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SMART DOCUMENT CONTROL: KNOW WHEN TO HOLD 'EM, KNOW WHEN TO FOLD 'EM

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In many ways a smart document control policy is like the lyrics in a Kenny Rogers song: "You've got to know when to hold 'em, know when to fold 'em." Almost all environmental statutes and regulations require that certain documents be maintained for compliance purposes, and there are good reasons to keep certain documents in order to protect a company and demonstrate that decisions and operations are being performed appropriately. Yet many times companies maintain unnecessary and potentially damaging documents that can lead to problems, especially in the context of enforcement or litigation.

Most environmental statutes give environmental agencies authority to request a wide range of documents. Moreover, a company may be required to turn over a massive amount of electronic and hard copy documents to an unfriendly party in the context of litigation through discovery requests and subpoenas.

A document retention policy provides the best protection against the creation and retention of sensitive and potentially damaging documents. It allows for the systematic review, retention and destruction of documents in the course of normal business operations. While a document retention policy can and should cover all aspects of a business' operations, this article focuses on how a document retention policy applies in the context of environmental compliance.

As any environmental manager knows, various environmental statutes and regulations require that certain documents be maintained for specified periods; however, care should be taken to avoid the creation of unnecessary documents, especially documents that speculate about matters that may or may not constitute actual problems. If such documents are needed (for example in the context of a facility audit), the documents should be created under the protection of the attorney-client privilege. Failure to protect sensitive documents under the attorney-client privilege can result in damaging results should the company become subject to an enforcement action or litigation. For example, the following language – introduced as evidence of negligence in a federal court case – was in a facility audit that was not protected under the attorney-client privilege:

> "The number of discrepancies generated by this routine semi-annual compliance inspection along with the seemingly laisses-faire [*sic*] attitude toward hazardous waste management is a serious problem...."

The above statement – based solely on opinion and speculation – proved to be damaging for the company in the eyes of the jury that heard the case. Because the audit was not performed under the attorney-client privilege, the document could not be protected during the discovery process.

In another situation, a consultant acting as an expert witness compiled handwritten notes analyzing the opposing side's environmental report. In his notes, he agreed to various conclusions drawn by the opposing side. To make matters worse, at the end of his handwritten notes, the expert witness wrote: "On the stand, I will deny all of the above."

The handwritten notes were obtained by the opposing side during the discovery process and presented to the judge in the case. The judge noted that the expert witness was obviously willing to commit perjury and excluded the expert from testifying, leaving the client without an expert witness on the eve of trial.

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