The Truth and Nothing but the Truth

By JAMES A. KOSCH

The term “environmental fraud” calls to mind unconscionable acts of brazen deceit. For example, a rogue company hides a catastrophic discharge of toxic chemicals as executives falsify reports, lie to regulators and skulk around in a Watergate-style cover-up.

Truthfully, operators of this caliber would never even read a publication like CCI or heed any compliance-related warnings contained therein.

But while environmental fraud (as opposed to, say, shoddy compliance) does require intentional deceit, even well-intentioned companies sometimes run the risk of committing fraud by taking a few furtive steps onto a certain slippery slope that involves “shading” the truth. And small companies, in particular, tend to be less aware of the need to establish strong internal controls geared toward preventing fraud.

Risk Area No. 1: Fudging the Numbers “Just a Little”

Back in the day, it was not uncommon for drivers to turn off their catalytic converters in order to boost the performance of their vehicles. When the time came to get an emissions test, they would switch the converter back on. While this was not exactly grand theft auto, it was nonetheless a deliberate act of deceit.

Plant managers are sometimes guilty of “fudging the numbers” in similar ways. They might, for example, reduce the volume of emissions coming out of the smokestack for a few days each month in order to create the appearance of regulatory compliance. The rationale here might run something like this: “I’m not

really committing fraud. I'm just shading the truth a bit. The boss will be thrilled if we can get a slightly better insurance premium."

The line between shoddy compliance and fraud can be thin, but in the aforementioned case, it has clearly been crossed. What makes the difference here is the intent to deceive. This, after all, is what environmental crime is all about. Cases of deliberate deception beg for criminal prosecution. Simply put, there is no such thing as a "minor" case of environmental fraud.

Risk Area No. 2: Running Afoul of Right-to-Know Obligations

During the 1980s, a spate of environmental catastrophes and near-catastrophes —everything from plant explosions to major releases of toxic chemicals — led to passage of a raft of environmental right-to-know laws. The public wanted to know what that plant with the smokestacks and funny smells had onsite.

Fire departments, too, wanted detailed information: If there was a fire at the plant, should they use water or chemicals to put it out? What materials were most flammable or explosive? Plants were thus legally required to open up. Not only did they have to report exactly how many tons of hazardous particulates were pouring out of the smokestacks, they also needed to give the public and fire and safety agencies a true picture of what was going on at the plant. While public relations or proprietary concerns might tempt some companies to try to create the impression of having a gentler environmental footprint than they actually do, any false reporting in this regard is, quite simply, fraud.

The risk of such deceit being uncovered is real. Now and again, state or federal permitting authorities will come on site for routine checks. The Environmental Protection Agency, moreover, periodically examines entire industries, conducting multimedia audits of every plant in the United States, with walk-on inspections and thorough audits in which they look carefully for ruses like maintaining "two sets of books," one for the outside world and one for internal use.

As an aside, while it might not rise to the legal definition of fraud, companies should take great care with how they publicly characterize their operations. Sometimes, businesses that legally release chemicals into the air or water under appropriate discharge permits will make overreaching statements: "Why, this stuff is perfectly safe. I'd have no problem with my children being exposed to it." But there is a difference between a chemical being "perfectly safe" and its having been deemed "safe enough" by the EPA when released in limited amounts over specific periods of time. Lying to the public in this way is yet another form of fraud.

Risk Area No. 3: Complying with Codes of Ethics

Engineers, geologists, hydrologists and the like always have professional licensing obligations and codes of ethics. Sometimes, compliance is voluntary, but in many states it is a legal requirement. Likewise, as signatories to the International Standards Organization or other industry groups, companies are legally bound to certain professional standards. Making false statements about compliance can also

rise to the level of fraud. Here, too, companies must pay close attention to accurate disclosure.

The Simple Solution: Be a Good Corporate Citizen

How can companies reduce their risk of being found guilty of environmental fraud? The simple solution is to make every effort to be a good corporate citizen. That means attending to all obligations vis-à-vis environmental disclosures, from voluntary agreements and professional codes to environmental reporting requirements mandated by the Securities and Exchange Commission.

If a violation occurs, the right thing to do is to self-report the incident. Agencies appreciate this. While there was a time when even self-reporting would land companies in hot water, today this is more likely to translate into good faith with regulators. They would just as soon have the problem remedied as chase you for penalties.

Mishaps are inevitable. When they occur, acknowledge them and fix them. Covering up is just as bad as lying in the first place and often leads to greater woes. But by establishing strong internal controls — from establishing routine audits and internal checks, to hiring a safety officer empowered to ferret out problems, or even working with an outside ombudsman focused on environmental compliance — companies can go a long way toward dramatically reducing their risk. The truth, and nothing but the truth, in other words, is the only option.

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