

AUDITS: ONE TOOL TO LIMIT ENVIRONMENTAL LIABILITY

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Businesses are required to comply with countless federal, state and local environmental regulations. Because these rules are constantly changing, maintaining a perfect compliance record is a difficult, if not impossible, task. Small and medium sized businesses, particularly those without full time environmental compliance managers, face unique challenges in tracking ever changing environmental regulations.

State and federal environmental laws now contain tough new provisions that impose criminal liability upon environmental offenders. As a result, individuals and firms who are subject to environmental regulations may now face stiff fines and jail time if they fail to comply with environmental laws.

Environmental audits are valuable as compliance assurance and risk assessment tools and, at the same time, potentially very risky. Audits are valuable because they can give managers and officers an independent and concentrated expert evaluation of compliance status. However, audits are sometimes viewed as risky because they result in a written record of compliance problems which can be used against the company and its employees if it is not protected. Whether environmental audits can be protected from disclosure under legal privileges is uncertain under present law.

There are a number of risks associated with undertaking an environmental audit. The audit may uncover problems that must be reported to the authorities, thereby triggering a potentially damaging sequence of enforcement proceedings, clean-up activities, demands for civil penalties, adverse publicity and possible civil litigation. If the audit findings are ignored, the adverse consequences may be even more severe. A company's past transgressions may eventually be discovered and the business and its responsible corporate officers could face criminal sanctions under state or federal law for knowing of the violations.

In 1986 the U.S. Environmental Protection Agency issued an audit policy encouraging audits but did not furnish any assurance that the information will not be used against the company that undertakes the audit. In 1991 the U.S. Department of Justice issued a guidance document, which recognized that prosecutions should not create a disincentive for audits and other self-policing activities. Unfortunately, none of the states in the upper Midwest region have adopted similar policies. Unless prosecutors exercise their considerable discretion and give substantial credit to firms that undertake audits, there is nothing short of compliance perfection that will assure that a business manager will not be subject to prosecution. Many attorneys believe that the risk of criminal prosecution created by environmental auditing is out-weighted by the risk of getting caught out of compliance by regulators.

Although the potential exists for the government to use audit-generated information as a basis for a criminal prosecution, it is important for companies and their officers to consider the likelihood that criminal prosecutions will be vigorously pursued in such cases. Generally, felony level criminal sanctions will be reserved for the most flagrant cases where a target has a history of non-compliance or engaged in wanton conduct that has caused great harm to the environment. Limitations on government resources dictate that most noncompliance situations will continue to be resolved through the administrative process. Moreover, prosecutors must recognize the beneficial aspects of auditing and other self-

policing activity. If prosecutors begin to routinely use audits to support criminal cases, this practice will only serve to undermine the government's overall objective of achieving compliance with environmental laws.

Despite the risks associated with audits, a number of major corporations, including several major oil companies, have chosen to devote significant resources to broad environmental compliance efforts. The Chemical Manufacturers Association requires its members to have auditing programs in place. Many businesses have weighed the risks associated with audits and decided that a strong compliance record coupled with a sincere commitment to correcting the problems that do arise will help them build trust and confidence with government agencies.

A company that undertakes an environmental audit may be able to invoke a "due diligence" defense to a criminal prosecution. Nevertheless, a company and its officials who are considering an audit need to carefully consider their actions. An audit should be designed so that portions of the program receive confidentiality protection. An audit should be designed to shield "responsible corporate officers" and provide an adequate defense against "knowing" violations that may serve as the basis for a criminal prosecution.

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