

Environmental Compliance Audits: Federal & State Guidance

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Environmental compliance audits often leave the preparer facing a sea of uncertainty. If the audit reveals violation, must the company disclose the violation to federal or state regulation agencies? Does the discovery of a violation increase the likelihood of a civil or criminal penalty? Can regulatory agencies and private litigants use an environmental compliance audit against the preparing company? Recently state legislatures and the U.S. Environmental Protection Agency ("EPA") have addressed some of these questions.

Thirteen states recently enacted legislation which give preparer companies protection from many of the above concerns. Numerous other states including Georgia and North Carolina have proposed such legislation. Typical statutes grant the preparer company a "privilege" from disclosing the data revealed in the compliance audit. To obtain the privileged status the audit usually must be labeled and kept confidential. Furthermore, the preparer must timely remediate the violations. The privilege is usually qualified and can be waived. For example, the privilege does not apply (1) if asserted for a fraudulent purpose; (2) to prospective conduct; or (3) if the preparer does not remediate discovered violations.

The EPA, on the other hand, has taken a more cautious and less lenient approach. On April 3, 1995, the EPA issued a nonbinding "interim policy statement" addressing environmental compliance audits. Pursuant to EPA guidance, an environmental audit is eligible for limited protection if the preparer satisfied seven requirements: (1) the audit is performed voluntarily; (2) violations are disclosed in writing to the applicable federal and/or state agencies immediately after discovery; (3) violations are remediated within sixty days or as expeditiously as possible; (4) violations posing an imminent and substantial endangerment to human health or environment are remediated immediately or as expeditiously as possible; (5) harm caused by the violation is remediated; (6) the violation did not result from the lack of proper preventative measures or is not a repeat violation; and (7) the company must cooperate with the EPA. If these conditions (or in some cases most of the conditions) are met, the EPA will be lenient in issuing civil penalties and will not recommend criminal penalties. This limited privilege is not applicable in cases of concealment, criminal conduct or violations causing serious or substantial endangerment to human health or the environment.

Companies considering environmental compliance audits should consider both the state and federal policies and guidance toward such audits. Legal advice is also recommended to determine whether other privileges might also apply.