COMPLIANCE AUDITS FOR ENVIRONMENTAL HEALTH

by

Chesley N. Blevins

Abstract: Environmental Compliance Audits are an emerging way for responsible entities to remain or become healthy by avoiding or limiting liability for non-compliance with environmental laws, regulations and permits. This paper describes, in concise and logical terms, methods by which a regulated entity can attain and maintain environmental health and regulatory compliance. Compliance audits range from media-specific (air, water, wastes) to comprehensive or multimedia. While environmental audits can be costly in terms of time and money, they can be far less expensive than a governmental enforcement action. Self-auditing statutes promulgated by many states offer limited privileges and immunities. With privileges and immunities in mind, entities should always conduct compliance audits with or through an attorney, not only for identification by the attorney of potential liability issues, but to maximize any privileges available. The International Organization for Standardization (ISO) has issued standards which provide audit guidelines which describe environmental audit requirements, objectives and scope, criteria, evidence and findings, conclusions and reporting. However, there is no one "best" approach. Companies are encouraged to utilize recognized successful audit program elements including a project plan, the use of individuals knowledgeable in environmental regulations, preplanning for audit activity by operating as if an audit were imminent, providing training for the environmental staff on all regulations as well as auditing procedures, organizing technical and compliance information in a central location, and conducting informal self-audits on a routine basis.

Additional Key Words: Privilege, immunity, confidentiality, Final Audit Report, computerized audit tracking, regulated entity, liability, self-evaluation, implementation, "Report Card", risk management, project plan, attorney, consultant.

Introduction

In the same way that preventive care is the best, most cost- effective way for a person to attain good health and remain healthy, for a regulated entity to attain and maintain its health as it relates to environmental and regulatory compliance, it must have a plan and a commitment to understand local, state and federal requirements, and to assure that those requirements are consistently met. COMPLIANCE AUDITS, effectively structured and consistently undertaken, can fill this need.

Local, state and federal environmental laws and regulations are constantly changing and have become more complex in recent years. Just as importantly, the economic and personal costs of noncompliance have skyrocketed. Even with the current reevaluation of many environmental laws and regulations, due diligence reviews and periodic assessment of environmental compliance, identification of potential liability and implementation of necessary remedial action must be an integral part of any entity's standard operating procedures. These activities constitute an effective self-evaluation or compliance health plan.

What is a Compliance Audit?

Compliance audits are formal, systematic, documented, periodic and objective reviews by a regulated entity of its operations and practices to determine if all regulatory requirements are being met. Compliance audits are generally conducted for an existing facility and examine a facility's operations against a specific set of standards. Due diligence audits, on the other hand, are usually aimed at acquisitions and are generally divided into three phases: Phase I - Historical records review; Phase II - Detailed site investigation; and Phase III - Detailed assessment.

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[2] Chesley N. Blevins is a Principal in the Law Firm of Lloyd, Gosselink, Fowler, Blevins & Mathews, P.C. 111 Congress Avenue, Suite 1800, Austin, Texas 78701.

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Compliance Audit Goals

Compliance audits should:

- Evaluate compliance with statutory, regulatory and permit license requirements;
- Evaluate the effectiveness of existing management systems;
- Assess risks associated with existing practices; and
- Provide management with information necessary to remediate current problems and avoid future ones.

Multimedia audits (water, air, wastes, etc.) should accomplish the following objectives:

- Provide a thorough review of all pollution control practices;
- Evaluate all production operations and associated pollution control equipment; and
- Determine the current status of compliance for the site.

Why Conduct an Environmental Compliance Audit?

By analogy, a visit to your doctor can help cure or correct obvious existing ailments and, by a careful examination, determine other areas of your health that may need to be addressed. A compliance audit can, in the same way, focus corrective action on both obvious problems and those not so obvious. Moreover, just like a doctor's examination, the audit can be very focused or media specific (air, water, wastes) or very comprehensive or multimedia. Again, just as important as the exam or audit is the determination and implementation of the best, most cost-effective treatment.

Costs

While it is true that environmental compliance audits can be costly both in terms of time commitment and financial resources, these costs are generally less, many times substantially less, than a governmental agency enforcement action and required remediation, or, in some cases, a private citizen lawsuit. Conducting the audit, and thus being proactive, can often save the time and money that would otherwise be spent in a lengthy enforcement action.

Audits can be planned and undertaken entirely in-house, by outside consultants or, as is often the case, by an audit team consisting of a combination of both. The real costs need not be that different whichever approach is taken. Unfortunately, many times outside consultant costs have been higher, substantially higher, primarily because there were not clear instructions and an understanding of what was needed and being requested, and insufficient oversight and account ability.

Where there is a plan and knowledgeable supervision, costs can be controlled. As to costs, compliance audit costs, in my experience, depend on how often the audits are undertaken and how comprehensive they are. The costs are also dependant on what is encountered. Since audits, regardless of whether an entity is looking at one media or several, are usually done in phases, the extent and therefore cost is often dependent on what is encountered along the way. Because of these variables, an audit of one facility can range from less than $1000 to $25,000 or substantially more. However, I know of hundreds done, effectively and efficiently on an annual basis, for a few thousand dollars. Once an effective compliance management system is developed and in place, including effective followup, the costs are known, controllable and become a part of the reasonable cost of doing business while protecting the public and the environment.

While $25,000 or more, or even a $1000 for an audit of a single facility on a regular basis may seem high, consider the alternative. In a self-audit the entity controls the review and, to a great extent, the way items found are addressed. In an enforcement setting, whether local, state, federal or a combination, the entity is automatically on the defense and subject to someone else's timing and control. In many instances the entity initiating the audit almost entirely controls the method and extent of cleanup or remediation, and therefore the cost. Just as important, if not more so to you and your company, the likelihood of civil and/or criminal penalties is much more likely when the review and necessary followup is initiated by someone other than the facility itself.

In either case, the non-compliant condition should be addressed. From a self-audit an entity has some control over the timing and methodology, therefore the costs. When a governmental entity steps

in, not only does it control the timing and methodology, it can often impose substantial fines or penalties, even bring civil or criminal actions against the facility and its management and employees. Just as a couple of recent examples, U.S. v. Ace Galvanizing, Inc., No. 97-152C (W.D. Wash. Jan. 30, 1997) (185 CERCLA de minimus defendants must pay a total of $741,546 for natural resource damages), 62 FR 7473 (2/19/97), U.S. v. Sherwin-Williams Co., No. 93-C-4267 (N.D. Ill. Feb. 6, 1997) (corporate defendant must pay a $4.7 million civil penalty for CAA, EPCRA, FWPCA, and RCRA violations at its facility in Chicago, Ill.; perform supplemental environmental projects worth $1.1 million; investigate and remediate soil and groundwater contamination at the site; and perform other injunction relief), 62 FR 7473 (2/19/97).

According to a summary of EPA enforcement activities, 1996 set records for both the number of EPA criminal enforcement actions and the amount of criminal fines. The combined level of criminal, civil, and administrative fines and penalties assessed in 1996 was the highest in EPA history, at $173 million. The agency says it referred 262 criminal cases to the Department of Justice in 1996 and assessed $76.7 million in criminal fines; civil penalties (in judicial cases) assessed during the year reached $66.3 million, and the agency levied another $30 million in administrative penalties. The total of 557 criminal and civil referrals during the year was the second highest ever. (5 Environmental Insider February 28, 1997) And this is just the U.S. Environmental Protection Agency, not state, local and private actions. The majority of these fines and penalties would have been avoided by regular, proactive, compliance audits with management support and effective followup.

State Action

A number of states are encouraging environmental self-audits by offering incentives and projections. For example, if a company performs a voluntary self-audit in good faith and uncovers violations, it is offered some level of immunity or privilege, as well as more control over any necessary remedial activities. (See, for example, the Texas Environmental, Health, Safety Audit Privilege Act (TEX. REV. CIV. STAT. ANN. art. 4447cc (West 1996 & Supp. 1997)). As of the start of 1997, at least nineteen (19) states have enacted their own environmental audit privilege laws. The EPA's Final Audit Policy, generally less inclusive than those adopted by the various states, was adopted on December 22, 1995. (Incentives for Self-Policing: Discovery, Correction and Prevention of Violations, 60 Fed. Reg. 66, 706).

How to Conduct an Environmental Audit

Two words: "carefully" and "consistently". Not only is it important that environmental compliance auditing be undertaken, but it must be done carefully to assure that all aspects of the operations are reviewed and fully evaluated, and consistently from audit to audit. Consistency is the key so that changes or trends in operations are noted and addressed.

US E.P.A. Audit Guidance

The U.S. Environmental Protection Agency (EPA) in its guidance document (U.S. EPA Multimedia Compliance Audit Procedures, Publ. No. 330/9-89-003-R), states that an effective environmental compliance audit system should include:

- Explicit top management support and followup;
- Independent audits;
- Adequate training and staffing;
- Explicit objectives, scope, resources and frequency;
- A process to analyze and interpret the information gathered to assure audit objectives are met;
- A promptly prepared written report including corrective actions and schedules, as well as communication of this information to the relevant personnel; and
- Quality Assurance/Quality Control.

Attorney Role

The attorney's role in the audit process:

- Development of objectives and scope;
- Review and analysis of the information gathered;
- Recognition and management of risks and potential liability (both civil and criminal); and

- Protection, to the extent possible, of the confidentiality of audit generated data and information. In Texas, for example, even under a Texas Natural Resource Conservation Commission (TNRCC) approved audit, an attorney's participation is a necessary tool to assure the confidentiality afforded by the State Act. Moreover, since the protection under the State Act does not extend to EPA or other federal agencies, an attorney can assure that the greatest level of protection available is provided.

Attorney involvement in the audit process should begin up front along with management and the technical experts. Indeed, when the purpose of the audit is to determine the state of compliance with environmental statutes and regulations, and to identify potential legal liabilities, the scope of the investigation and the meaning of the results should be coordinated with an attorney as an integral part of the audit team. In many cases the key to securing and maintaining confidentiality is that information is requested by an attorney who is "rendering legal advice" to the specific entity. This investigation and analysis should be planned and conducted in concert with technical experts and under the guidance and leadership of the highest level of management possible.

Audit Plan and Procedures

To assure consistency you must have both a good plan and good procedures, understood and consistently followed. One recognized organization working to develop these procedures is the International Organization for Standardization. In the United States this is a joint effort with the American National Standards Institute (ANSI). The ISO has a draft standard, ISO 14010, which, if adopted, would provide guidelines for conducting environmental audits (Guidelines for Environmental Auditing, ISO 14010 - 199X). The ISO 14010 guidelines describe environmental audit requirements, objectives and scope, criteria, evidence and findings, conclusions, and reporting. They also emphasize that the relationship between the audit team and the client should be one of confidentiality and discretion.

At this time there is no one recognized "best" approach. There are, however, recognized elements that are a part of most successful independent audit programs.

In performing the facility or operations assessment, the auditing team should:

- Develop a project plan that outlines all audit activities, resources, and schedules; and

- Include individuals who are well-versed in all environmental regulations that will be addressed during the audits. This does not mean that one individual could not handle more than one regulation, but merely that the audit team should focus on areas of expertise. Prior to the assessment, the audit team should review all pertinent information on the facility, including technical information about processes and operations and legal information about past compliance performance (or lack thereof).

The parties being audited can improve their chances of a successful audit by concentrating on the following:

- Preplanning for audit activity by operating as if an audit were imminent-this is a good operating practice regardless of company audit policies;

- Training environmental staff on all regulations as well as auditing procedures; staff should learn to think like auditors;

- Organizing technical and compliance information in a central facility file; and

- Conducting informal self-audits on a routine basis. These can be company-wide, division-specific, or facility-specific.

Generally, as corporations grow in size, the complexity of the auditing schemes, protocols, schedules, and tasks associated with each audit also grows. In addition, audits tend to become more formal as company size increases.

Self-Audit

The internal or self-audit, whether entirely in-house or utilizing consultants, is comprehensive and should generally cover at least the following topics:

- Management systems;
- General comments;
- Air quality;
- Water quality;
- Solid and hazardous waste management;
- Emergency planning and release reporting;
- Chemical substance control;
- Bulk liquid storage tanks;
- Transportation of hazardous materials;
- Handling of chemicals;
- Safety;
- Industrial hygiene;
- Ergonomics; and
- Radiation protection.

Audit Report

If the audit is to be effective, the audit results must be assembled in a user-friendly format. The format should include a one-page Executive Summary and in most cases no more than a ten (10) to twenty-five (25) page Final Audit Report which contains a discussion of major findings and potential root causes. The Audit Report should be developed and protected as a "confidential" document. A separate Audit Action Plan, often considered proprietary, may also be prepared, and should contain only required actions resulting from the audit. Each Action Plan item should have a space for comments, a space to assign the item to a responsible individual for accountability and spaces to note the expected and actual completion dates of the item. The Action Plan is designed for a wider distribution within the company to facilitate resolution of the items.

If at all possible, the audit team should provide a draft report on the last day of the on-site inspection, which should usually last a week or less, and a Final Audit Report within approximately 30-45 days of the on-site visit. This procedure will help to improve feedback on performance and expedite action item resolution. In addition, audit protocols should be provided to the facilities in advance to help them prepare and conduct self-audits.

Today, a company may have a computerized audit tracking system to allow for identification of environmental and safety compliance trends within the company. This system also helps in the follow-up of audit items. Consistent and effective follow-up helps to eliminate the "smoking guns" that can be created by open action items from previous audits.

Management Systems Assessment

Regular and consistent Management Systems assessments are a critical part of the audit analysis. Systems that allow the facility to comply with environmental, health, and safety requirements are assessed for their effectiveness. A root-cause analysis should periodically be performed on audit results to determine if any item points to a one-time occurrence or a systemic problem. This "report card" can then be used to continuously improve a facility's environmental performance. Assessment of Management Systems and root-cause analysis of audits will help to institutionalize a process that ensures environmental compliance. Once in place, the performance of each process can be monitored through future audits. This makes the assessment a living document as opposed to a snapshot in time of a facility's compliance. Likewise, the audit protocols are continuously reviewed to incorporate new regulatory or company requirements, and audit procedures are improved to efficiently use resources at the corporate and facility levels.

Conclusion

Effective environmental compliance audits are both valuable and critical tools for responsible entities working to remain or become more healthy by avoiding or limiting liability for noncompliance with environmental laws, regulations and permits. A qualified attorney as a part of the management and technical team can assist in maximizing the positive risk management effects of these audits. Such a coordinated

process will enhance the likelihood of obtaining and maintaining the goal of environmental compliance, while at the same time reducing risks to acceptable levels and effectively minimizing costs.

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