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When to Conduct an Audit and When to Just Fix the Problem

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Environmental or safety compliance audits can be great tools to determine compliance status, assess whether programs or departments are operating as they should, and to educate and train employees. But if there is not management commitment and sufficient resources available to address the audit findings, an audit has the potential to create more harm than good. While certain audits or components of them may be able to be protected by attorney-client privilege, that does not necessarily address the potential liability of knowing there is a problem and not addressing it.

This article discusses factors to consider when determining whether it is appropriate to conduct an audit, and when it may make sense to just fix a known or likely problem instead of auditing first. Sometimes the best advice is to simply put compliant programs in place and perform necessary training to ensure both current and future compliance.

Various environmental and safety laws impose requirements on industrial facilities, commercial buildings and even offices. For example, the generation of hazardous waste can trigger certain operational, record-keeping and reporting requirements, and failing to comply can have serious enforcement repercussions if discovered by the U.S. Environmental Protection Agency or a state environmental agency. Similarly, failing to have required written programs and procedures or to perform requisite monitoring and training under Occupational Safety and Health Administration regulations can put employees at risk and can subject an employer to citations and penalties. Moreover, the EPA, OSHA and state agencies can often look back several years and assess penalties for past violations, thereby multiplying the financial impact of any current noncompliance. In light of the potential penalties and enforcement actions and the potential risk to employees and property that can result from failing to comply with environmental, health and safety (EHS) requirements, EHS compliance is of paramount importance to the owners and operators of regulated facilities.

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So, how should a regulated entity ensure that its facility or business is in compliance with EHS requirements? There is no one-size-fits-all approach to resolving this question. Often, a manager responsible for EHS will want to perform an audit to get his or her hands around all compliance issues. While an audit can be a great tool for accomplishing this goal, it can also have unintended negative consequences. When deciding whether to embark on an audit, questions to consider include: Are management and sufficient resources committed to addressing noncompliant items found during the audit? Should the audit be structured so as to be protected by the attorney-client privilege? Might the company want to take advantage of available federal and state audit policies?

If a company is not committed to expending the necessary resources to address the findings of an audit, the consequences of an audit can include turning violations into "knowing" or "willful" violations, thereby increasing the company's exposure and potential penalties, as well as creating a document that provides the relevant agencies with a roadmap to the company's violations.

To address these concerns, a company often considers structuring the audit so the results are protected by the attorney-client privilege. However, an audit is only protected by the attorney-client privilege if the company has hired a lawyer to

provide it legal advice (such as concerning its compliance status) and the audit is being used as a tool to provide necessary information to the lawyer. (See *Conrail v. Department of Environmental Protection*, 1999 EHB 204.) Simply cc'ing an attorney is not sufficient to make an audit privileged; legal advice must be the purpose of the audit. A drawback of performing an audit under privilege is that the information obtained should be treated as confidential in order to maintain the privilege, which may defeat a critical goal of the audit. Also, whether an audit will eventually be viewed as privileged is not always certain and the underlying facts (such as sampling results) may not be considered privileged no matter how the audit is structured.

Some of the limitations of performing an audit under the attorney-client privilege can be addressed by taking advantage of available audit policies. Also, even if an audit is initially structured to be covered by the attorney-client privilege, a company can sometimes still take advantage of federal or state audit policies if it complies with the applicable notice periods and other requirements of the policy.

Under the EPA's "Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations" policy, for disclosures meeting the nine criteria established in the audit policy (including disclosing to the EPA within 21 days of discovering a violation, and, in most cases, correcting and remediating within 60 days of discovery), the EPA will not assess the gravity-based portion of a civil penalty, will not recommend criminal prosecution and will not routinely request copies of the audit report. The audit policy thereby offers important incentives to encourage facilities to voluntarily disclose and correct environmental violations. Many states have similar audit policies for violations of state environmental laws.

However, not every state has an audit policy, and some that do also require disclosure before the audit begins. Thus, making a disclosure to the EPA can sometimes make your facility a target for state scrutiny. And while OSHA's policy is to not routinely request self-audit reports, OSHA can still request them, has no policy regarding penalty reduction and will not view the audit as evidence of a willful violation only if it views the employer as having promptly taken appropriate corrective measures, as in *BP Products North America*, OSHRC Docket No. 10-0637 (August 12, 2013), which is pending Occupational Safety and Health Review Commission review.

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One option that companies should consider is limiting the scope of an audit. A company need not audit all requirements or all programs at the same time. If an EHS manager is concerned about his or her company's compliance with a specific environmental or safety program, why not start by auditing just that program? Limiting an audit in this way requires less of an initial commitment, and if you obtain positive results, it may assist you in convincing others to make the necessary commitment for a broader audit.

Alternatively, if a company becomes aware or suspects that it is not in compliance with a specific environmental or safety requirement, sometimes the best approach may be to simply put compliant programs or procedures in place and perform the necessary training to ensure both current and future compliance. Under this approach, the company may still have exposure for past violations, but an inspector who comes to the facility will observe that the company is currently in compliance and so may not even investigate historic compliance. For example, for a facility that realizes it is registered as a small-quantity generator of hazardous waste but routinely exceeds the relevant thresholds for large-quantity generator status, it may be best to implement the necessary requirements and re-register the facility without flagging the prior noncompliance through an audit disclosure. Similarly, if a facility requires a spill prevention, control and countermeasure plan, but one is not in place, the best approach may well be to simply put the plan in place without trying to obtain audit policy protection. In fact, simply addressing the noncompliance can be the best approach even when an audit was originally designed to comply with an audit policy, especially where there is concern about being able to satisfy the requisite elements of the policy. In contrast, if attaining compliance will require submittals to an agency that will likely trigger questions regarding why the company had not previously made these submissions, then it is typically best to try to take advantage of an audit policy. Examples of this type of requirement include submissions of MSDS (material safety data sheet) and Tier II and toxic release inventory forms under the Emergency Planning and Community Right-to-Know Act, or obtaining a necessary stormwater permit.

Self-audits and agency disclosures have significant potential benefits in terms of penalty mitigation, but come with certain risks that should not be overlooked. Sometimes the best approach is to put compliant programs in place and perform the necessary training to achieve current and future compliance. •