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Self-Defense: How to Keep Your Environmental Audit Documents from Killing You

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Air & Waste Management Association
Since 1907

For Presentation at the
85th Annual Meeting & Exhibition
Kansas City, Missouri
June 21-26, 1992

INTRODUCTION.

Most companies in the manufacturing sector are now conducting environmental audits on a regular or intermittent basis. Their managers have recognized that environmental problems cannot be ignored or solutions postponed. This is especially true if the company is subject to SARA Title III[1] reporting and the EPA's Toxics Reduction Initiative. Violations of statutes and permits can bring massive civil penalties, and criminal fines for both companies and individuals. Toxic tort litigation can result from community exposures to toxic and hazardous chemicals. Insurance for these risks is seldom available, and is often unaffordable when available. Compliance audits are a proven tool for defining and managing these risks.

Environmental assessments and audits create and compile a great deal of information. This information can get into the hands of competitors and government agencies unless steps are taken to keep it confidential. In the hands of government agencies, candid self-assessment information can expose the inner workings of a company to the world. There may be times when the company would voluntarily disclose some or all of this information. Likewise, there will be times when the company would prefer not to make disclosures. With a little effort, the company can keep its self-assessment information confidential, and preserve its option to decide when, and under what circumstances, to disclose information.

This paper will discuss: (1) the different points of view on keeping self-assessment information confidential; (2) the procedural steps that must be taken to protect self-assessment information from disclosure to outsiders; and (3) the legal consequences of failure to correct problems that are identified in self-assessments.

WHAT INFORMATION CAN LAWFULLY BE KEPT CONFIDENTIAL?

The starting point for any discussion of confidentiality of documents is the identification of those documents that can lawfully be kept confidential. Many reporting forms, e.g., discharge monitoring reports required under the Clean Water Act, and reports of spills and other incidents are required by law to be filed. Failure to file such reports subjects the violator to civil penalties and may also lead to criminal sanctions.

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1 The Emergency Planning and Community Right-To-Know Act of 1986, 42 U.S.C. §§ 11001 to 11050, is referred to as "SARA Title III", because it was enacted as Title III of the Superfund Amendments and Reauthorization Act of 1986 ("SARA").

KEEPING DOCUMENTS CONFIDENTIAL: DIFFERENT POINTS OF VIEW

Some managers ask: is it necessary or desirable to keep the audit process, and the resulting findings, confidential? Will this mean that the lawyers, rather than the engineers and managers, will control the audit process?

If the facility being audited is a manufacturing plant subject to SARA Title III, the answer to the first question is yes. As a society, the United States has chosen (perhaps by default) to use the judicial system to resolve most conflicts. Many products liability and environmental problems -- from asbestos and toxic torts cases to Superfund matters -- have resulted in extended, adversarial litigation. Some of these cases have destroyed the affected companies. Better preparation before litigation ensued would have saved some of them.

One may argue that there are better ways to resolve problems than litigation, and most people would agree. There are a number of available alternatives. Nevertheless, litigation is always a possibility and it is almost always prudent to prepare for litigation, which is the worst case, and hope that some more attractive alternative will become available.

It is not necessary to turn the environmental audit process over to the lawyers to prepare for litigation. Certainly, legal counsel must be involved in the process, or there is no basis for obtaining confidential treatment of audit findings and conclusions. But, lawyers need not run the whole show. It is the lawyer's job to create the proper matrix of engagement letters and other documents within which the engineers and management can conduct the audit.

HOW DO ENVIRONMENTAL AUDITS FIT INTO OVERALL ENVIRONMENTAL COMPLIANCE EFFORTS AT A FACILITY?

In its broadest sense, compliance auditing involves more than periodic reviews using checklists.

First, of course, management must take care to train its people to run the regulated units and processes properly.

Second, prudent management has already started planning how to reduce or eliminate toxic and hazardous chemical usage. Substitution of safer chemicals is often possible, and installation of different processes.can reduce chemical emissions and wastes.

Because finding new chemical substitutes and retooling processes may take years, management should audit the facility's performance regularly in the meantime.

Where toxic and hazardous chemicals are used and emitted, there is significant risk of "toxic tort" litigation. Many people believe that the 1990's will bring a wave of such litigation, fueled by the availability of SARA Title III information overlaid on health effects data. To minimize the risks of such litigation, management should also audit the facility's document retention program and environmental compliance files. Because such document programs cannot be conducted after litigation ensues, prudent management should start on this effort now.

The importance of good records in an environmental lawsuit cannot be overemphasized. Even if strict liability, eliminates "fault" as a primary consideration, a company's conduct can be very relevant to the issue of the amount of penalties or punitive damages which put the company's conduct directly at issue.

Records can contain unfavorable as well as favorable information. But selectively retaining information, (that is, keeping favorable information and destroying unfavorable material) is ill-advised. In the first instance, selective record retention could violate the law. Moreover, such conduct can give rise to the inference, if not prove, that the company has something to hide. The solution is to retain documents on a non-selective basis despite possible adverse consequences in the short run. A good record retention plan, which establishes scheduled reviews and objective disposition criteria, eliminates many of the problems which can arise from documents destruction.

Because internal records, absent some privilege, are generally discoverable in agency enforcement actions and civil litigation, it is important that employees be made aware that their notes, reports, records and the like should contain well-thought-out factual information, rather that speculation or conjecture. Important documents should be carefully scrutinized in this regard. Sloppy records can be worse than no records at all. The company should examine its files for memoranda and correspondence that raise questions or concerns about environmental compliance and the consequences of the use or emission of toxic or hazardous chemicals. These documents should not be destroyed, except perhaps in accordance with a non-selective document retention policy. In any event, the issues raised in these documents should, be answered in subsequent memoranda, evidencing the company's attention to these concerns and correction of any problems that actually exist.

WHAT IS THE VALUE OF USING OUTSIDE EXPERTS IN ENVIRONMENTAL COMPLIANCE AUDITS?

Why use outsiders? Full-time specialists in environmental auditing have greater familiarity with compliance requirements and agency enforcement practices than can typically be gained, by corporate staff engineers or legal counsel. Outsiders workproduct is often be viewed as more objective.

Why use lawyers? Environmental compliance and enforcement have legal and technical components. While legal counsel should not be making technical assessments, neither should engineers be making legal assessments. Both engineers and legal counsel are indispensable members of the audit team, and together they can improve compliance while minimizing corporate and corporate officer liability.

Outside lawyers who specialize in environmental law are usually familiar with the requirements of agencies, lenders, and attorneys and business advisors for prospective buyers of companies. By helping anticipate those requirements, outside legal counsel can prepare management for those times when some third-party will be looking over its shoulder at its compliance status.

Confidentiality cannot be accomplished without the active involvement of legal counsel, because the means for protecting information from disclosure are the attorney-client privilege and attorney work product.

The role of outside legal counsel is to ensure that (a) adequate procedural steps are taken at the outset to protect the information generated in an environmental audit from disclosure to outsiders, and (b) the scope and detail of the audit questions are sufficient to cover all possible liabilities.

HOW DOES INFORMATION GET OUT OF THE COMPANY'S HANDS AND INTO GOVERNMENTAL OR THIRD PARTY-HANDS?

Voluntary disclosure to agencies and others is the primary way information gets into other hands. A large category of information -- regular self-monitoring reports, incident reports, etc. -- must be submitted by a permittee as a condition to having certain permits.

Other information may be submitted to agencies voluntarily -- in permit applications, in post-incident reports created to head off enforcement actions, etc. -- even though not required by statute.

Once the information is given to anyone outside the company without appropriate agreements, the claim of confidentiality through privilege is waived, and the information is available through agency disclosure or civil discovery.

Very often, agencies cannot keep information confidential, but instead must produce it upon request under freedom of information statutes or other procedures to other agencies or third parties.

Civil discovery is a second disclosure path. In civil lawsuits, any unprivileged document must be produced to the other side upon request. The scope of discovery is very broad, and one may not object to disclosure on the ground that the information sought would not be admissible as evidence at trial so long as it appears reasonably calculated to lead to the discovery of admissible evidence.

The criminal process can also result in information disclosure. Criminal prosecution of companies and management personnel is on the increase where there are knowing violations of environmental statutes. Rules of criminal procedure allow state and federal prosecutors and Judges to subpoena unprivileged information for review by grand juries or the courts.

WHAT ARE THE ATTORNEY-CLIENT AND ATTORNEY WORK PRODUCT PRIVILEGES, AND HOW ARE THEY USED TO PROTECT SENSITIVE DOCUMENTS FROM DISCLOSURE OR DISCOVERY?

The attorney-client privilege protects confidential communications between an attorney and client for the purpose of securing or rendering legal advice. When its specific requirements are met, and if the client has not waived it, the attorney-client privilege is absolute: no showing of exceptional need, even on the basis that the information contained in the confidential communication cannot be learned by other means, can overcome the privilege. However, the privilege protects only the confidential communication itself, not the underlying facts. The facts may be obtained from other sources. The specific requirements for the attorney-client privilege are:

1. The individual or entity asserting the privilege must be a client or potential client at the time of the communication.

2. The person to whom the communication is made is an attorney, acting as a lawyer in connection with the communication.

3. The communication is made by the client -- with no third parties present.

4. The communication is made for the purpose of securing legal opinions or services.

5. The communication is not for the purpose of committing a crime or tort.

6. Communication with counsel for the corporation by corporate employees at the direction of supervisors, within the scope of employee duties and necessary to provide information upon which legal advice to the corporation will be based, is privileged, if employees understood that statements to be privileged when made and the statements are not disclosed to anyone outside those in the corporation with a need to know. Upjohn Co. v. United States. 449 U.S. 383 (1981).

The attorney work product privilege provides the attorney with a zone of privacy so he can prepare his client's case to the fullest extent possible, free from exposure of the case to his adversary.

This privilege protects from disclosure materials prepared by an attorney, in anticipation of litigation. Covered are the attorney's legal strategy, intended lines of proof, evaluation of the strengths and weaknesses of the case, and inferences drawn from interviews of witnesses. These mental impressions and beliefs are protected whether in the form of notes, memoranda, or correspondence. These include oral statements of witnesses to counsel and materials prepared by investigators, accountants, engineers, and other experts performing their functions under the attorney's direction.

Work product material may be discovered if the party seeking disclosure is able to show that there is a substantial need for the material and he will experience undue hardship in obtaining that material through other means. Hickman v. Taylor, 329 U.S. 495 (1947); c.f., Rule 26 (b)(3) of the Federal Rules of Civil Procedure.

HOW IS THE CORRECT FOUNDATION FOR THE AUDIT PROCESS CREATED?

Clear documentation must be provided to show that counsel was retained to provide legal advice and that the audit was conducted pursuant to a need to provide, legal advice on the issue. The letter should provide the company's authorization to conduct the audit, identify the "client", recite the elements necessary to lay the foundation for the attorney-client and attorney work product privileges, and describe the range of possible litigation broadly.

All documents should be marked as privileged and confidential and as attorney work product.

Corporate employees should be interviewed by, and communicate directly with, counsel.

The company and counsel should direct that communications be kept confidential.

All consultants employed should be engaged by legal counsel, and his letter should meet the same requirements as the letter retaining counsel.

ARE THERE STEPS THAT THE COMPANY CAN TAKE TO AVOID WAIVER OF THE PRIVILEGES IF INFORMATION MUST BE DISCLOSED TO AGENCIES OR OTHERS?

The company should seek an express agreement from the agency that disclosure does not constitute a waiver of the attorney-client or attorney work product privileges. Such an agreement may protect the company from having to make further disclosures in subsequent agency proceedings and to third parties. See In Re Martin Marietta. 856 F.2d 619 (4th Cir. 1988), cert. denied, 109 S.Ct. 1665 (1989).[2]

When dealing with lenders, prospective buyers and other private parties, the company may likewise obtain confidentiality agreements which recite that disclosure does not waive applicable privileges. Such agreements are akin to joint defense agreements among defendants in litigation.

CONCLUSION

Outside legal counsel can help the client company (a) take adequate procedural steps at the outset to protect audit work product from disclosure to outsiders, and (b) make the scope and detail of the audit questions sufficient to cover all possible liabilities.

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2 In this case, the company was threatened with criminal prosecution for overcharging the Defense Department for travel costs. In an effort to head off prosecution, the company gave the government a detailed written paper that included certain findings of an internal investigation. No agreement was made with prosecutors to preserve the privileges for the information. The government was not satisfied, and the company pleaded guilty to the criminal charges. Later, the grand jury indicted one company employee, a low level manager. In preparing his defense, his attorney subpoenaed certain witness statements, notes and internal audit reports compiled during the internal investigation. The company refused to produce the materials, arguing that they were privileged, but the court required the company to give them up, finding that the company had waived the privilege by voluntarily making the disclosure to the government.

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