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ENVIRONMENTAL NOTES

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SMART DOCUMENT CONTROL: KNOW WHEN TO HOLD 'EM, KNOW WHEN TO FOLD 'EM

BY: PHILLIP L. CONNER

In many ways a smart document control policy is like the lyrics in a Kenny Rogers song: "You've got to know when to hold 'em, know when to fold 'em." Almost all environmental statutes and regulations require that certain documents be maintained for compliance purposes, and there are good reasons to keep certain documents in order to protect a company and demonstrate that decisions and operations are being performed appropriately. Yet many times companies maintain unnecessary and potentially damaging documents that can lead to problems, especially in the context of enforcement or litigation.

Most environmental statutes give environmental agencies authority to request a wide range of documents. Moreover, a company may be required to turn over a massive amount of electronic and hard copy documents to an unfriendly party in the context of litigation through discovery requests and subpoenas.

A document retention policy provides the best protection against the creation and retention of sensitive and potentially damaging documents. It allows for the systematic review, retention and destruction of documents in the course of normal business operations. While a document retention policy can and should cover all aspects of a business' operations, this article focuses on how a document retention policy applies in the context of environmental compliance.

As any environmental manager knows, various environmental statutes and regulations require that certain documents be maintained for specified periods; however, care should be taken to avoid the creation of unnecessary documents, especially documents that speculate about matters that may or may not constitute actual problems. If such documents are needed (for example in the context of a facility audit), the documents should be created under the protection of the attorney-client privilege. Failure to protect sensitive documents under the attorney-client privilege can result in damaging results should the company become subject to an enforcement action or litigation. For example, the following language – introduced as evidence of negligence in a federal court case – was in a facility audit that was not protected under the attorney-client privilege:

> "The number of discrepancies generated by this routine semi-annual compliance inspection along with the seemingly laisses-faire [*sic*] attitude toward hazardous waste management is a serious problem…."

The above statement – based solely on opinion and speculation – proved to be damaging for the company in the eyes of the jury that heard the case. Because the audit was not performed under the attorney-client privilege, the document could not be protected during the discovery process.

In another situation, a consultant acting as an expert witness compiled handwritten notes analyzing the opposing side's environmental report. In his notes, he agreed to various conclusions drawn by the opposing side. To make matters worse, at the end of his handwritten notes, the expert witness wrote: "On the stand, I will deny all of the above."

The handwritten notes were obtained by the opposing side during the discovery process and presented to the judge in the case. The judge noted that the expert witness was obviously willing to commit perjury and excluded the expert from testifying, leaving the client without an expert witness on the eve of trial.

Based on the above principles and examples, thought should be given to what documents to generate, the language used in them, and whether they should be created under circumstances where they can be protected under the attorney-client privilege.

The following are some general guidelines regarding environmental document retention:

> Consider creating a document retention policy if one does not already exist.
> Know what documents must be retained under applicable statutes and regulations, and maintain a schedule to follow those requirements.
> Avoid creating documents that speculate about possible problems. If these types of documents are needed, consider having the documents created in the context of the attorney-client privilege.
> Keep documents subject to inspection by regulatory authorities in one place and separate from other documents.
> Keep attorney-client privileged documents separate and secure.
> Unless there is a specific reason, avoid keeping drafts of documents.

Also, remember that electronic documents as well as hard copies are subject to discovery in litigation. Oftentimes careless and unnecessary comments are put into internal emails that can be damaging if disclosed to an opposing party. Employees should be instructed not to generate emails that are inappropriate or that make unnecessary and potentially damaging statements about the company or a customer.

Finally, in creating a document retention policy, it's important to understand that the destruction of documents relevant to pending or foreseeable litigation can result in significant sanctions. In addition, a judge or jury may conclude that the relevant documents were destroyed because they were detrimental to the company's case. For this reason, a good document retention policy should provide for a "litigation hold" if pending or foreseeable litigation exists.

OSHA PENALTIES SKYROCKET

BY: KEITH "KIP" MCALISTER, JR.

OSHA civil penalties jumped dramatically on August 1, 2016, creating a daunting burden for employers.

Last year, Congress enacted the Federal Civil Penalties Inflation Adjustment Act of 2015. The Act directed federal agencies to adjust their civil penalties annually to account for inflation. But that's not all. It also required them to make adjustments to account for any inflation that had not been taken into account since the date their penalties were first enacted or 1990, whichever was later. For OSHA, this meant its penalties had to be increased by 78%.

Beginning August 1, 2016, citations issued by OSHA for violations that occurred after November 2, 2015 – when the Act took effect – nearly doubled. For example, maximum penalties for serious and other-than-serious violations increased from $7,000 per violation to $12,471. Likewise, maximum penalties for willful and repeat violations increased from $70,000 per violation to $124,709.

States such as Virginia and South Carolina that implement and enforce their own OSHA programs must also adopt the maximum penalty levels set by the U.S. Department of Labor. OSHA says it will continue to provide penalty reductions based on the size of the employer and other factors in an effort to mitigate the impact of penalty increases on smaller businesses; however, such discretionary guidance offers little solace for many businesses when the size of the penalty before any reductions has grown so significantly.

What's the best way for employers to avoid penalties? Review your safety programs to ensure compliance with applicable safety and health regulations, and make any necessary adjustments. A single willful or repeat violation could cripple many businesses.

Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, Pub. L. 114–74, title VII, §701(b), 129 Stat. 599 (11/02/2015); 81 Fed. Reg. 43430 (July 1, 2016).

VIRGINIA DEQ PROPOSES TO AMEND ITS ENFORCEMENT MANUAL

BY: HENRY R. ("SPEAKER") POLLARD, V

Virginia's Department of Environmental Quality ("DEQ") plans to amend key portions of its enforcement manual (the "Manual"). The Manual details key enforcement policies of the agency and is used by DEQ to guide almost every aspect of its enforcement functions for a variety of programs, including air pollution, wastewater and stormwater discharges, wetlands, and waste

management. In particular, the Manual sets parameters for selecting appropriate compliance and enforcement actions, pursuing administrative enforcement actions, calculating civil charges for alleged violations, and selecting and overseeing corrective actions. Therefore, while important to DEQ, the Manual also offers regulated parties greater understanding of how DEQ is likely to approach compliance and enforcement matters.

DEQ's proposed changes to the Manual include substantial editing and updating of several parts, but there are several significant organizational and substantive changes proposed as well:

- Chapter 2 – General Procedures: Changes to Chapter 2 would more clearly distinguish compliance guidance from enforcement guidance given their application to different DEQ operations and staff and different administrative actions. To this end, DEQ plans to remove the entire discussion of general compliance procedures from Chapter 2 of the Manual to create a separate general compliance procedures guidance document. However, no substantive changes are proposed at this time to the general compliance procedures themselves. The general compliance procedures describe how DEQ notifies parties of alleged violations, determines informal versus formal compliance actions, handles challenges to alleged violations, administers informal dispute resolution, and sets timeframes for regulated parties to respond and for resolving compliance matters. So, while being separated from the Manual, these procedures remain very important. As to the current general enforcement procedures, they will remain as the sole content of Chapter 2 and are not being changed significantly.
- Chapter 3 - Appropriate/Consistent/Timely Enforcement: DEQ is providing more specific timelines for many staff actions during the enforcement process. The revised Chapter 3 would also incorporate by reference EPA's High Priority Violator and Significant Non-Complier guidance, rather than replicating most of these documents in the Manual. In addition to shortening this chapter considerably, this step allows the Manual to keep current with and reflect changes to these EPA guidance documents without related amendments to the Manual.
- Chapter 4 - Civil Charges and Civil Penalties: DEQ seeks to consolidate similar guidance for assessing civil charges and penalties that currently is repeated in separate discussions of the major media (air, water, and waste) programs. Existing variations of the meaning of "potential for harm" would be minimized to ensure consistent treatment of that concept across all media programs. DEQ also is adding new guidance with associated penalty worksheets for discharges of oil into state waters.

DEQ's announcement is a good reminder that the Manual offers valuable insights into DEQ's internal workings, expectations and program implementation. Facility owners and operators should take heed of these insights, not only to understand better how DEQ will proceed in compliance and enforcement actions, but to help minimize the risk of potential enforcement actions. For similar reasons, owners and operators also should keep handy the expected new compliance procedures guidance document.

DEQ is taking public comment on the proposed changes through October 21, 2016. Comments should be directed to Lee Crowell of DEQ at lee.crowell@deq.virginia.gov. More evolution of the Manual can be expected in 2017 as well, when DEQ expects to make changes to Chapter 6 of the Manual, addressing adversarial administrative actions.

http://townhall.virginia.gov/L/ViewNotice.cfm?gnid=620; http://www.deq.virginia.gov/Programs/Enforcement/PublicNotices.aspx.

Join Us in Celebrating Manufacturing Day

Please join us in celebrating Manufacturing on Friday, October 7, 2016. This day is an annual event that is meant to "inspire the next generation of manufacturers." Thank you to all of our manufacturing clients and industry organizations that help keep this critical industry growing and progressing in the U.S. and beyond. We are proud to serve you and help remove legal roadblocks so you can grow your business.

CEMEX SETTLEMENT BOLSTERS EPA AIR ENFORCEMENT INITIATIVE

BY: RYAN W. TRAIL

Earlier this year, EPA announced revised National Enforcement Initiatives ("NEIs") beginning October 1, 2016 for fiscal years 2017-2019. Among other areas of concentration, EPA's NEIs include the expansion of a previous air quality enforcement initiative focused on reducing air pollution from large sources. With a renewed and expanded emphasis on pursuing enforcement for air emission violations, EPA quickly showed the industrial community the new NEIs are not simply agency rhetoric.

EPA and the Department of Justice recently reached an agreement with CEMEX, Inc., the nation's largest supplier of Portland cement, settling alleged violations of air permitting regulations at facilities in Tennessee, Texas, Alabama, and Kentucky. DOJ's complaint against CEMEX alleged the company made major modifications resulting in significant net emissions increases of nitrogen oxides at its facilities without undergoing proper permitting applications and reviews. As a result, the modified facilities allegedly operated without the required Best Available Control Technology and violated emissions limitations for several years.

To settle the alleged violations, CEMEX entered into a Consent Decree with EPA and DOJ on July 27, 2016, which was lodged in the U.S. District Court for the Eastern District of Tennessee. Under the Consent Decree, CEMEX agreed to pay a civil penalty of $1.69 million, invest approximately $10 million in control technologies aimed at reducing emissions at its facilities, and spend $150,000 on energy efficiency projects to mitigate effects of past violations.

EPA's announcement of the Consent Decree clearly indicated the settlement's role in fulfilling the Agency's policy: "This settlement is part of EPA's National Enforcement Initiative to control harmful emissions from large sources of pollution." Other NEIs include reduction of industrial pollutants and contaminated stormwater in the Nation's waters, reducing risks of accidental releases at industrial and chemical facilities, and ensuring energy extraction activities comply with environmental laws. The CEMEX settlement should serve as a reminder to facility owners and operators to evaluate internal compliance assurance processes, with a particular emphasis on areas where EPA enforcement is focused.

U.S. v. CEMEX, Complaint and Consent Decree

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