>.

[3] *Id.*

[4] Dawn Reeves, *Lacking Fixes, Oil & Gas Sector Unlikely to Use EPA Penalty Relief Policy*, Inside EPA (April 2, 2019), available at <https://insideepa.com/daily-news/lacking-fixes-oil-gas-sector-unlikely-use-epa-penalty-relief-policy>.



Gibson Dunn's lawyers are available to assist in addressing any questions you may have regarding these developments. Please contact the Gibson Dunn lawyer with whom you usually work, any member of the firm's Environmental Litigation and Mass Tort or Oil and Gas practice groups, or the authors:

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