

# Benefits To Industry of Planning For Regulatory Compliance

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## INTRODUCTION

When I began practicing environmental law, some thirteen years ago, the field was much less complex than it is today. At the time, the Clean Air<sup>1</sup> and Clean Water Acts<sup>2</sup> had been enacted, and some rules had been issued under those statutes. However, there were no federal hazardous waste rules, no federal program for cleanup of abandoned waste sites, and no control of toxic air emissions.

Now, much has changed. The federal hazardous waste rules have been issued, under the Resource Conservation and Recovery Act ("RCRA"),<sup>3</sup> and then have been amended almost, it seems, every day in the Federal Register. The Comprehensive Environmental Response, Conservation and Liability Act ("CERCLA")<sup>4</sup> was enacted, and has since been implemented, with enormous financial consequences for industrial manufacturers and all other waste generators. Further, both the Clean Air and Clean Water Acts have been amended in recent years,<sup>5</sup> imposing significant new obligations on plants to control their discharges to the environment. And, of course, literally hundreds of new rules have been issued under those and other federal statutes, as well as state statutes that have been developed to implement these federal programs. As a result, the environmental laws now touch upon nearly every facet of business activity in this country, and their impact promises to grow even stronger in the coming years. For that reason, it has become critical to the success of any business that it

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1. 42 U.S.C. §§ 7401-7671(q) (1993).

2. 33 U.S.C. §§ 1251-1387 (1993).

3. 42 U.S.C. §§ 6921-6939(b) (1993).

4. 42 U.S.C. §§ 9601-9657 (1993).

5. See Clean Air Act Amendments of 1990, Pub. L. No. 101-549, 104 Stat. 2399 and Water Quality Act of 1987, Pub. L. No. 100-4, 101 Stat. 7.

develop and follow a coherent plan for coming into and staying in compliance with environmental laws and regulations.

### I. ESTABLISHING A COMPLIANCE PLANNING SYSTEM

Planning for regulatory compliance means substantially more than simply applying for permits in a timely fashion and making sure that manifests are signed before wastes are sent off-site for disposal. Instead, a company needs to develop a comprehensive framework that its employees can follow in order to get the company into compliance, stay in compliance, verify its compliance status, and act upon any opportunities to minimize the cost of compliance or to gain economic benefits from particular compliance steps. This type of planning is very similar to the tax planning that companies perform as a matter of course. In fact, corporate tax planning procedures are a good analogy for the type of program that companies need to develop in the environmental compliance area.

In both the tax and environmental areas, the company is confronted by a complex set of regulations and requirements, which are enforced by aggressive government agencies. The U.S. Environmental Protection Agency ("EPA") and its State counterparts have in the last several years substantially increased their enforcement efforts against noncompliers, including criminal sanctions in the more egregious cases.<sup>6</sup> As a result, the risk of facing a severe fine, or even a jail term, for violating the environmental regulations has significantly increased. It simply makes no sense any more to be cavalier about environmental compliance in the hope that the agencies will not discover the problem. Instead, substantial problems can be avoided, and benefits gained, by planning for environmental compliance in the same way that one plans for compliance with the tax laws.

When a company puts together a tax planning program, it seeks to achieve two purposes. First, the company has to ensure that its program is in compliance with rules and regulations in order to avoid the severe sanctions that can follow noncompliance. Second, the company wants to ensure that within the confines of the regulations, every possible opportunity is pursued that would yield an economic

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6. For example, between FY 1989 and FY 1992, EPA increased its criminal enforcement efforts in the following respects: (1) a 38% increase in the number of agents; (2) a 44% increase in the number of investigations; (3) an increase of 108% in the number of defendants; (4) an increase of 250% in the amount of months sentenced; and (5) a 44% increase in the dollar amount of fines. U.S. EPA Office of Enforcement, Enforcement Accomplishments Report FY 1992, EPA 230-R-93-001, at 2-2 (1993).

benefit. Those same two aspects must also be the primary components of an environmental planning program.

In addition, an environmental plan must adopt some of the same procedural components that are part of a tax plan. For example, there must be a system for taking inventory — in other words, to ascertain what assets (or chemicals) the company owns or uses, as well as the value (or legal compliance status) of each of these items. Next, there must be a system for periodic tracking of those items in order to continually assess their legal status and any changes that need to be made. Finally, there needs to be a procedure for advance planning, to anticipate legal, technical or other developments that will occur in the future, and to begin developing responses to those developments before they occur.

It is critical that short-term *and* long-term factors be addressed in a compliance program. After all, when a company invests in a new plant, or closes a plant, it considers (or should consider) the tax consequences of these moves beyond the next fiscal year. The same is true in the environmental area, where pollution control expenditures can run into millions of dollars and can even result in shutting down a plant or not being able to open a new plant.<sup>7</sup>

## II. PROBLEMS AVOIDED OR REDUCED BY COMPLIANCE PLANNING

The most obvious benefits of planning for environmental compliance are the possible problems that are either avoided or reduced. Noncompliance with the environmental laws can damage a company in a number of ways. First, the federal and state agencies can assess civil penalties for noncompliance. These penalties can run up to \$25,000 per day.<sup>8</sup> When violations run for a period of years, the penalties can be truly staggering. The courts have assessed multi-million-dollar penalties in a number of cases brought by EPA.<sup>9</sup>

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7. For example, in December 1991, Amoco Oil Company closed its refinery in Casper, Wyoming. The company would otherwise have had to spend about \$150 million to comply with new environmental standards for the plant, while the plant itself had a value of only \$30 to \$40 million. See David Ivanovich, *Clean Air Act Choking Refineries; Pollution Law Causes Firms to Close or Make Big Investments in Some Plants*, HOUS. CHRON., June 20, 1993, Business Section at 1.

8. See, e.g., Clean Air Act § 113(b), 42 U.S.C. § 7613(b) (1991); Clean Water Act § 309(d), 33 U.S.C. § 1319(d) (1993); RCRA § 3008(g), 42 U.S.C. § 6928(g) (1993).

9. See, e.g., *United States v. Bethlehem Steel Corp.*, No. H90-326 (N.D. Ind. August 31, 1993) (imposing \$6 million penalty for violations of RCRA corrective action permit and landfill operation requirements).

No less significant are the possible criminal penalties. Under the environmental laws, felony sanctions can be brought even for negligent violations of regulations.<sup>10</sup> In addition to monetary fines against the company and corporate personnel, those same corporate personnel and officers could be jailed.<sup>11</sup> In fact, under the federal sentencing guidelines, there are certain environmental violations for which the court has to impose a jail sentence, with no probation allowed.<sup>12</sup>

In addition to the financial damage brought by civil and criminal penalties, noncompliance with environmental regulations can have other direct impacts on a company's operations. For instance, the government can take steps to debar the company from doing work under government contracts.<sup>13</sup> Additionally, if a regulatory agency determines that the company's operation is posing a risk to public health or the environment, the agency can under certain circumstances issue an order, or seek a judicial injunction, forcing shutdown or limitation of those operations.<sup>14</sup> Even if the operations are not so affected, there will be interference with the everyday operations due to continuing government oversight.

In addition to those costs brought about through government enforcement actions, there are other economic damages that a company can suffer as a result of noncompliance. For example, if the violations at issue deal with the storage of hazardous waste, the result may be soil or groundwater contamination at the company's plant. This can give rise to substantial cleanup costs, and interfere with operations due to the remediation work being performed at the site. Also, if contamination gives rise to exposure (or potential exposure) to employees or nearby residents, the company may be forced to defend itself against toxic tort actions, seeking damages for physical

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10. See, e.g., Clean Water Act § 309(c)(1), 33 U.S.C. § 1319(c)(1) (1993).

11. See, e.g., *United States v. Speech*, No. CR 90-464-Kn (N.D. Cal. Dec. 3, 1991) (sentencing president of waste management company to six months in jail and fine of \$28,000 under RCRA, for illegal storage and transportation of hazardous waste sludges).

12. See John F. Seymour, *Civil and Criminal Liability of Corporate Officers under Federal Environmental Laws*, 20 ENV'T REP. (BNA) 337, 344 (1989).

13. This action can be taken under § 306 of the Clean Air Act, 42 U.S.C. § 7606 (1992), and § 508 of the Clean Water Act, 33 U.S.C. § 1368 (1982). See also EPA Policies Regarding the Role of Corporate Attitude, Policies, Practices, and Procedures, in *Determining Whether to Remove a Facility from the EPA List of Violating Facilities Following a Criminal Conviction*, 56 Fed. Reg. 64,785 (1991).

14. See, e.g., *Pennsylvania Shuts Down Trash Facility, Says Philadelphia Firm Disobeyed DER Order*, 20 Env't Rep. (BNA) 1657 (1990).

injuries or illnesses, or even potential injuries or illnesses.<sup>15</sup> And, of course, the company will be faced with paying large legal fees for its defense in those toxic tort actions, as well as its defense in the cleanup cases and enforcement cases brought by the agencies concerning the alleged violations.

The problems identified above, which result from noncompliance, can be avoided, or at least reduced, if a company develops and faithfully implements an environmental compliance plan. That is not to say that the company would then never again commit any violations of the regulations. That is nearly impossible. However, if the company follows a plan to get into and stay in compliance, the number of violations are likely to be far fewer than if compliance is a haphazard matter. Moreover, the existence of a compliance plan can make a significant difference when the government evaluates whether to take enforcement action against a company, and if so, the nature of the action.<sup>16</sup> If the government believes that the company is not serious about environmental compliance, then it is much more likely to take action to file a lawsuit, and to seek severe penalties and possibly restrictions on the company's operations. However, if the agency perceives that the company is generally in compliance but that unique circumstances caused a particular violation, then the agency is much more likely to let the company off with a warning or small penalty.<sup>17</sup>

The policy stated above has been adopted by the U.S. Department of Justice ("DOJ"), in a recently issued guidance document concerning environmental criminal prosecutions.<sup>18</sup> In that document, DOJ lays out the various factors to be considered in deciding whether to prosecute a company for environmental violations. The basic theme of the DOJ's guidance is that companies that have developed and faithfully implemented strong environmental compliance procedures are much less likely to suffer sanctions when a violation does occur.<sup>19</sup>

In addition to reducing the likelihood of severe penalties, a strong compliance program should also reduce the government's oversight and consequent operational interference. As with the IRS, EPA must

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15. See, e.g., *Renaud v. Martin Marietta Corp.*, 972 F.2d 304 (10th Cir. 1992).

16. See Thomas L. Weisenbeck & Rita Elena M. Casavechia, *Guidelines for Prosecution of Environmental Violations: The Tension Between Self-Reporting and Self-Auditing*, 22 *Env't Rep. (BNA)* 2481 (1992).

17. See *id.* at 2481-82.

18. U.S. DEPARTMENT OF JUSTICE, *FACTORS IN DECISIONS ON CRIMINAL PROSECUTIONS FOR ENVIRONMENTAL VIOLATIONS IN THE CONTEXT OF SIGNIFICANT VOLUNTARY COMPLIANCE OR DISCLOSURE EFFORTS BY THE VIOLATOR*, July 1, 1991 [hereinafter JUSTICE].

19. *Id.* at 3-6.

rely to some extent on the companies themselves to stay in compliance on their own. If the government feels that a company can basically be trusted, then the government can focus its resources instead on the companies that do not have the government's trust. The best way to become an untrusted company is if the government comes to believe that the company does not have an organized compliance system. Without such a program, the government may feel that it cannot obtain reliable information from the company concerning its own compliance status. The government will then start interfering with operations through intrusive oversight actions, because it believes that to be the only way to make sure that the company is staying in compliance.

### III. BENEFITS GAINED THROUGH COMPLIANCE PLANNING

By putting together and following a compliance plan, a company can not only avoid or reduce the problems that result from noncompliance; it can also take advantage of significant, positive benefits from strategic compliance planning. It is not always easy to quantify these benefits. However, they are tangible, and can be planned for in the same way that a company plans for benefits under the tax laws.

There are provisions, for example, in some of the environmental laws that provide opportunities for a company to impose significant regulatory burdens on its competitors. Under the new "hazardous air pollutants" provisions of the Clean Air Act Amendments of 1990, new pollution control requirements will be developed by EPA based on the level of control met by the *best* performer in each industry.<sup>20</sup> Assessing these requirements, a company might determine that it could feasibly install advanced control equipment that its competitors, whether for technical reasons or financial concerns, might not be able to readily adopt. In that case, it might make economic sense for the company to install that equipment. Then, the company would advise EPA of its action, so that it will be identified as the "best performer" in the industry, setting the control standard for others to follow. If its competitors cannot comply, or cannot do so at a comparable cost, the company gains a substantial advantage while improving the environment at the same time. But that is only possible if the company plans in advance, carefully assessing the control requirements as they are developed by EPA, so that the company sets the standard instead of one of its competitors.

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20. "The maximum degree of reduction in emissions that is deemed achievable for new sources in a category or subcategory shall not be less stringent than the emission control that is achieved in practice by the best controlled similar source . . . ." 42 U.S.C. § 7412(d)(3) (1993).

Many companies that have developed compliance plans have found that an important element, which can lead to significant cost savings, is "pollution prevention." That concept calls for companies to adopt measures to reduce pollution at the source, by not generating it in the first place, rather than creating the waste and then having to treat or dispose of it. For example, many printers have changed from the use of solvent-based inks to water-based inks.<sup>21</sup> They have thereby reduced their air pollution control requirements, which are required for solvents but not necessarily for water-based materials. Also, the waste inks that result from use of the water-based process may not need to be disposed of as hazardous wastes, and the company therefore avoids the high cost of incinerating solvent-based wastes.

In addition to switching to non-hazardous materials, some companies have saved costs by simply reducing their use of the hazardous materials that remain in their process. For example, in order to comply with the federal right-to-know requirements, many companies have had to inventory and account for their solvent use for the first time.<sup>22</sup> A number of companies have discovered, upon performing such an inventory, that they were using far more solvent for cleanup and other purposes than was really necessary. After careful inventory procedures were put into effect for uses of these materials, the companies found that their use of solvents has dropped dramatically with consequent savings.<sup>23</sup> These are savings that would not have happened but for the companies' efforts to comply with environmental reporting requirements.

In addition to those economic advantages and cost savings, there are other intangible, but significant benefits to be gained from a commitment to environmental compliance planning. For example, consistent compliance generally fosters better relations with agencies. If EPA personnel develop confidence that the company is working hard to stay in compliance, and the company is willing to work honestly and cooperatively with the agency to remedy any problems that are observed, it is more likely that when such problems do occur,

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21. See Anthony Birritterri, *Printers Find Environment a Critical Issue*, NEW JERSEY BUSINESS, Nov. 1992, § 1, at 16.

22. The Federal Emergency Planning and Community Right-to-Know Act (EPCRA) requires facilities to submit, to EPA and the relevant State, an annual report detailing uses and releases of certain "toxic chemicals." 42 U.S.C. § 11,023(a) (1988).

23. Cf. *Industry Reduced Chemical Releases in 1990, Continuing Trend that Began in 1987*, 23 Env't Rep. (BNA) 424 (1992).

they will be dealt with by the agency in a more reasonable fashion.<sup>24</sup> (Not necessarily reasonable, but at least *more* reasonable.)

Compliance can also help employee relations. For example, printing companies that have switched from solvent-based to water-based inks have found that the reduced solvent smell in the plants is viewed very positively by the workers, as a significant improvement in their working environment. Also, if occupational safety and health issues are incorporated into the compliance program, compliance will show a commitment to protecting the employees, which should be a positive factor in labor-management relations.

Similarly, a clear commitment to environmental compliance can also be helpful in dealing with the public. This is particularly true when compared to the situation where a company becomes known in the public mind as a violator of environmental regulations that is unconcerned with protection of the public health and environment. A company that has a record of consistent compliance, and a program to keep that record intact, is much more likely to be able to "weather the storm" when a problem does occur. In those situations, good relations with workers, agencies and the public can be essential to the well-being of the company, and a strong compliance plan will help maintain those good relations.

There is one more positive benefit gained by a company that has a sound environmental compliance program: that company can gain a substantial advantage over its competitors, to the extent that those competitors do not have such a program. When the competitors suffer penalties, shutdown orders, cleanup costs and interference with operations, all of which can follow from haphazard compliance efforts, the company that "stays out of trouble" can reap the benefits of its competitors' travails.

#### IV. ELEMENTS OF A COMPLIANCE PROGRAM

A company can gain the advantages discussed above by simply importing into its environmental efforts some of the same concepts that it has adopted and followed for years in other aspects of its business, such as tax planning. The key components of such a program are as follows. First, the company needs to do a systematic environmental audit of its operations. This involves two steps: (1) an inventory, which will determine the identities of the chemicals that the company uses or manufactures, the amounts of those chemicals that are used or manufactured, and the types of equipment that the

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24. See JUSTICE, *supra* note 18.

company uses; and (2) an assessment, to determine what regulations apply to the company's chemicals and equipment, and the extent to which the company is currently complying with those requirements. Based on that audit, the company can determine what measures are needed in order to get its operations into compliance.

That audit is only the first step in a compliance program. Just as important is the need to put into effect a formal program whereby compliance will be periodically reassessed. A plant's compliance status can change based upon a number of factors, including changes in operations and changes in laws or regulations. In order to ensure that compliance changes are recognized and dealt with, the company needs to have two procedures in place: (1) a clear delegation of authority to some person or some group that is responsible for supervising environmental compliance, and (2) a procedure whereby all employees whose actions could affect compliance are made aware of the regulatory requirements and are assigned responsibility for "doing their part" in keeping operations within the law. Thus, for example, personnel in the purchasing department of a boat-building plant must be knowledgeable of air emission requirements to ensure that prior to purchasing a new resin, the volatile organic content is checked against the limits that have been imposed on the plant in its air permit. If proper training is not implemented, environmental compliance problems can arise without the environmental department ever knowing about them. Environmental compliance must be a plant-wide and company-wide effort in order for it to succeed.

It is important to remember that in developing and implementing an environmental compliance program, the program should not be totally focused on present compliance. Often, EPA issues regulations that provide an extremely short time period in which to comply.<sup>25</sup> Therefore, the company that wants to get into compliance in a timely fashion must keep track of the regulation as it moves from proposal to final issuance, in order for the company to start planning for compliance well before the final rule is issued. The company can then begin looking at possible pollution control options and can select the

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25. For example, in 1990, EPA allowed only a six-month compliance period for large quantity waste generators under the new "organic toxicity characteristic" rule, which subjected substantial numbers of wastes and waste generators to RCRA regulation for the first time. See *Hazardous Waste Management System; Identification and Listing of Hazardous Waste; Toxicity Characteristics Revisions*, 55 Fed. Reg. 11,798 (1990).

most cost-effective alternatives. When the rule is issued in final form, the internal decision process can be completed quickly and the needed equipment can be ordered immediately.

In addition to planning in advance, the company must also plan strategically. As noted above, there are significant benefits that can be gained by making certain initial pollution control expenditures, which the company's competitors must then follow. Those expenditures may not be strictly required by regulation at the time that they are planned, but they nevertheless can prove advantageous for the company. Therefore, it is important to remember that sometimes going beyond compliance can make sense for a company, depending on the particular regulation and situation presented. If the company does not have a planning process in place, though, it may not recognize such opportunities when they present themselves. The company may then end up in the position of having to follow one of its competitors, who did recognize the opportunity and then set the standard for others to follow. The challenge, then, is to be "ahead of the game," by instituting a planning process that will enable the company to reach and capitalize on these possibilities before its competitors.

#### CONCLUSION

The environmental laws facing companies today are complex and stringent, and promise to become even more so in the future. Although some may wish it, the environmental laws will not go away. Therefore, it is incumbent upon any rational company, which seeks to maximize its profits to learn how to live with the regulations, and, in fact, to profit by them when possible. By importing concepts applied to other aspects of business, such as tax planning, a company can develop and implement a regulatory compliance program that will avoid or reduce the financial and operational problems that flow from noncompliance, while giving the company an opportunity to reap significant economic benefits where those present themselves in the compliance process.