

Tennessee's Policy Encouraging Self-Policing and Voluntary Correction

The Tennessee Department of Environmental and Conservation ("TDEC") has recently formalized its policy encouraging self-policing and voluntary correction of environmental violations. It became policy in Tennessee on November 17, 2011 when signed by TDEC Commissioner Robert J. Martineau. The Tennessee policy is based upon the U.S. EPA's Self-Reporting Policy of 1995 and revision in 2000.

The purpose of the policy is to encourage companies and individuals (referred to in the policy as "regulated entities") to voluntarily discover their own violations of state environmental requirements, to disclose those violations to TDEC, and to take action to correct the violations and get back into compliance. The incentives for voluntarily discovering, reporting, and correcting one's own violations are threefold. First, if a regulated entity has fully complied with the conditions of the policy, TDEC will not seek non-contingent civil penalties for the violation (unless TDEC determines that the entity made a significant economic gain because of the violation). Second, TDEC will not recommend that criminal charges be brought against an entity that has complied with the policy. And third, TDEC will not routinely request or use an environmental audit report; therefore, regulated entities should not forego conducting self-audits out of fear of having to furnish copies to TDEC in the event of a routine inspection.

There are nine basic conditions that a regulated entity must satisfy to comply with the policy.

1. The violation must have been discovered during the course of (i) an environmental audit; (ii) a systematic procedure reflecting the regulated entity's due diligence in preventing, detecting, and correcting violations; or (iii) on-site assistance with environmental compliance or pollution prevention given to a small business by a governmental entity.
2. The process by which the violation was discovered must have been initiated voluntarily, and not through a legally-required activity. For example, the policy does not apply to violations of permit emissions or discharge standards detected through required periodic sampling.
3. The violation must be disclosed to TDEC in writing within 21 days of discovery.
4. The violation must be discovered and disclosed prior to (i) the commencement of a governmental inspection or issuance of an agency request for information; (ii) notice of a citizen suit; (iii) the filing of a complaint by a third party; (iv) the reporting of the violation by a "whistleblower" employee; or (v) the imminent discovery of the violation by a governmental agency.
5. The violation must be corrected within 60 days of discovery (or such longer period as agreed to by TDEC if the violation cannot be corrected within 60 days).
6. The regulated entity must agree in writing to take steps to prevent a recurrence of the violation.
7. The specific violation (or closely related violation) must not have occurred within the prior three years at the same facility or other facilities of the regulated entity, and it must not be part of a pattern of violations by the facility's parent organization (if any) within the prior five years.
8. The violation is not one which (i) resulted in serious actual harm or presented an imminent and substantial

endangerment to human health or the environment; or (ii) violated the specific terms of any judicial or administrative order or consent agreement.

9. The regulated entity must cooperate with TDEC and provide such information as is necessary to determine the applicability of the policy. TDEC hopes that by means of this self-policing policy, companies and individual business owners will adopt appropriate self-auditing procedures and will voluntarily report and correct any violations discovered thereby rather than risk the discovery of such violations by TDEC through an inspection or otherwise. The latter situation could lead to much harsher penalties, which could even include criminal prosecutions.

It is important to note that the policy does not absolve a complying company of any and all civil penalties. The policy generally saves a violator from non-contingent civil penalties (sometimes called “up front” penalties). TDEC is still entitled to impose contingent civil penalties, which are penalties that only become due if a company or individual who received a Commissioner’s Order fails to comply with the provisions of the Order. For example, failing to meet a deadline in a corrective action schedule that was incorporated into an Order would likely result in contingent penalties as provided in the Order.

Furthermore, as mentioned above, TDEC may assess non-contingent penalties if the violation resulted in a significant economic gain for the violator. TDEC’s position is that it is not fair for a regulated entity to obtain a competitive advantage in the marketplace by means of noncompliance with environmental laws, and that having the option to impose civil penalties in such cases is simply “leveling the playing field” for the entire regulated community.

It is also important to note that in any situation in which TDEC has reason to believe that a company or individual is not acting in good faith, TDEC is not bound to follow the policy, and generally will not.

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The opinions expressed in this bulletin are intended for general guidance only. They are not intended as recommendations for specific situations. As always, readers should consult a qualified attorney for specific legal guidance. Should you need assistance from a Miller & Martin attorney, please call 1-800-275-7303.

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