

Help Desk

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“The policy provides the framework by clearly identifying the commitments so that they can be met. Evidence of meeting the commitments includes setting and obtaining objectives,” he says. “Some organizations make a list for each of their commitments, showing related aspects, impacts, activities, products, services, challenges, problems, opportunities, programs, procedures and other evidence of the organization’s commitment.

“When establishing and reviewing its objectives, the standard requires that the organization consider the legal and other requirements, its significant environmental aspects, its technological options and its financial, opera-

tional and business requirements and the views of interested parties.

“Considering the items in the commitment lists, and the requirements of the standard, the organization creates objectives that support the commitments. The policy sets the direction of the organization; objectives take the organization in that direction,” says Madsen.

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Letter to the Editor



A Rebuttal to Avoiding Legal Pitfalls

I have noticed that a number of environmental practitioners moonlighting as freelance authors for the many environmental trade publications take some form of poetic license in the material they publish.

Be that a lack of informed oversight by their editors, or the fact that getting good people to write good, factual, easy-to-read articles are getting more scarce each day, many articles out there need a factual accuracy and reality check. Which brings me to the article in question that Thea Dunmire wrote in the July/August 2004 issue of *ESU*.

As a former fellow EPA regulator, and current EMS and regulatory compliance practicing consultant, I disagree with the concluding statement in her article, in which she states, “... If you have not had a system in place in your organization to routinely and systematically evaluate your compliance status, you should consider retaining an experienced environmental attorney to assist you in conducting an initial compliance review ... One word of caution, if the compliance evaluation is conducted without involving an attorney first, virtually nothing can be done to protect the results from discovery ...”

First off, a company considering a third party to conduct an initial compliance audit, needs to evaluate the value it will receive in utilizing an environmental attorney vs. an experienced compliance specialist who could also fix the recommendations made, such as fill out required regulatory forms, provide specific training, or craft various permits. That level of expertise may not be within the skills set of an environmental law firm, and may cost the company less. But that decision rests with the company, and if they choose not to use an attorney, it will not be as dire as Ms. Dunmire recommends. Why? She leaves out several key points in her discussion that need to be brought forth. She makes no mention of EPA’s audit disclosure policy that requires companies to disclose any violations noted to receive some form of regulatory amnesty, regardless of whether an attorney, consultant or

facility personnel conducted the audit — so where is the value she recommends? Second, as a former EPA inspector, I know from past experience that if an inspector wants to find a violation they will, independent of any previous audit conducted and any attorney-client privilege the company may have over previous audit reports. So again, where is the value in her recommendation?

However, to give Ms. Dunmire the benefit of the doubt that attorney-client privilege needs to be maintained, some well-heeled companies’ in-house counsel retain third party consultants to perform the environmental audit, and thus do not break the attorney-client privilege chain.

From my perspective, what really matters to a company considering hiring a third party to conduct an initial compliance audit as this task pertains to the specific ISO 14001 elements of Legal and other requirements and the second half of Monitoring and measurement, is for company officials charged with outsourcing contracts to carefully screen the resumes, past client experiences and client references of potential outside contractors (attorneys and consultants alike) to determine which firm(s) would be best suited to provide the company value for their investment. As I have briefly described, having an environmental attorney perform this work instead of a seasoned compliance specialist does not necessarily provide the client any added value, nor is there an unwritten rule that only attorneys are compliance specialists. There are a good number of ex-regulatory folks out there who excel in this capacity, and not all of them hold a J.D. In all business transactions, the customer’s voice needs to be heard, not ours, the service providers.

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