CEEC

Corporate Environmental Enforcement Council

Submitted Electronically

Date: July 13, 2007

Attn: Docket Docket ID No. EPA-HQ-OECA-2007-0291.

Re: Corporate Environmental Enforcement Council Comments on Enhancing Environmental Outcomes from Audit Policy Disclosures Through Tailored Incentives for New Owners

The Corporate Environmental Enforcement Council (CEEC) appreciates the opportunity to submit the attached comment on EPA's Request for Comments in the May 14, 2007 Federal Register entitled "Enhancing Environmental Outcomes from Audit Policy Disclosures through Tailored Incentives for New Owners."

The Corporate Environmental Enforcement Counsel (CEEC) is an organization of corporate counsel and environmental professionals representing thirty major companies from a wide range of industrial sectors. CEEC focuses exclusively on civil and criminal environmental enforcement policy issues and activities by providing a forum for review and discussion of such issues and developing constructive recommendations to executive and legislative environmental enforcement policymakers.

We thank you for the opportunity to participate in this process and look forward to continuing the dialogue with the Agency on these important issues.

Sincerely,

Steven B. Hellem
Executive Director

COMMENTS OF THE CORPORATE ENVIRONMENTAL ENFORCEMENT COUNCIL IN RESPONSE TO THE U.S. ENVIRONMENTAL PROTECTION AGENCY'S MAY 14, 2007 REQUEST FOR COMMENTS ON ENHANCING ENVIRONMENTAL OUTCOMES FROM AUDIT POLICY DISCLOSURES THROUGH TAILORED INCENTIVES FOR NEW OWNERS

EPA-HQ-OECA-2007-0291

July 13, 2007

The Corporate Environmental Enforcement Council ("CEEC") appreciates the opportunity to submit these comments to the U.S. Environmental Protection Agency ("EPA" or "the Agency") regarding the Agency's Request for Comments in the May 14, 2007 Federal Register (72 Fed.Reg. 27116) entitled "Enhancing Environmental Outcomes from Audit Policy Disclosures through Tailored Incentives for New Owners." These comments are submitted in conjunction with, and should be considered together with, comments submitted by Robert H. Fuhrman, Seneca Economics and Environment LLC, on behalf of CEEC and the American Chemistry Council.

CEEC is an organization comprised of corporate counsel and environmental professionals from 30 companies, encompassing a wide range of industrial sectors, that focus on civil and criminal environmental enforcement issues.

CEEC has always been committed to a strong and effective enforcement program, and has frequently worked with EPA on enforcement issues such as the development and implementation of the Agency's Audit Policy.

As a general matter, the Audit Policy has been a useful tool for companies that are subject to myriad environmental regulatory requirements, and we have supported and continue to support Agency efforts to make the Audit Policy more effective and taking the steps necessary to encourage the more widespread use of the Audit Policy.

General Comments

CEEC supports the Agency's efforts to consider offering tailored incentives to encourage new owners of regulated entities to use the Audit Policy in the "new owner context," and the development of a pilot program to implement such incentives. In that regard EPA has identified a number of issues and questions in the May 14th Federal Register notice regarding its belief that new owners may be "well-situated and highly motivated" to conduct compliance audits at newly acquired facilities. By offering tailored incentives, EPA will encourage and enable new owners to take proactive steps to discover and address potential historical compliance issues ultimately leading to environmental benefits realized in a more efficient and timely fashion.

CEEC believes that the Agency is focusing on the right issues and questions with respect to the pilot program. As the Agency implements this new approach, it is

essential to provide new owners with clear expectations and a predictable outcome. We also believe that it is important for the Office of Enforcement and Compliance Assurance to communicate throughout the compliance program how new owner issues should be treated.

Certain references in the Federal Register notice indicate a continuing concern by EPA that these types of incentives not be abused. CEEC believes that this concern may be excessive in this context, given the realities of mergers and acquisitions. We encourage EPA to seek the information it needs to alleviate these concerns.

For example, EPA posits that providing tailored incentives "could cause sellers to further delay or avoid compliance" or "could have the unintended effect of encouraging buyers to perform inadequate due diligence." EPA also suggests that "there should be no possibility that a firm could evade significant environmental liabilities by making superficial changes designed to make it appear as if the regulated entity has a new owner."

CEEC submits that this does not reflect either the manner in which these types of issues are addressed in the real world of mergers and acquisitions or the motivations that drive mergers and acquisitions, as discussed further in the Specific Comments below. Rather, this approach appears to be an indication that EPA remains unduly suspicious of companies and their motives, and fears that any company that seeks to avail itself of the Audit Policy is somehow getting away with something. As a result of this distrust/fear, the Agency subjects any issue relating to self-disclosure and the Audit Policy to a level of strict scrutiny that CEEC does not believe is warranted.

Furthermore, this perception of distrust is counterproductive to EPA's efforts to encourage more companies to utilize the Audit Policy. Companies are less likely to come forward and self-disclose if they believe that EPA is pre-disposed to challenge the disclosure or question the underlying motives of the company making the disclosure.

As stated, the Audit Policy and EPA's proposed treatment of new owners will have the important benefit of improving environmental compliance with potentially each new acquisition. Encouraging new owners to take advantage of the tailored incentives is important to enhancing the use and utility of the Audit Policy.

While CEEC commends the Agency for its efforts to thoroughly understand these broader issues, there are also a number of specific comments that we ask the Agency to consider and address.

Specific Comments

Recognize Realities of Merger and Acquisition Transactions. In developing this pilot program we believe it is essential that EPA recognize that its concerns regarding the potential impact of a pilot program are not based on a typical situation, given how mergers and acquisitions take place in today's competitive marketplace. EPA should take care to design its qualification criteria based on a typical, responsible new owner

(one likely to consider stepping forward to work with regulators), not an exceptional case where an acquiring company may try to abuse the system.

With respect to the issue of who should qualify as a "new owner," we believe it is unlikely that companies – buyers and/or sellers -- would enter into transactions for the sole purpose of being considered a "new owner" potentially eligible for beneficial treatment under the pilot program. Mergers and acquisitions will continue to take place for legitimate business purposes. The possibility of an unscrupulous company using the policy as a tool to avoid or limit exposure for noncompliance with environmental laws is remote.

CEEC acknowledges that there may be some types of internal, reorganization-driven transactions or corporate spin-offs that may arguably create a "new owner" of a business but in circumstances where the management control of the business in question remains the same as before the transaction. CEEC understands the Agency's concern with respect to extending the benefits of the Audit Policy to the "new owner" in that scenario, and suggests that in those circumstances the Agency consider a "management control" test to determine eligibility for treatment under the Audit Policy – where the "new owner" held management control over the business in question prior to the transaction (and thus had the ability to conduct environmental audits of the business prior to the transaction), that "new owner" would not be eligible for Audit Policy relief under the pilot program.

Further, it is highly unlikely that a seller in the merger and acquisition context would affirmatively "delay or avoid compliance" with environmental requirements based on the potential relief that a buyer might be eligible for after the deal closes. Companies strive to comply with environmental regulations on an ongoing basis, and the current owner of a facility will not compromise its compliance status based on potential relief from environmental liabilities that might accrue to a buyer of the facility.

Finally, potential buyers are not likely to perform a lower scale due diligence based on potential post-closing relief under the Audit Policy. In any merger or acquisition the scope of the due diligence performed is and will continue to be driven by the circumstances of the transaction – circumstances including the timing and nature of the deal (including whether the transaction is a purchase and sale of the stock or of the assets of the selling company, as well as whether the transaction is an "arms-length" deal (where full due diligence may occur) or a hostile takeover (where very limited, if any, due diligence may be available), the nature of the business being acquired, business decisions on indemnification, confidentiality of information, etc.

Ensure no Deterrent to Post-Closing Audits. Any pilot program that seeks to offer tailored incentives should contain sufficient protections such that a new owner is not deterred from performing post-closing environmental audits for fear that they could face civil penalties for noncompliance (whether gravity-based or economic benefit) for either pre-closing violations **or** for noncompliance continuing after the closing but prior to the time that a new owner has the opportunity to conduct a full audit and bring the asset or assets into compliance.

Economic Benefit of a Price Adjustment or Indemnification Agreement. Even if a transaction includes either a price adjustment or an environmental indemnification that is designed to cover the costs of bringing the asset or business into compliance, there is no monetary benefit to the buyer, as any deal savings or indemnification revenue it realizes will be spent as the buyer incurs the cost of bringing the asset or business into compliance. The issue of how to treat "economic benefit" in the context of this pilot program is discussed in greater detail in the comments submitted by Seneca Economics and Environment LLC on behalf of CEEC and ACC.

Acceptable Timeframe. EPA has requested comment on what constitutes an acceptable timeframe within which a new owner must disclose and correct noncompliance to qualify for treatment under the Audit Policy and the pilot program. Because the circumstances of individual transactions vary significantly, we believe that the pilot program should contain a flexible mechanism that both avoids creating an artificial barrier to eligibility and creates an incentive to conduct audits and remedy noncompliance as quickly as possible under the circumstances. In addition, the pilot program must contain mechanisms for both disclosure of noncompliance discovered during due diligence conducted pre-closing and noncompliance discovered in the course of a post closing audit. We recommend the following general approach:

(1) For noncompliance discovered during pre-closing due diligence, notice must be given to the Agency within sixty (60) days of the closing; and

(2) For post-closing audits, the new owner must, within sixty (60) days of the closing, either conduct the audit and disclose noncompliance or give notice to the EPA that it is the new owner of the asset/business, and that it intends to conduct a post-closing environmental review of operations. Where the new owner gives notice that it intends to conduct a post-closing review, the new owner must commence the audit within one (1) year of the closing, and it must be completed within two (2) years of the closing, again with an opportunity for an extension if circumstances warrant.

We would also suggest that the Agency retain case-by-case discretion to allow companies that disclose outside of these timeframes to remain eligible for Audit Policy treatment if extraordinary circumstances prevented disclosure within the timeframes.

Conclusion

CEEC strongly supports the goal of more widespread use of the Audit Policy to increase the number of disclosures with the potential to yield significant environmental benefits. We believe this goal can be achieved if EPA provides new owners with incentives tailored to their unique situation. Key elements to those incentives are the recognition that bona fide new owners that correct violations typically do not garner economic benefit, treatment of new owners as distinct from a typical enforcement case, including fair press treatment, and a predictable and streamlined resolution process.

CEEC continues to support EPA's efforts that have made the Audit Policy a successful tool, as well as the Agency's efforts to make it a tool that is used more often by the

regulated community. We believe that the current project evaluating tailored incentives and developing a pilot program for new owners is another positive step in those efforts, and CEEC looks forward to continuing to work with the Agency to develop this program and others as well.