



BUSINESS MATTERS

Volkswagen's Woes Could Affect Ethanol Plants

By James L. Pray

The shocking admission by Volkswagen that it deliberately modified diesel engine emission control software in 11 million vehicles sold worldwide so that it could fake tailpipe emissions compliance will kick off years of civil and criminal litigation. But what does that have to do with ethanol plants and other industrial operations with air emission permits?

Diesel-powered Volkswagen cars and ethanol plants share more than their common tie to the auto industry. Both must meet rigorous emission standards: For Volkswagen cars, it is the exhaust from the tailpipes; and for ethanol plants, it is the emissions from boilers, flares, scrubbers and thermal oxidizers. In both cases, the Clean Air Act gives the U.S. EPA and states significant regulatory authority with strict penalties for noncompliance. Federal and state prosecutors are also equipped with a wide variety of civil and federal fraud statutes if companies deliberately fake or modify test results. Unfortunately for the regulated industry, bad decisions by a few Volkswagen automotive engineers and managers are likely to affect ethanol plants and other industrial operations with air permits.

There are three tools that the government can use to respond to corporate failures: tightened regulation, civil lawsuits and criminal prosecutions.

Regulatory Response

Ethanol plants may see tightened oversight of stack testing and emissions monitoring systems. Regulators will not hesitate to suspect that anyone is capable of that level of deception. The federal government nearly always responds to major industry failures and accidents by significantly tightening enforcement. A good example is the 2013 Lac-Mégantic disaster in Quebec involving a train carrying North Dakota Bakken crude that derailed and exploded, killing 42 people and leveling half of the nearest town. The Department of Transportation swiftly proposed new rules on tank car design that may pose significant problems with ethanol logistics as the rail industry switches to all new cars.

Civil Litigation

The Volkswagen debacle will likely unleash a torrent of litigation. Car owners, class action plaintiffs, environmental groups, state attorneys general, state regulators and the EPA are all now beginning investigations or preparing lawsuits. This will in turn create a cadre of experts who will soon be well-versed in calculating environmental costs associated with dodgy emissions testing. Any industry accused of similarly faking or altering emissions test will face a much more alert and prepared group

of plaintiffs and regulators. The costs associated with an accusation (even if unfounded) of cutting corners on testing can generate massive litigation costs and penalties.

Since 2009, the Justice Department has increased criminal convictions of Clean Air Act violations tenfold. This increase in convictions is largely a reflection of the current administration's laser-like focus on environmental enforcement. Volkswagen chose a very bad time in which to become a target for a criminal prosecution. Normally, a prosecutor's greatest obstacle to getting a criminal conviction is proving to a jury that a corporate defendant intentionally committed a criminal act. The admission by Volkswagen is extremely rare and criminal indictments will be swift to follow. As an attorney with three decades of experience in this field, I know what happens when a client is accused of an environmental crime. You do not want to go through that experience.

What To Expect

The existing regulatory scheme already allows government oversight of many emissions tests. However, the Volkswagen problem will trickle down to other industries. The EPA frequently enacts new regulations to pacify environmental groups and, less frequently now, Congress. I fully expect ethanol plants will face regulators strongly considering requiring additional certifications from senior management that stack tests and emissions monitoring devices are functional and working properly. Assume that unannounced inspections of emissions systems may become more regular.

What To Do

It is no surprise that Volkswagen forced its CEO to resign soon after the fraud revelations were disclosed. A culture of compliance must come from senior management. Also, full disclosure and clarity are the keys to avoiding any accusation that a stack test was faked or doctored. Document all aspects of your emissions monitoring and testing. Communications with consultants handling stack testing must be absolutely clear and there cannot be any misunderstanding regarding the testing parameters or environment. Disclose all conditions that could affect the integrity of a stack test to the regulators in the report. Companies handling stack testing ought to be equally diligent in making sure that their results have not been compromised.

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