Holland & Hart

New Mexico Stiffens Penalties for Air Quality Violations and Tightens Environmental Audit Policy



Kayleigh Verboncoeur

Associate
303.290.1088
Denver
kyverboncoeur@hollandhart.com



Adam Rankin

Partner
505.954.7294
Santa Fe
agrankin@hollandhart.com



Aaron Tucker

Partner
303.295.8369
Denver, Santa Fe
abtucker@hollandhart.com

Insight — September 16, 2024

On September 4, 2024, the New Mexico Environment Department's Air Quality Bureau (AQB) updated its Civil Penalty Policy, making several key changes to its assessment of civil penalties and administrative compliance costs in enforcement actions as well as its environmental audit policy. The new policy is effective October 4, 2024 and replaces the AQB's existing policy from June 2022. Companies subject to AQB jurisdiction should take note of these changes, which may have important impacts on compliance and enforcement going forward.

Increased Penalties for Air Quality Violations

AQB's new Civil Penalty Policy increases the potential civil penalties for all air quality violations—increasing the base penalties (up to $7500) and multi-day component (up to $1000) under the gravity component of its penalty calculation as well as under its alternative assessment for excess emissions. The new policy not only imposes higher penalties for all excess emissions (between $2.00-$4.00 per pound depending on the extent of deviation), but will levy even greater penalties in certain circumstances, such as double penalties for excess emissions of hazardous air pollutants or even higher penalties (up to $30.00 per pound) for continuing events. The new policy also makes notable changes to the use of penalty adjustment factors, particularly its treatment of voluntary disclosure made under the audit policy for purposes of evaluating a company's compliance history. While the new Civil Penalty Policy does not alter the existing statutory maximum civil penalty of $15,000 per day per violation under NMSA 74-2-12.1.A, the policy outlines the key factors and calculations guiding NMED when determining the amount of a civil penalty for violations of the CAA, AQCA, or NMAC.

Assessment of Administrative Compliance Costs

Following a 2023 guidance memo, AQB is now formalizing the assessment of administrative compliance costs in enforcement actions in addition to any civil penalties that may be due. These costs will be applied to regulated entities that incur civil penalties, with the aim of recovering expenses related to the initiation and enforcement of compliance actions. NMED also reserves the right to seek additional administrative compliance costs related to compliance monitoring associated with any settlements and Supplemental Environmental Projects. However, these

new charges do not extend to routine permit verification actions or field citations. Failure to pay administrative compliance costs may incur further penalties and/or civil enforcement actions.

New Requirements for Conducting Environmental Audits

Regulated entities now face heightened obligations when conducting environmental audits with AQB. Under the previous policy, entities that satisfied all conditions for a voluntary disclosure were eligible for elimination of the gravity-based penalties. Under AQB's new audit policy, entities that satisfy all conditions for a voluntary disclosure may be eligible for the elimination of gravity-based penalties. Companies will also now be required to submit an environmental audit proposal to AQB for approval prior to initiating an audit. Audit proposals must detail the planned scope of the proposed audit, timelines, and commitments to provide progress reports throughout the audit, as well as a final report at the conclusion of both the audit and any recommended corrective actions. Approval of the audit proposal will require a written agreement between the company undertaking an audit for one or more facilities and the AQB. Once an approved audit is undertaken, NMED now expects violations discovered during the course of the audit to be disclosed, regardless of whether they are eligible for penalty mitigation. Lastly, environmental audits also must now be completed within one year of initiation.

Takeaway

AQB's new Civil Penalty Policy signals a tougher approach to air quality compliance and enforcement by the Bureau. Companies facing an enforcement action or even considering an environmental audit should carefully evaluate how the new policy may affect them.

Subscribe to get our Insights delivered to your inbox.

This publication is designed to provide general information on pertinent legal topics. The statements made are provided for educational purposes only. They do not constitute legal or financial advice nor do they necessarily reflect the views of Holland & Hart LLP or any of its attorneys other than the author(s). This publication is not intended to create an attorney-client relationship between you and Holland & Hart LLP. Substantive changes in the law subsequent to the date of this publication might affect the analysis or commentary. Similarly, the analysis may differ depending on the jurisdiction or circumstances. If you have specific questions as to the application of the law to your activities, you should seek the advice of your legal counsel.