



## THE CUBICAL

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### Criminal Enforcement, Voluntary Self-Disclosure & Environmental Justice

On February 23rd, the Department of Justice issued its Voluntary Self-Disclosure ("VSD") Policy for United States Attorneys' Offices. (To access a copy of this guidance, click [here](#).) The VSD Policy sets forth the factors that federal prosecutors are to weigh in determining whether self-disclosures of wrongdoing by a corporation should be considered as voluntary. The Policy also addresses the benefits that may accrue to a corporation that makes a VSD. The VSD Policy is intended to serve as a companion piece to previous DOJ guidance regarding VSD and cooperation.

While the reach of the VSD Policy extends well beyond environmental enforcement, environmental professionals familiar with EPA's Audit Policy will recognize the VSD Policy's fundamental principles. To be considered voluntary, the self-disclosure must be made prior to an imminent threat of a separate third-party disclosure or a government investigation. The disclosure must be made within a reasonably prompt time after the company becomes aware of the alleged misconduct.

Among the companion pieces to this guidance, corporate criminal enforcement guidance from DOJ's Environmental and Natural Resources Division ("ENRD") establishes additional relevant factors for federal prosecutors to consider. (To access a copy of this guidance, click [here](#).) These factors mirror similar factors in EPA's Audit Policy. To take just one example, if the corporate entity had recently been penalized for a violation that is the same or similar to the violation being disclosed, the self-disclosure may not be considered as voluntary.

The biggest difference between the VSD Policy and the EPA Audit Policy is that the VSD Policy provides federal prosecutors with considerably more discretion on

whether and how to proceed with prosecutions of corporations for criminal environmental violations. If a corporation can establish that it meets the criteria set forth in the Audit Policy, it will almost certainly obtain at least a 75% reduction in the gravity component of a monetary penalty. In contrast, a federal prosecutor who determines that a corporation's self-disclosure is voluntary under the VSD Policy still has latitude in deciding whether to prosecute, seek a guilty plea, and/or require the establishment of an independent monitor.

One question that the VSD Policy does not answer is how decisions on whether to prosecute a corporation for environmental violations might be impacted by Environmental Justice ("EJ") considerations. On June 20, 2021, EPA's Office of Enforcement and Compliance Assistance ("OECA") issued a memorandum entitled *Strengthening Environmental Justice Through Criminal Enforcement*. (To see more on this memorandum in the July 6, 2021 edition of The Cubical, click [here](#).) In this memorandum, EPA highlights the importance of environmental criminal prosecutions being structured to "yield meaningful protection for communities and address the harm caused by criminal offenses." This may not necessarily be at odds with the VSD Policy. Even when a self-disclosure is considered to be voluntary, the VSD Policy calls for restitution and other appropriate forms of remediation. However, situations may arise where EPA's approach to strengthening EJ through criminal enforcement and DOJ's VSD Policy are at odds with each other. It remains to be seen how such situations will be resolved.

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## **Behind the Numbers: HazWaste Enforcement in South Carolina in 2022**



One of the most prevalent environmental enforcement risks for operations of all shapes and sizes is noncompliance with the requirements for generators of regulated hazardous waste. One of the primary purposes of hazardous waste regulation is to administer a "cradle-to-grave" system for the proper management, treatment, and ultimate disposal of hazardous waste. Generators are a key cog in this "regulatory wheel" because they occupy a significant segment of the cradle-to-grave management chain. From the moment hazardous waste is generated right up until the time the waste is shipped off-site, there are a multitude of functions and responsibilities that a generator must fulfill. Even after hazardous waste leaves the operating site, the generator remains obligated to ensure that the shipment of hazardous waste arrives at its intended final destination. Any flaws and defects in a hazardous waste generator's compliance program are likely to manifest themselves throughout the waste management chain. Violations can pile up quickly, leaving the generator to face significant penalties.

A closer look at the hazardous waste enforcement activity in South Carolina last year offers a useful illustration of this risk. In the first eleven months of 2022, the South Carolina Department of Health and Environmental Control ("SCDHEC") issued 21 hazardous waste consent orders with total penalties exceeding \$300,000. Most of these consent orders addressed violations of the generator requirements under South Carolina's hazardous waste management regulations. SCDHEC issued at least one hazardous waste consent order in ten of those first eleven months.

When looking at the consent orders with penalties in excess of \$10,000, one thing jumps out: The generator's problems started at the point of waste generation. The problems often started here because the generator apparently did not realize it was generating a hazardous waste in the first place. In more than half of the consent orders with penalties in excess of \$10,000, the generator was cited for failure to make and/or properly document hazardous waste determinations. Failures to make such determinations often lead to more violations throughout the waste management chain. These problems can grow exponentially if improperly designated wastes are being shipped off to facilities that are not permitted to treat or dispose of such wastes.

Generators often get tripped up at the very beginning of the waste management chain by failing to properly make and/or document the critical threshold determination of whether a waste is hazardous. When they do, they often find themselves on the wrong end of sizable penalties.

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