

Why Environmental Compliance Auditing is Important in the Purchase/Sale of a Business

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Posted By: David P. Ruetz

Practice Area: Environmental Law and Litigation & Mergers and Acquisitions

As we discussed in recent *Legal Updates*, because environmental sustainability is now viewed as an essential component of the overall operation of most companies, and Environmental, Social and Governance (ESG) initiatives are gaining in popularity, the value of conducting periodic environmental compliance audits and establishing an environmental management program is essential for companies that desire to be viewed as leaders in environmental compliance. We also discussed environmental regulatory agency programs (“Enviro-Check” and “Green Tier”) that reduce the risk of environmental enforcement and/or fines and penalties for businesses that voluntarily conduct environmental compliance audits, self-report any non-compliance that is discovered and agree to remedy the non-compliance.

Another very important reason for conducting environmental compliance audits is tied to the purchase/sale of a business, particularly where operations associated with the business use or store hazardous substances (e.g., cleaning solvents, hydraulic oils) or generate hazardous wastes (e.g., used chlorinated solvents) or universal wastes (e.g., used lead-acid batteries, antifreeze). If the purchasing entity intends to carry on the same operations as the selling entity, the purchasing entity will likely transfer the environmental permit coverage from the selling entity. If an environmental compliance audit is not conducted prior to the purchase, there is the potential that violations of environmental permit conditions and environmental regulatory requirements may not be detected and the purchasing entity may inherit an obligation to correct any non-compliance issues. (Note: An environmental compliance audit is different than a Phase I Environmental Site Assessment [Phase I ESA], which is often conducted as part of the pre-purchase due diligence of a real property. The focus of a Phase I ESA is to evaluate whether documented contamination is present at the property or whether the potential exists for contamination to be present at the property based upon historical or current uses of the property. In contrast, an environmental compliance audit is an evaluation of a company's environmental legal requirements and an assessment of how the company complies with those requirements.)

What often is a surprise to many is that even the most basic of manufacturing operations frequently uses or stores hazardous substances or generates wastes that could require a variety of environmental permits and/or obligations to comply with environmental regulations. Some examples that may trigger an obligation to obtain an environmental permit or to comply with environmental regulatory obligations include:

1. If a facility has the capacity to store 1,320 gallons of oil (twenty-five 55-gallon drums of oil), aboveground at any time on a site there is a requirement under federal law to prepare a Spill Prevention, Control, and Countermeasure (SPCC) Plan, which is a comprehensive plan to address releases of oil stored at a site.
2. Even if a facility does not emit hazardous air pollutants as part of its operations, if the facility has boilers or furnaces, there may still be a requirement to obtain an air permit, or at a minimum, demonstrate why an air permit is not needed.
3. If a facility stores wooden pallets outdoors on the premises, or has open dumpsters or uncovered loading dock areas, there may be a requirement to obtain a stormwater permit and prepare a Stormwater Pollution Prevention Plan (SWPPP).
4. If a facility generates waste aerosol spray cans, the cans and residual contents of the cans may be classified as a "hazardous waste," which requires that specialized hazardous waste storage and disposal procedures be met as opposed to simply disposing of the cans. Further, non-empty waste aerosol cans should not be exhausted into the air to empty the cans. The uncontrolled release of hazardous waste and containerized propellants (e.g., butane, propane) into the atmosphere from the aerosol cans can constitute disposal of a hazardous waste.
5. If a facility generates used fluorescent light bulbs and antifreeze, such wastes must be segregated from other wastes, identified as "Universal Wastes" and disposed of within specified time periods.

These are just a few of the most common areas in which environmental permits may be required and regulatory compliance obligations imposed.

The list below includes some of the most common environmental regulatory compliance areas that are evaluated in an environmental compliance audit:

- Air Permitting, including the requirement for periodic air emission calculations and annual air emission inventory reporting to a regulatory agency;
- Stormwater Permitting, including the requirement to prepare a Stormwater Pollution Prevention Plan (SWPPP), update the SWPPP annually and periodically monitor stormwater discharges;
- Wastewater Permitting, including the requirement to obtain local Publicly-Owned Treatment Works (POTW) wastewater permits and periodically monitor wastewater discharges;
- Spill Prevention, Control, and Countermeasure (SPCC), including the requirement to prepare a SPCC Plan, and periodically update the SPCC Plan;
- Tier II Reporting, including the requirement to identify, calculate and monitor the storage of hazardous and extremely hazardous substances on the site and report the presence and quantities of such substances to a local Emergency Planning Authority;
- Toxic Chemical Release Reporting, including the requirement to file with the Environmental Protection Agency (EPA) a Toxic Chemical Release Inventory (TRI) Report, which is a comprehensive annual report that documents the use and release of toxic chemicals that are commonly used in industry.
- Hazardous Waste Compliance, including the requirement to identify and track the generation, storage and disposal of Resource Conservation Recovery Act (RCRA) "hazardous wastes," properly handle and store the wastes, and file annual inventory reports to a regulatory agency;
- Universal Waste Compliance, including the requirement to identify and properly store and dispose of "universal wastes";
- Aboveground Storage Tank (AST) and Underground Storage Tank (UST) Management, including the obligation to properly identify and store regulated hazardous substances and maintain AST/UST testing records.

While the above list includes the most common areas that are covered in an environmental compliance audit, the list is not exhaustive and may include other items, depending on the type of operations associated with the facility.

The environmental compliance audit associated with a purchase/sale of a business is typically performed by a third-party environmental engineering or consulting firm. The cost for an environmental compliance audit of a manufacturing facility could range from \$3,500 - \$10,000, but also could be above that range depending on the size of the facility and complexity of operations. Our experience is that the cost of the audit is well worth the savings in potential fines, penalties and/or the measures required to achieve compliance, if such non-compliance is not identified prior to the purchase/sale transaction.

von Briesen's Environmental Law Section has experience assisting clients with environmental compliance auditing, including making environmental consultant recommendations, attorney-client privileged auditing services, defining the scope of and oversight of the audit process, review of audit findings, provision of legal interpretations associated with the audit findings, recommendation of actions to achieve compliance, use of agency compliance assistance programs (e.g., WDNR's "Enviro-Check" Program) and negotiations with agencies regarding non-compliance issues.

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