Critical Environmental Assessment Issues For Property Owners

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Many companies conduct environmental site assessments/audits of their properties. Some even conduct annual updates. Yet a large number of companies prefer to follow the "See No Evil, Hear No Evil, Say No Evil" approach and do nothing. Even those who perform audits are divided as to the information that should be passes on. Should these findings be released? Or should they be suppressed? If they are released, how much and to whom?

Osha's Revised Asbestos Standard

Additional Responsibilities of Owners of Buildings:

1. Must identify presence, location, and quantity of ACM and PACM *before work performed* [1926.1101(k)(1)]
2. Receive post-project information from employer performing asbestos abatement work
3. Owners must receive information about ACM or PACM discovered in building
4. Must post signs at entrance to mechanical rooms showing location of ACM or PACM
5. Must retain information on ACM and PACM and pass on to subsequent owners, including: building survey, test results, required notifications

ATTORNEY-CLIENT PRIVILEGE

The attorney-client privilege applies to communications from, as well as to, the attorney. The information provided to the attorney and the advice rendered may be protected. The 1981 United States Supreme Court case, *Upjohn v. United States*, sets out the elements required to provide the report confidentiality protection: (1) the communications must be in order to obtain legal advice; (2) the communications must be with an

attorney; (3) both the attorney and owner must act in a manner consistent with the intent to maintain confidentiality of the communications; and (4) neither the attorney nor the owner may have waived the privilege.

WORK PRODUCT DOCTRINE

"Work product" is generally work done by an attorney in the process of representing a client which is ordinarily not subject to discovery. A prime example of what meets the test of attorney work product is the attorney's opinion as to whether the facilities of the client violate environmental laws. The confidentiality of the attorney's opinion can be asserted by either the attorney or the owner.

Rule 26(b)(3) of the Federal Rules of Civil Procedure codifies the elements of attorney work product by providing qualified protection for documents, notes and other tangible things being prepared for or by an attorney "in anticipation of litigation" as well as "mental impressions, conclusions, opinions, or legal theories of an attorney." The courts have held that the work of consultants hired by the attorney on the client's behalf is protected although it may be somewhat less protected than that of an attorney.

SELF-EVALUATIVE PRIVILEGE

Self-evaluative privilege is discussed in *Bredice v. Doctors Hospital*. Under this doctrine, which is still evolving, the courts have indicated a willingness, consistent with public policy, to protect a company's candid self-evaluation of compliance with state or federal laws. The doctrine protects only the self-evaluative elements of reports, not the factual material itself; and, exceptional necessity can overcome the right to confidentiality of even self-evaluative information.

There are three elements to be considered in deciding whether self-evaluative privilege confidentiality will be afforded:

1. Whether the information to be shielded from discovery results from a critical self- analysis by the party seeking the protection;

2. Whether the public has a strong interest in preserving the free flow of the type of information sought; and

3. Whether information is of the type whose flow would be curtailed if discovery were allowed.

Although some courts have applied the self-evaluative privilege, it should *not* be relied on without taking other precautions under the attorney-client privilege and the work product doctrine. The state of the law in this area is far too uncertain.

REPORTING POTENTIAL NONCOMPLIANCE

If, while performing the environmental site assessment, the consultant discovers facts which tend to show possible noncompliance with state or federal environmental laws, the consultant should immediately notify the attorney. The attorney will then, hopefully, be able to recognize the wisest legal advice to give the owner.

Further, after performing phase I of any environmental site assessment, the consultant should always communicate with the attorney as to whether he or she should commence with phase II. Providing phase II is advised, the attorney may also be able to provide some advice on precisely how the phase should be performed so as to protect the owner. Of course, the attorney should advise within the proper bounds of the law, while considering all rules of ethical and professional conduct.

GOVERNMENT POLICIES

1. Environmental Protection Agency

In 1986, the Environmental Protection Agency (EPA) issued its policy statement encouraging self-assessments, by assuring, at least to some extent, that the EPA would not demand the environmental site assessment report. However, although the Policy Statement provides some comfort as the the EPA's philosophy, it certainly does not provide full protection from disclosure. The Statement provides that the "EPA's authority to request an audit report . . . will be exercised on a case-by-case basis where the Agency determines it is needed to accomplish a statutory mission, or where the Government deems it material to a criminal investigation." In January of 1994, the EPA issued a document entitled "The Exercise of Investigative Discretion." This was considered by many to be the EPA's chance to clarify its position on the discovery of EPA reports. The document, unfortunately, did not provide any further guidance, with the exception of the cases where there exists significant harm and culpable conduct. Otherwise, the new guidelines remain the same - thus providing very little guidance as to when, if at all, the EPA would attempt to seek discovery of an ESA report.

2. Department of Justice

The United States Department of Justice, on July 1, 1991, published guidelines for its criminal prosecution of an environmental crime, entitled "Factors in Decisions on Criminal Prosecutions for Environmental Violations in the Context of Significant Voluntary Compliance or Disclosure Efforts By the Violator."

The guidelines spell out some examples of responsible corporate environmental behavior which may lead to application of prosecutorial discretion to afford the offender leniency. The factors to be considered in the favorable exxercise of discretion are:

1. voluntary disclosure
2. cooperation

3. preventative measures and compliance programs
4. pervasiveness of non-compliance
5. internal disciplinary actions in response to environmental violators; and
6. subsequent compliance efforts.

TEN EXCUSES OWNERS GIVE NOT TO SELF-AUDIT:

1. THE AUDIT COST IS NOT IN THE BUDGET
2. EVEN IF THE AUDIT COST IS IN THE BUDGET, WE WON'T BE ABLE TO PAY FOR A CLEAN UP IF WE NEED IT.
3. AN AUDIT WILL ESTABLISH OUR KNOWLEDGE OF A PROBLEM AND WILL SET US UP FOR A "KNOWING" VIOLATION - WHICH HAS TO BE WORSE THAN A CHARGE THAT WE "SHOULD HAVE KNOWN" IN TERMS OF CRIMINAL LAW
4. IT WILL PUT OUR PERSONNEL IN A BIND AND WILL CREATE AN OBLIGATION ON THE PART OF MANAGEMENT, LAWYERS, AND ACCOUNTANTS TO REPORT
5. WE WILL HAVE TO DISCLOSE WHAT WE FIND ON OUR FINANCIAL STATEMENTS
6. WE ARE AWARE THAT THERE IS NO WAY TO ASSURE CONFIDENTIALITY - EVEN THROUGH THE USE OF LAWYERS
7. ONCE WE AUDIT, WE WILL NEED A FOLLOW UP EVERY YEAR - WE DON'T WANT TO COMMIT TO AFFORDING THIS.
8. IF THERE IS A GENERAL STANDARD DEVELOPED FOR ENVIRONMENTAL AUDITING, WE WILL FOLLOW IT - UNTIL THEN WE WILL HOLD OFF SPENDING THE MONEY.
9. HOW DO I KNOW WHICH ENVIRONMENTAL CONSULTANT TO HIRE?
10. HOW DO I KNOW HOW FAR TO GO AND HOW MUCH TO SPEND - WILL I EVER GET A CONFIRMATION THAT I HAVE A CLEAN BILL OF HEALTH

TEN REASONS IT IS IMPORTANT TO SELF-AUDIT

1. THE AUDIT HEADS OFF VIOLATIONS
2. THE AUDIT STOPS SUBSTANDARD PRACTICES
3. CONTAMINATION WHICH IS ONGOING WILL BE STOPPED
4. THE VALUE OF THE PROPERTY CAN BE CONFIRMED FOR FINANCING OR FOR SALE
5. IT ALLOWS FOR AN INCREMENTAL APPROACH - AN ENVIRONMENTAL BUDGET CAN BE SET
6. IT BRINGS UPPER MANAGEMENT INTO THE LOOP
7. IT DEVELOPS RECORDS WHICH CAN HELP PROTECT YOU LATER - IT CREATES A BASELINE AS TO WHICH CONTAMINATION YOU MAY HAVE CAUSED
8. IT MAY ASSIST YOU IN ASSERTION OF THE INNOCENT PURCHASER DEFENSE
9. FEDERAL PROSECUTION MAY AFFORD LENIENCY TO THOSE WHO ATTEMPT TO COMPLY
10. EVEN THOUGH CONFIDENTIALITY IS NOT ASSURED, GOVERNMENT AGENCIES SELDOM SUBPOENA AUDIT INFORMATION; IN PARTICULAR, GOVERNMENT AGENCIES DO NOT WISH TO DISCOURAGE VOLUNTARY AUDITS

TEN BASIC PROBLEMS OF ENVIRONMENTAL CONSULTANTS

1. THE ENVIRONMENTAL CONSULTANT IS OFTEN A PARTICIPANT ADDED LATE IN THE PROCESS
2. THE SELECTION OF AN ENVIRONMENTAL CONSULTANT IS DIFFICULT
3. THE OWNER MAY BE MOST INTERESTED IN A "CLEAN BILL OF HEALTH"
4. INVOLVEMENT OF A SHORT-TERM OWNER MAY EXPLAIN FAILURES OF DISCLOSURE OR ATTEMPTS TO RESTRICT SEVERELY THE SCOPE OF SERVICES TO BE UNDERTAKEN
5. BEWARE OF AN OWNER WHO DOES NOT ACT WITH CARE AS TO THE SCOPE OF THE INSPECTION OR CONCESSIONS AGREED IN THE CONSULTANT - OWNER AGREEMENT

6. NOTHING TAKES THE PLACE OF HANDS-ON INVOLVEMENT OF THE OWNER
7. MUTUALLY DEVELOPED WORK SCOPES INCORPORATE KNOWLEDGE AND EXPERTISE OF BOTH THE OWNER AND CONSULTANT AND ENHANCE COST-EFFECTIVENESS
8. SEVERE RESTRICTING OF TESTING PERFORMED BY THE ENVIRONMENTAL CONSULTANT IS NOT BENEFICIAL TO THE OWNER
9. TREATING THE ENVIRONMENTAL CONSULTANT AS A PART OF THE TEAM IS ESSENTIAL
10. COMPREHENSIVE UNDERSTANDING OF THE WAY A PROJECT IS TO BE DESIGNED AND CONSTRUCTED IS THE ESSENTIAL FIRST LINE OF DEFENSE TO ALL TYPES OF LIABILITY

TEN RULES FOR OWNERS

1. INVENTORY ALL ENVIRONMENTAL PROBLEMS AT THE OUTSET
2. PREPARE WRITTEN PLAN TO ADDRESS ENVIRONMENTAL PROBLEMS
3. RETAIN AND TRAIN QUALIFIED REPRESENTATIVES
4. RECORD-KEEPING
5. FORMULATE EMERGENCY PLAN
6. DEVELOP A HANDS-ON PROGRAM AND TAKE IT TO UPPER MANAGEMENT
7. DO NOT RELY ON INSURANCE
8. DO NOT RELY ON CONTRACT CLAUSES
9. WORRY ABOUT WHERE DISPOSED ASBESTOS OR WASTE IS SHIPPED
10. BE CANDID