

ASSOCIATION OF CORPORATE COUNSEL

How to Respond to Potential EH&S Violations Discovered During an Internal Audit September 11, 2007

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Faculty: **Lauren P. Alterman**, Associate General Counsel, Saint-Gobain Corporation; **Kathleen Hennessey**, Senior Environmental Counsel, DaimlerChrysler Company LLC; **Stacy Watson May**, Senior Counsel, Holland & Knight LLP

Moderator: **Vincent Gonzales**, Senior Environmental Counsel, Sempra Energy

Vincent Gonzalez: Good morning. I am Vincent Gonzalez, Senior Environmental Counsel for Sempra Energy and outgoing chair of the ACC Environmental Health and Safety Committee. Welcome to today's webcast entitled "How to Respond to Potential EH&S Violations Discovered during an Internal Audit." This webcast is sponsored by the ACC EH&S Committee and it's produced the EHS Committee sponsor, the law firm of Holland & Knight.

I would like to go over a few items before we proceed with our webcast. First of all, please make sure that you're properly logged on to the webcast and can see the presentation as well as hear me. Please observe that on your screen, you have the ability to type and send in a question or two to the panel during the webcast. Please locate on the lower left hand corner of your screen the questions box, type in the question and click send. Please fill out the evaluation form at the end of the webcast. The form itself is, there's a link on your left hand side.

Given the limited amount of time we have and depending on the questions received, I will time to ask our panelists your questions towards the end of the webcast rather than during the webcast. Currently we plan to reserve the last five minutes or so of this webcast for Q&A.

I would like to thank the law firm of Holland & Knight for its generous sponsorship of the Acc EH&S Committee, especially our panelists, Stacy Watson May, for her help in preparing and producing today's webcast. I would also like to thank our two outstanding in-house council panelists, Lauren Alterman and Kathleen Hennessey, for giving us not only

their time and energy, but also the benefit of their insights and expertise in this area. Finally, I would like to especially thank Sandy Friedman and ACC's (Sherrese Williams), without whose help this webcast would not have been possible.

I would now like to introduce our panelists. Kathleen Hennessey is Senior Environmental Counsel for Chrysler LLC and is based in Auburn Hills, Michigan. Before joining Chrysler, Miss Hennessey was a member of the Illinois Pollution Control Board, which adjudicates environmental cases and adopts environmental regulations for the State of Illinois. Before that, she was an environmental partner at Mayer, (Browne & Platz), now Mayer, Browne, (Raul & Mall), and once served as Senior Supervising Attorney for the City of Chicago Law Department. Miss Hennessey is a certified hazardous materials manager and is a graduate of the University of Chicago Law School.

Lauren Alterman is Associate General Counsel for Saint-Gobain Corporation and is based in Valley Forge, Pennsylvania. Alterman started her practice in the environmental enforcement section of the Ohio Attorney General's office, where she prosecuted violations of Ohio's environmental statutes before moving to a firm. She has been in-house with Saint-Gobain for 14 years and has several significant matters involving EPA's self-policing policy. Alterman is a graduate of Capital University Law School.

Stacy Watson May is Senior Counsel for Holland & Knight, practicing environmental law in their Orlando and Jacksonville, Florida offices. She has counseled clients in environmental compliance and enforcement actions across multiple states as well as at the federal level, regularly negotiating reduced penalties. Before joining Holland & Knight, Miss Watson May was in-house counsel with CFX Transportation, the largest railroad in the Eastern United States. In 2007, she was named by Florida Bar Members as an up and comer in the legal profession, as reported in one of "Florida Trend Magazines," "Florida Legal Elite." Miss Watson May is a graduate of the John Marshall Law School.

Without further ado, I would like to go to the next slide and give a preview of our program today. We will first discuss internal EHS audits in general, then we will proceed to discuss how you would handle the discovery of potential violations. We will then have a short discussion on the attorney/client communication privilege and attorney work product doctrine as utilized in the context of a corporation. We will then discuss various voluntary disclosure policies, both at the federal level and at the state level. We will then move on to the more important discussion, which is to report or not to report and EH&S violation. We will do so by utilizing various scenarios. Towards the end, we will have a Q&A before we conclude.

On the left side of your screen you will notice several links. These are links to supplemental and reference materials, including the disclosure policy materials for United States EPA, as well as California and Michigan. It also contains the panel's bios and contact information for your reference.

Internal EH&S audits in general. What is the purpose of an internal Environmental Health & Safety audit? For the most part, many companies utilize it primarily to determine compliance with Environmental Health & Safety rules. It also is meant to ascertain the ability of internal management systems to insure compliance. Finally, these audits are used

to make sure there are no surprises in the anticipation of a government agency investigation or inspection.

In the course of conducting an audit, in-house counsel plays a critical role in counseling audit teams, primarily counseling audit teams to be objective. They need to be objective and accurate when recording observations. In particular, they need to use factual and calm language. There are examples of this language on the screen.

What audit teams need to avoid is subjectivity and speculation. Do not use language that involved legal judgment or conclusion. This is particularly difficult when you're dealing with non-attorneys. Avoid emotion, hyperbole and colorful terms, for example: The meter was bad. I saw a violation. Or avoid, for example: Hypoxic smelling was oozing all over the darn place for God knows how long.

An important caveat to remember during the course of conducting an Environmental Health & Safety audit is the fact that routine EH&S audits may not be protected under the attorney/client privilege or attorney work product doctrine. However, there are some statutory protections that may be available but the basic premise is these are generally not protected materials.

I should like to turn on to our next panelist, Kathleen, to talk about potential violations.

Kathleen Hennessey: OK, thank you, Vince. What I have laid out here on slide 12 is a step-by-step checklist that we've utilized at Chrysler in, for our audit programs. This is certainly not the only way that an audit program can be done but EPA has, we have submitted this to EPA and they have found that this constitutes part of a comprehensive environmental management system, which is part of the criteria that we're going to be discussing later today.

What we do is have our auditors, who can be either inside or outside consultants, input their proposed findings into a database. We have our headquarters, program managers for example, the person in charge of the air program, as well as counsel review the proposed findings, and they can either review, approve the finding or request additional information, request it be clarified, and at this point is when we would usually make the decision about whether this, we are going to report this under an audit policy or, of course, whether there might be some other legal obligation to report the violation. Once the findings have been approved and finalized, the plant, working with headquarters, will propose some corrective actions. The program managers in the council will review and approve these corrective actions. The plant will form and document the corrective action, which is like the most important step of all, and then the finding is considered closed.

On slide 13; I've just given a list of some of the types of audits that we've performed. There are several types that we've performed, sometimes to maintain or ISO for 2001 certification. Others are a kind of internal assessment and there's just basically a description of what they are and what the frequency is of these audits. This is, again, just to give you an idea of how this could be done, certainly not the only way it needs to be done.

At this point, I'm going to turn it over to Stacy to discuss the attorney/client privilege.

Stacy Watson May: Thank you, Kathleen and thank you, Vince, for the nice introduction.

I'm going to talk about the attorney/client communication privilege and also work products privilege and you are very familiar with these principals but it's helpful to point these out when you're talking about the context of your audit as well as when an enforcement action is begun because of some condition at your, at one of your facilities and the steps that you need to take to protect your company's interests and have the best possible outcome in your negotiations.

So the first thing to remember is the public policy behind the attorney/client privilege, and it's to encourage full and frank communication between attorneys and their clients to promote the broader public interests. But we want to be able to give advice to our clients but we can't do that unless they feel free to talk to us about what their concerns are. And it's important to remember that the privilege belongs to the client, and in the corporate context, it's important to keep in mind that the client is. So remember, when we are talking about the elements of the attorney/client privilege, which the client is that the communication was for the purpose of legal advice and it was communicated to the attorney and it was made for the purpose of legal advice and in confidence. Again, it's also important to keep in mind that in the corporate setting it needs to be within the scope of the employee's duties in order to remain confidential. If it's something unrelated to legal advice then it's going to retain that, it's not going to be covered, protected by the attorney/client privilege.

Also, in slide 18 I just wanted to point out that it's important to remember what legal advice is not. When we're involved in a situation where our clients are looking to us for legal advice, or excuse me, for business advice or maybe political advice then sometimes we forget that we've maybe taken off our hat as the lawyer and we're not giving advice that does not fall within the attorney/client privilege, so we just need to remember, if you're talking to your public relations people about the best way to communicate a piece of information then you're not necessarily providing legal advice. It may be a combination or a mixture but as you're putting together your audit policy or you're considering the value of a self-audit policy or disclosing an infraction or potential violation then you, again, you want to think about as you're interacting with these other people how that affects the attorney/client privilege.

When you think about who the client is, remember that the client is the company. If an employee says to you well, I want to tell you something in confidence then they can't do that with respect to them personally and you probably need to explain that to them so they don't feel like they have their own personal attorney. Also keep in mind how this affects former employees. Every state is a little bit different but if you, as an outside lawyer, are talking to a former employee of your client who may have been involved in an incident that's now the subject of litigation, some states will allow you to have a communication with that former employee so long as you don't ask questions about that confidential communication. Other states will prohibit that communication altogether because of the privilege.

And again, the expectation of confidentiality is key. In order to retain the confidentiality of the privilege you must treat the information as confidential and it's very important to help remind your clients of that, particularly the non-lawyers, because they have a tendency to talk to other people, either forward your e-mail to their environmental consultant because they think it's helpful or they want to make sure to keep those public relations people involved and up to date so they tend to send your legal analysis on in an e-mail, so

forwarding e-mails, talking in elevators, talking with consultants is very challenging, particularly in the context that we're talking about today, where you may have a third party conducting your audit, you'll need to consider whether you are conferring with that outside party for the purposes of legal advice because it may retain, it may be confidential. It may be work product, which we'll talk about in a minute, but before you have that consultant sitting in a meeting with you and your client you just want to consider whether that's going to potentially abrogate the privilege that you would otherwise hope to retain.

So let's turn briefly to the attorney work product doctrine. As you know, this protects the attorney's thoughts and ideas when addressing legal issues and its documents prepared or collected in anticipation of litigation. It may or may not involve an attorney. Courts tend to look for the attorney's involvement as an indicator that it really was done in anticipation of litigation but certainly there are times when your client has taken some action because they thought there was going to be a lawsuit or a claim maybe by an employee who thinks they were exposed to something in the workplace or any number of scenarios. And this becomes important in the context of an investigation.

In slide 23; you'll see two memos that were put out by the Department of Justice. In 2003, Larry Thompson was the Deputy Attorney General and he issued a memorandum that talked about waiving the attorney/client privilege and the work product privilege, or work product doctrine, in the context of one of the factors in determining whether the agency should seek criminal penalty. If you look at that memo and then the more recent one which supersedes the 2003 memo, Paul McNulty wrote a memo in December of 2006 which has the same nine factors which are used by the agency in deciding whether to charge a corporation with criminal offenses, and generally the premise of the nine factors is they want to, and the policy is to encourage corporations to prevent corruption through self-policing and to punish wrongdoers through cooperation with law enforcement.

And in those factors, you know, they look at the seriousness of the offense, the pervasiveness of the wrongdoing within the corporation, the history of similar conduct, but importantly, the fourth factor is the corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate.

In the 2003 Thompson memo, it seemed as though, and I think there's some consensus that agency was trying to condition a finding of willingness to cooperate on the willingness of the company to waive attorney/client privilege.

And the McNulty memo now limits that and finds that a prosecutor should seek privileged information from a corporation in more limited circumstances and they also have some steps they must go through in order to get, potentially, permission to do that.

So if you or your clients are being asked to waive the attorney/client privilege, you need to review this memo and understand how it fits into the factors and whether the agency is going to seek the waiver of the attorney/client privilege. The reason they want it is they think it helps them understand the company's compliance and willingness to cooperate and their, the environment of voluntary disclosure, but again, it's unusual for them to ask for this but it certainly is part of their policy if it's the right circumstances, and just be aware that this is part of their policy and you need to be prepared to defend why it shouldn't be waived, or in some cases you may make the decision to, that it's in the company's best interests. It

certainly is going to depend on the circumstances and you'll want to think about even in a non-criminal action that if you can tell a better story by producing some report that arguably is protected by the work product doctrine, you may decide in your company's defense and negotiation to provide that to demonstrate that your company has a good internal compliance program or that you discovered the violations for your own self-audit.

So with that, I'm going to turn it over to Lauren Alterman to talk about the voluntary disclosure policy.

Lauren Alterman: Thank you very much. As some of you know, within a corporate setting you may choose to do an audit internally or, and you might do an audit on an annual basis. You might do a very focused audit where you're looking at maybe pieces of equipment and/or you might do it on a permit-by-permit basis. If we could ...

Stacy Watson May: And Lauren, I'm sorry. I did not advance the slide for you but I have set you as the leader.

Lauren Alterman: OK. So if I could just do page down. Right now it's not working.

Stacy Watson May: The blue arrow up at the top?

Lauren Alterman: I apologize. Here we go. The policies that we have been talking about, or the policies I'm going to talk about, are the federal policies and then the state policies, and it's not advancing to the next slide so I apologize. Here we go.

The United States policy as was just mentioned is really more of a self-policing policy and thus the name, the name, self-policing, and what it's intended to do is to give the company a benefit in the way of forgiveness of gravity based penalties if you meet nine elements. The policy would apply to any of the environmental statutes that the EPA administers and they're listed there for you. Not all of them are listed but it would cover all of them. Any type of business can take advantage of EPA self-policing policy. Many states have also implemented statutes and there's going to be a discussion in a few minutes about a couple of those particular statutes in the states. But the question is what is it that you want to protect? Why do you want to protect it? If you conduct an audit and you discover something do you just go ahead and fix it? Do you report it to the government? Or do you simply just hold your breath and hope that nothing ever happens? We're going to talk a little bit about that and what you should do.

Under the federal policy, which is the self-policing policy, I'm not going to read all of the words here but I'm going to highlight several of the nine criteria that you must meet if you want to get a 100 percent reduction or elimination of any gravity based penalties that the federal government can impose.

The first one is that you have to have conducted or discovered this through a systematic audit. The second is that you must have identified it voluntarily. Third, that you disclose it in a short time period, 21 days; and the fourth, self-explanatory, you have to disclose it and identify it before certain events. Number six, or number five, rather, you have to correct it within 60 days of discovering it. Number six, you have to correct, agree to correct. You cannot have had this ...

((Inaudible))

Male: ... this coming year ...

((Inaudible))

Lauren Alterman: ... have number eight, there be harm to human health or the environment, and of course, you must cooperate with EPA. If you meet all of these elements, you can get a 100 percent reduction of any gravity-based penalty. You will not get a reduction in an economic penalty, so that if you failed to install a piece of a control equipment ((inaudible)) that, there will be penalties associated with that, but what I want to do is I just want to briefly tell you about some of the pitfalls with a couple of these and I'm going back to the previous slide.

The systematic audit; what is that? If you happen to just trip over a violation, the argument would be that you did not discover it during the systematic audit and I suggest that you get with your legal staff. It's possible that you were conducting an audit and you just didn't know you were, and it can actually fall within the definition of a systematic audit and so you have to pay careful attention to how you develop the argument as to how you discovered the violation.

It also must have been discovered voluntarily. This is very important when it comes to a Title V situation. Title V, for those of you who have Title V facilities, are aware that you are obligated to certify that you are in compliance with your permit terms and conditions, and you're obligated to submit that certification and disclose if you are not. So if you find a violation of a permit condition in a Title V permit then there is a lot of authority, although it's not a lock and it's not a shut case, that you would not be entitled to take advantage of the self-policing policy.

You must disclose it within 21 days. We have had occasions where we weren't entirely sure that it was a violation but we put the agency on notice so that we met this timeframe and we have subsequently gone back and said we've discovered more facts and it's not a violation but if you don't meet this element then you do not get the reduction in the economic, I'm sorry, the gravity based penalty. And then it must be corrected within 60 days. If you cannot meet that timeframe then you must notify the agency that you will not be able to do so.

If you are not able to meet the first element, that is that you discovered it through a systematic audit, you could still be eligible for a 75 percent reduction of the gravity based penalty, and that's important because depending upon the nature of the violation that could be significant. Again, economic benefit is not going to be waived. It's to level the playing field with those folks who might have installed equipment. If you do meet these elements then EPA will not recommend that there be criminal prosecution for the violation to the extent that that is warranted.

And with that, I'm going to turn it over to Vincent.

Kathleen Hennessey: Actually, this is Kathleen, Lauren. I'm handling this session.

Lauren Alterman: OK. I'm sorry.

Kathleen Hennessey: So if you could make ((inaudible)). That's OK; if you could make me the leader?

Lauren Alterman: I'm going to do that.

Kathleen Hennessey: OK, thank you. I'm going to, we're going to do a little discussion here of some states' voluntary disclosure policies which, they have the same basic idea that there can be some important differences and I'm going to be talking about the Michigan policy, which is what I'm most familiar with.

Michigan has an environmental audit policy that provides us certain documents generated in connection with an audit or privilege, if you've given prior notice of the audit and if you promptly notify the Michigan Department of Environmental Quality of any violations discovered during the audit. What we have typically done at Chrysler is we will tend to schedule our audits in January of each year or set up a schedule and then we notify the MDEQ of all those that we plan to take in, during the year and a general idea of the timeframe although that shifts, and that has been not a problem for MDEQ at least so far. All the documents generated in connection with the audit must be labeled with these particular words: Environmental Audit Report, Privileged Document. And the benefit of the compliance with this policy is that it provides some immunity from certain administrative, civil or communal fines and penalties if you've met the condition of prior notice and prompt disclosure. But, as with the federal policy, the immunity or the benefits are not available for certain circumstances.

Immunity is not available if a company's been found guilty of a knowing violation of the criminal law, if there's been a pattern of violations in the last three years, if the violation has given the company clear economic advantages over competitors, if there's been some serious harm to the public health or the environment, or the violation is with respect to administrative or conditional order.

I'm now going to turn it over to Vince who's going to talk about the California policy.

Vincent Gonzalez: Thank you, Kathleen. I'd like to talk about the California Voluntary Disclosure Policy; policy with quotation marks around it and I'll explain later what that means.

Generally speaking, the California policy essentially has the same nine elements of the federal policy which requires systematic discovery of the violation, excuse me, voluntary disclosure of the violation, prompt disclosure, usually within 14 to 21 days, the discovery or disclosure was independent of a third party audit or government audit. It has to be corrected and remediated immediately. There's not real timeframe for that, for the definition of immediately. The entity must conduct measures to prevent recurrences. There should, this violation should not have been a repeat violation of prior occurrences. Serious violations are excluded from the policy. These violations could include those that involve serious physical injuries. And there has to be full cooperation with the agency in order to take advantage of the policy.

The policy has similar incentives and benefits as the federal policy. The agency can waive or reduce gravity-based penalties and automatically criminal penalties are taken off the table. The agency would not engage in any requests for audits and to some extent the economic benefits are, can be mitigated to a certain extent. For example, when in the process of estimating economic benefits from the violation, agencies will work with the agency in attempting to calculate that. They could work with the entity, for example, in establishing a baseline and going with the lower number versus the higher number of the economic benefit.

One critical caveat, the reason why this is not a policy is because it's actually a set of guidelines. As for those of you who practice environmental law in California, and you can raise your hands if – yes, I can see you. There are several agencies that comprise the California EPA Agency, such as the Department of Toxic Substances Control, the California Air Resources Board, among others, and these agencies are not required to follow the policy however they certainly do so from the process of using these policy points as guidelines. So if you try and resolve a matter down, let's say in San Diego, dealing with the San Diego APCD, they generally do not follow the nine or 10 elements of the policy.

The Department of Toxic Substance Control follows a similar set of policies or guidelines but they do so with, using, again, their own special way of doing so and so on. So it takes, it would take someone a little bit of time to acclimate themselves with respect to how different agencies follow these different kinds of policies so without further ado, I'd like to pass on the baton to Stacy for the next slide.

Stacy Watson May: Thank you, Vince. We're going to have a discussion now about to report or not to report, and I'm going to start it and then I'm going to ask my co-presenters to add to the discussion. Also, I see there have been a few questions and I think that we probably will try to hold them to the end so that we can make sure we cover all the material, but feel free to send in any questions if you have that and we will cover it either in this discussion or in the discussion of the scenarios.

So when there is not statutory or regulatory requirement to report a possible violation, what are some of the things to consider? And we're assuming, of course, that if there is a statutory or regulatory requirement to report that obviously that speaks for itself and that must be done. So what we're talking about are those times when your audit team or an employee or a contractor or a vendor, somebody brings it to your attention that there has been a violation or a non-episode of non-compliance.

Let's turn to slide 38, which have a number of important considerations and the first, is risk of harm to safety in the environment. Obviously, if there is risk of harm to the environment then there's going to be a heightened sense of concern about whether the agency needs to be notified so that some action can be taken. We're assuming that the, your company or client is going to take the corrective action needed in order to make sure it doesn't happen again, remedy the problem in the first place and probably then figure out what's needed to make sure that the processes in the company are changed, maybe it's a law that's been passed that hadn't come to your attention yet. So certainly risk of harm to safety in the environment is one of the most important considerations in determining whether the agency needs to be notified.

And I'll take this a little bit out of order but in terms of the second to the last bullet, corrective action needed, would the involvement of the regulator prove helpful? Again, sometimes it could be a new process, maybe something that you're trying to figure out how the regulations would apply; whether it's a process that needs some modification in order to remain in compliance.

The second bullet, the second important consideration is risk of harm to the company's credibility. The company's reputation and relationship with the agencies is so important. If you have a reputation for hiding the ball or not letting the inspectors in or every time the inspectors come you make them wait. You tell them this isn't a good time or you say well, I have to have the following information. You know, there are steps that you can take that you're certainly entitled to but generally you need to make sure that you convey to the regulators a sense of (cooperativeness), of cooperation, willingness to share information and it's really an issue of transparency, again, keeping in mind, and it's a balancing act with the legal rights of the company but credibility with the regulators is important and if you maintain that credibility you're less likely to see an aggressive enforcement action. You're less likely to see the inspectors as frequently.

The third bullet is to consider the ease of compliance, which doesn't really require government notification. Again, if there's no requirement and it's a small thing, there's been no risk of harm to safety in the environment and it's really a very small technical issue then you probably are going to want to make the correction yourself and not necessarily notify the regulators. Keeping in mind, again, with the formal notification, if it's a permit requirement then you may find yourself with an obligation to notify.

Importantly, think about the self-audit disclosure policy. You just heard about the EPA policy, Michigan and California, and most states have it. Some follow it more than others but think about whether that is the right tool for your company or your client to use so that you can, again, increase your credibility and transparency and take advantage of those provisions, which are going to reduce the amount of the penalty, if any, and help your company comply.

And again, the last bullet, compliance assurance, fits in with that. If your goal is to make sure that your company is complying with the regulations then, again, sometimes notifying the regulator, working with the regulator may lead to a better solution. Not every time; there are going to be times when you don't find that there are any benefits to notifying and would any of the other presenters like to add to that at this time?

Kathleen Hennessey: Stacy, it's Kathleen Hennessey. It just occurred to me as we were discussing this that one thing you'd need to think about as well possible public relations, you touched on corporate reputation but if you are going to make a disclosure and it might become public, it's important to let your PR department know so that they would, might be able to respond to media inquiries that might come as a result of this disclosure.

Stacy Watson May: That's a great point. And the other thing to keep in mind too is how you handle the disclosure to employees. If one of the reasons you're, you've decided to make a notification is that you've got some disgruntled employees and you feel like they think it's not being handled properly, maybe notification to the regulator is appropriate, but maybe it's just communicating with the employees. Let them know what you found and how

you're correcting it and that you're correcting it because you want to have a safe place to work. When you do things like that and you follow up with them, again, you can improve your compliance record and get the employees to share in that compliance goal and have some ownership over it and feel that that's the company's real goal as opposed to, you know, hiding the ball or sweeping it under the rug.

So I've turned now to slide 39. As we've said, you know, the key consideration, we call it close the loop. Make sure that not only are you identifying and assessing the violation, but you're correcting it. Think about the remedial measures that need to be implemented to prevent the recurrence. If you have an inspector who finds the violation, one of the best defenses you have is to show that you have a procedure in place, that your training is good, that your documentation is good and if you can tell a good story you're going to have a much better outcome in your negotiations than if your response is oh gosh, we hadn't thought about that. So do your best to learn from those instances where you find a violation and take advantage of the opportunity to see if you can get to the roots of the problem and make sure it doesn't happen again.

And with that, I'm going to turn it over to Vince to lead us in the discussion about our first scenario.

Vincent Gonzalez: Thank you, Stacy and thank you, Kathleen, for discussing those important considerations.

One of the things I'd like to talk about now and this is more of a teaching by hypothetical. I'd like to start talking about our first scenario. Your audit team finds in the dumpster behind one of your company facility a large volume of broken up pieces of asbestos insulation. They suspect this waste was apparently dumped by a contractor recently who did a facility remodel with your company facility. The audit team also discovers that the 10-day asbestos NESHAP pre-notification requirement, pre-notification requirement was not met by this contractor so what do you do?

One of the first things I often counsel the company to do is to first of all ascertain whether these broken up pieces of asbestos, whether or not it's friable. Is it even RACM, which is regulated asbestos containing material, the presence of which would put it in the potential to trigger the asbestos NESHAP rule? Secondly, we try and identify or try and ascertain how much of this material is in that dumpster. If it exceeds a certain amount, a certain square footage for example, then it would trigger the asbestos NESHAP rule.

We then discuss the possibility that other asbestos waste may have been dumped by this particular contractor elsewhere so we'd conduct, again, another internal investigation to determine exactly what this contractor did and where this contractor might have dumped the material.

In the course of doing so, you would do so under the attorney work products doctrine, at the end of which you would then decide well, do we notify the air quality agency regarding the failure to provide a 10-day asbestos NESHAP notice? That becomes a function of two things: one, your relationship with this particular agency. As Stacy had mentioned previously, it's important to maintain credibility with an agency considering you are always going to be a repeat player with respect to a certain agency.

The other consideration, number two, would be the fact that how strictly does this agency enforce its asbestos rules? If it's a very strict enforcer of these rules then clearly you need to make notification so that an inspector that finds out after the fact that you did not give this notice will not come down on you hard. And there's also a sequel to this, OSHA. You might, you may want to consider what elements of OSHA might also have been violated by the discovery of this asbestos waste. Was the work in fact conducted where PLs in the workplace were in this facility remodel? Were any PLs exceeded and if so what do you do? So that's one example of applying of, one way of trying to figure out how, whether or not to report or not to report a violation.

I'll go ahead and pass it on to Lauren, who is going to talk about our next scenario.

Lauren Alterman: Thank you. In this scenario, which is a real life scenario; it had a few more parts to it. We have a piece of equipment that is not installed as was contemplated by the permit and you also discover that you have some DOCs, and it could be really anything, that were not included in historical permits or even your recent expansion permits.

Looking at these independently, which I think is an appropriate thing to do, you have a piece of equipment, and I'll give you the real life factual, some of the facts here. The piece of equipment, there was a disagreement amongst the folks that were designing it as to how it should be designed. The question was, quote, total enclosure and what was meant by total enclosure. Some thought total enclosure meant maybe a 95 percent; others thought 100 percent and no percentages were really used in any discussions but it was actually how the piece of equipment looked when it was done. And it wasn't until after the expansion was completed and somebody who is not located at the facility came to the facility to look at the newly installed expansion and the equipment that was part of that expansion where the fellow said I don't think that that's totally enclosed and the discussion ensued. There is in that particular situation and there could be in others a real question as to whether there is a true violation and that is something that you may encounter. Is it really a violation? Is it something that needs to be disclosed cause maybe it's not a violation and that's the tricky part because now you're in that 21 days, when do I disclose? It's supposed to be 21 days of discovery. Is it discovery of it might be a violation? Is it discovery of it is a violation?

In our case, we erred on the conservative side and said since we had other things to report, let's roll it in and, you know, in hindsight I will tell you that we will never do that again because it was very simple to fix the piece of equipment and it was discovered very quickly. It was corrected quickly. There was no harm to human health or the environment. This has never happened to us before, et cetera. There really was no reason had we not had other issues which we clearly needed to report that we should have reported that, and we explained that to the agency because they said well, we think it is a violation and we got into a whole to-do about whether walking around and seeing whether the expansion was installed the way we contemplated actually was a systematic audit. But the long and the short of the story is that we were able to convince them that it was.

The more, the more interesting question here is that you have some VOCs that you didn't include in your permit. Well the problem with that is if you're a Title V facility and you might otherwise have been required by law to identify that and let the agency know about it. You're in a little bit of a pickle here because you clearly are going to have to amend your

permit. You're going to have to tell the agency. So now you say to yourself I have to tell them when I am in my permit. Should I also self-disclose this before I am in my permit? And I will tell you that I do think that you need to speak with your in-house counsel or your outside counsel and look at the facts of each one of your particular situations. It may vary somewhat and it may vary depending upon the state that you're in but it can be a very tricky situation as to whether the agency, whether it's state or federal, will give this a very hard look and say that you are not, you're not entitled to the waiver of the gravity based penalty because you were otherwise required by law to disclose it, therefore it wasn't voluntary. You could also say to yourself but since I have to amend my permit I might as well tell them. Or do you hold your breath and maybe they don't see it as a violation when you submit your permit amendment? So it's not an easy answer. I can tell you that we self-reported these things and we were able to work out a resolution with EPA. It was a federal region and we did get a majority. We didn't get 100 percent but we got a substantial majority of any penalty reduced or eliminated, I should say.

With that, I'm going to turn it over to Kathleen.

Kathleen Hennessey: Thank you, Lauren. The scenario that I wanted to discuss involves a situation in which an audit team discovers that there is battery acid in corporate batteries that has not been accounted for in the company's site (serrated) 311 and 312 reports and should have been, and it actually triggered a reporting threshold. And you're facing the question about whether to report that or not, you need to consider are there other facilities that you have that might be in the same situation. And I just want to mention a couple of things to consider while you're trying to make that decision.

First of all, there is, you can lose the protections of the audit policy if there are repeat violations. EPA though has said if you report everything as it, if you, if you report a violation at a facility and you suspect that there are other facilities that have the same violation, you should disclose them all at the same time within the 21 day period. So that's something that you need to think about doing because certainly if you report it at one facility and EPA is aware that you have many facilities that are similar, they may well begin to ask some of their other facilities.

Now a couple of other considerations, you may not, you may not wish to report everything at once because you may not actually have problems at the other facilities and you're inviting scrutiny at all these other facilities which you may not want to do. There is one other option, which I have not personally had any experience with but EPA will enter into what they call corporate-wide audit agreements under which you can set forth a schedule for auditing other facilities and they will extend the 21-day reporting period. Now again, you are, I think, inviting scrutiny to all of these other facilities. You'll need to identify them as part of the agreement so if you're, want to be really sure that you're reporting real violations that may not be a good solution for you.

The other thing to think about too is when you have multiple facilities is that if you are reporting in more than one region, EPA has a policy that you should report it to EPA headquarters and, again, some people are uncomfortable with that. You may have a good working relationship with the people in the regional offices but may not know people in headquarters and, you know, bad things might happen so these are all considerations that you definitely need to think about when you're reporting. It's not a single facility decision.

Even if you have an audit at just one facility and have a violation at just that one facility that you're, that you've confirmed, you need to think about are there other facilities that might have the same problem and how are we going to handle it.

With that, I'm going to turn this over to Stacy for the next scenario.

Stacy Watson May: Thank you, Kathleen. I wanted to talk about a scenario where once the employee leaves the company you discover that hazardous waste – oh, I'm sorry. I need to advance the slide. There we go, slide 43.

After an employee leaves the company you discover that hazardous waste manifest records have not been properly maintained and retained. What is the appropriate corrective action?

Well certainly the first thing I'd want to do is try to get to the bottom of why. Is it because there is no hazardous waste? Is it because I'm looking in the wrong place or it was a different employee? You know, hopefully there's some good answer but if there isn't then the next thing I would do is I would try to find those records. If you can figure out maybe from your invoices the company that's been disposing or transporting the hazardous waste and contact those companies and see if you can find those records.

Once you have the records then you'll have an idea of what type of waste stream, where it's been going and you can evaluate some of those factors that we discussed like the risk of harm to safety in the environment, risk of harm to the company's credibility, how easy it is to bring it into compliance and whether one of the self-audit policies might help you here, where you find that the company is really doing a pretty good job. You just had an employee that didn't do a good job and maybe you can show that you're going to amend your environmental management system to add some type of independent verification so that this can't happen again.

I would also consider whether the corrective action might vary for missing records versus improper disposal of hazardous waste. Let's say you get some of those records and you find that the company that has been disposing of those materials for you is now out of business or they're the subjects of a surplus superfund site action.

That will also affect some of your analysis as to whether you think there's going to be a serious problem, and again, the more serious it is, the more likely you are to want to take advantage of those self-disclosure policies and to take very seriously how to correct the problem so it doesn't happen again, maybe improve your training records, or excuse me, your training programs, make sure you're keeping your records, and any time you find that something like that has happened, remember that you're probably now in anticipation of litigation and you want to make sure that you maintain records and you don't destroy them so that if you are involved in an enforcement action you can have those records and you won't be subject (exfoliation) charge.

And as Kathleen pointed out, you know, think about your other facilities. Is this a problem just at this facility or is it something that might be company-wide that deserves a harder look?

And with that, I will turn it back to Kathleen who's going to go over our conclusions for us.

Vincent Gonzalez: Actually, Stacy, we're going to have some Q&A first.

Stacy Watson May: Oh, thank you. OK. So I'll send it back to you Vince.

Vince Gonzalez: Sure. I believe we had a question that came in when you were discussing legal advice in slide 18 in your discussion of the attorney/client privilege. How do you define political activity and would that include rule-making activities?

Stacy Watson May: I think it could include rule making. I think it's going to depend on what stage and where you are. Generally when I think of political advice I think about, you know, how is somebody going to vote? What is the political environment for a particular proposed piece of legislation? And so there are definitely times when you've crossed over into political advice and you don't necessarily need a lawyer for that.

I still think though that there are going to be times when a lawyer is giving legal advice about the implications of those law, the changes to law and other factors so I think it's a very good question and I would say that in those cases you need to advise you client that there's a potential that won't be protected as attorney/client privilege or work product, those political communications but I would still do my best to maintain the confidentiality, to mark them as privileged and confidential because it's going to give you the better argument that it, that that's how it was intended and I would try to retain those protections.

Vincent Gonzalez: I'd like to ask Lauren and then Kathleen the same question, namely how would you handle political issues within the company, between competing managers and employees with respect to the decision whether or not to report a violation?

Lauren Alterman: And not so much as to whether that falls into or is qualified as attorney/client protected information?

Vincent Gonzalez: Correct. There are going to be some political fallout issues sometimes. There are influences exerted by certain managers, for example, or even officers regarding how to disclose or even if to disclose.

Lauren Alterman: I would tell you that in my experience, this is Lauren, we have in many cases a difference of opinion as to whether to report and some of the considerations that were discussed earlier by Kathleen and Stacy, I think you are going to have to play out and you're going to have to have a discussion with your team, whomever is your team within your company, and outside counsel if you have outside counsel involved, you're going to have to go over the facts of the situations.

It's not a one size fits all and that what the company and sometimes its management has to understand is that there, in some cases, you have no choice, that the agency is either going to find out or you have some obligation to notify the agency. And so it's almost like you're trying to play a hand so that you can take advantage of some of the self-policing policies. That's the way I personally see it. If there is an opportunity to avoid gravity-based penalties, seriously consider that opportunity.

Vincent Gonzalez: Let me ask Kathleen, how would you handle an employee's disclosure of protected information?

Kathleen Hennessey: This is an issue where an employee has disclosed information that would otherwise be protected by attorney/client privilege?

Vincent Gonzalez: That's correct.

Kathleen Hennessey: That's the situation.

Vincent Gonzalez: Yes.

Kathleen Hennessey: Well I'm not expert in this area. I think you could argue that the employee is not the client and has no right to waive the privilege and that this should be akin to an inadvertent disclosure and should be treated as such and that the privilege should still attach to the information. You know, that being said, once the cat is out of the bag you might want to consider doing some kind of self-disclosure yourself to EPA, either under the audit privilege or just simply as a self-disclosure because there might likely be some investigation.

Lauren Alterman: This is Lauren. I may be that the agency that would argue that when you told the employee, you waived the privilege.

Kathleen Hennessey: Could be, yes.

Vincent Gonzalez: One more question for both Kathleen and Lauren, and also Stacy; if you're dealing with a contractor and the contractor causes the non-compliance do you self-disclose on behalf of the company or do you pressure the contractor to self disclose on behalf of the contractor?

Lauren Alterman: I personally ask myself, is my company at risk? Is my company potentially going to be penalized as a result of the actions of the contractor? And we have been in situations where we have disclosed situations to a state or federal agency and said that we don't know that it is our responsibility. We think it's the contractor's responsibility and we don't know if they've reported it but we felt it was something that we needed to do, and I will tell you though, that we will give prior notice on more than one occasion to the contractor and strongly suggest that it is their obligation.

Vincent Gonzalez: And Kathleen?

Kathleen Hennessey: I think I would agree with that. Typically if we think that we have some risks, we would want to be the person in, or the entity in control of making the disclosure and negotiating with the agency as necessary as to what a corrective action that might necessary. You could also consider make a joint disclosure with the contractor as well, and certainly if, to the extent that we have indemnity claims against the contractor, we'll, it's wise to get them involved as much as possible.

Vincent Gonzalez: We are out of time. I'd like to ask Stacy if she could go ahead and conclude the presentation and after doing so, if there are further questions from participants in the call,

please go ahead and send e-mail directly to Lauren, Kathleen or Stacy with respect to your questions. Stacy?

Stacy Watson May: Thank you Vince, and thanks to everyone for participating today. I think this has been a really great discussion. I know I've learned something as well. I think what we have come to is that we know we need to close the loop and implement our corrective actions, which includes figuring out to how to prevent this from happening again. I think this is the right thing for our employees and for the public at large, as well as it will be perceived very well by the regulators that you've undertaken that regardless of the enforcement action.

And, as I'm sure you all do, you think through the entire situation before deciding to voluntarily disclose. You've heard some discussion here today about sometimes it makes sense to disclose and sometimes it doesn't, and it's a very fact intensive analysis and there's no bright line so you just try to make the best decision you can based on the information you have at the time. And good documentation almost always helps. Every now and then people feel like well, if we hadn't had that document maybe that we wouldn't be in this situation but generally, good documentation is going to help you put together your best defense and I think it's a good rule to keep good documents, good files and that includes your training programs and the other things that we've talked about today so.

Vincent Gonzalez: This is Vince. I'd like to thank Lauren Alterman, Kathleen Hennessey, Stacy Watson May for doing a fantastic job at this webcast. For those again of you who would like to get in touch with each of them, their e-mail addresses are on the screen. Thank you and have a good day.

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