

Managing liability with environmental audits Program should extend current compliance efforts

By DIANE SMITH

Environmental audits are valuable tools for managing environmental and compliance risks, both in owner-occupied and leased facilities. Audits can be conducted to verify compliance with regulatory and/or lease requirements, identify or document site conditions, evaluate effectiveness of management systems already in place and/or assess risks from regulated and unregulated materials and practices.

Environmental audits are not required by law but many laws do contain audit-like requirements for monitoring, testing, record keeping and certifications. To some extent, regulated businesses already self-police critical operational activities. An auditing program, therefore, may be only an extension or enhancement of existing compliance efforts.

Audits can be used to:

- Improve compliance.
- Repair problematic operations before serious problems develop.
- Obtain mercy if a violation occurs.
- Prioritize expenditures.
- Focus attention on compliance strategies.
- Avoid liability to third parties.
- Facilitate emergency-response activities.
- Provide training to new staff.
- Improve public perception.
- Reduce risk of personal liability.
- Reduce risk or severity of employee injuries.
- Improve relationships with lenders and insurers.

Poorly planned and executed audits may:

- Turn otherwise innocent violations into knowing ones.
- Provide easy proof for prosecutors.
- Result in poor public relations if information becomes public.
- Spark toxic tort lawsuits or workers' compensation claims.

- Provide a trail for assessment of daily penalties.

- Be a waste of money if not conducted properly.

- Result in a need for significant expenditures.

- Increase the risk of personal liability.

- Force disclosures to regulators, the public or others.

Tenant audits

Tenant audits can correct conditions of concern before liability is exacerbated, provide professional guidance on correcting processes or systems to assist in risk control and monitor compliance/document performance for liability allocation. Periodic tenant audits are one of the most powerful tools for landlords and a wise investment in property management.

Tenant audits differ from audits of owner-occupied facilities, in that the owner usually commissions the audit but the tenant's activities are the focus. Because the tenant has substantial regulatory exposure if noncompliance is noted, and the owner also has significant reason to desire confidentiality, confidentiality is of paramount concern to both parties.

Self-audits

With respect to self audits, environmental agencies may give consideration to a commitment to audit when calculating civil penalties, and look more favorably on facilities that are well-managed and controlled from an environmental standpoint, even if violations occur.

Implementation of an auditing program also may greatly assist in averting criminal prosecution. Fear of criminal prosecution is one of the most effective motivators for performance of compliance audits, since some violations of environmental laws carry potential criminal sanctions. Knowing, intentional violations, which place another person in imminent danger of death or serious bodily injury, carry enormous fines and lengthy prison terms.

Courts have used the "responsible corporate officer" doctrine to hold corporate officers liable for the company's crime, where public-welfare statutes, such as environmental laws, are involved. The Supreme Court has stated that crime is committed by all who have a responsible share and who stand in responsible relation to a public danger.

The Supreme Court has held that a corporate officer stands in such a relation when the officer has responsibility and authority to prevent in the first instance, or promptly correct, the violation and fails to do so. The practical impact of the responsible corporate officer doctrine is to impose a duty to ascertain whether an environmental-compliance issue exists and to promptly correct all violations. Audits are a powerful tool for effective management.

Confidentiality

Since it is impossible to determine at the outset what an audit will reveal, it is extremely critical to maintain confidentiality. The only hope is to utilize privileges available through an attorney-client relationship. This privilege is the most powerful legal tool for maintaining confidentiality of environmental audits.

It is available only if:

- It is asserted by a client, or someone seeking to be a client.

- The information is disclosed to a licensed attorney in confidence to secure a legal opinion and not in furtherance of a crime or tort.

- The privilege has not been waived.

The privilege will not protect audits conducted by management for business purposes, even if management runs the report by the lawyers. Just having a lawyer on the audit team is not enough to protect information, particularly where in-house counsel, who also has management responsibilities, is the only lawyer involved.