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Keep Calm and Carry On - Self-Audits Under UDEQ's Agreement with EPA

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On July 27, 2020, the Utah Department of Environmental Quality (DEQ) and Region 8 of the Environmental Protection Agency (EPA) (collectively, the “Parties”) entered into a Memorandum of Agreement (MOA) related to self-audits conducted under Utah law. EPA's standard practice is to enter into similar MOAs when states have self-audit statutes. Therefore, the MOA is similar to agreements in states like Wyoming. However, the MOA is a unique document, with various provisions that the regulated community should keep in mind when considering whether to conduct a self-audit in Utah.

Key Provisions of the MOA

The stated purpose of the MOA is to establish procedures and policies for the administration of Utah's Environmental Self-Evaluation Act (the “Self-Audit Act”). To that end, the Parties agree to promote more self-policing among the regulated community. In order to ensure increased self-policing, EPA agrees that it will not investigate a regulated entity simply because the entity sought penalty immunity under the Self-Audit Act. In addition, EPA will not request an environmental self-audit report in order to initiate a civil investigation. While these commitments from EPA might encourage some regulated entities to conduct more frequent self-audits, the MOU expressly acknowledges that EPA can obtain information that may be contained in a self-audit report via other means.

Under the MOA, if EPA does obtain information by some other means and finds that violations of a federally-delegated environmental law: (a) were discovered during a self-audit but not disclosed; (b) were disclosed but have not been corrected; or (c) are not currently subject to an order under Utah Code Section 19-7-109, the EPA can take enforcement action based on those violations. In addition, while EPA will generally defer to DEQ's judgment on penalty assessments, it need not do so in every instance. If DEQ's “pattern and practice of penalty mitigation results in implementation of a federally delegated program that is less stringent than the federal program[.]” EPA can request that DEQ seek penalties. If DEQ declines to do so, EPA can take action on its own.

Implications for the Regulated Community

Although much of the MOA is consistent with current statutes and general practice, there are a few items which the regulated community should keep in mind.

- First, the MOA does not affect EPA's authority to seek injunctive relief or to correct ongoing violations of federal law that are not being addressed by DEQ, nor does it affect EPA's ability to address an imminent and substantial endangerment.
- Second, under the MOA, conducting a self-audit might not completely shield a regulated entity from facing civil penalties.
- Finally, a regulated entity that conducts a self-audit must take care to not only disclose all violations discovered during the audit but also correct all discovered violations.

If members of the regulated community need assistance in interpreting the MOA or understanding how they could be affected by the MOA, attorneys in Holland & Hart's Energy, Environment, and Natural Resources Group are prepared to help.

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