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THE REGULATORY ENVIRONMENT OF ENVIRONMENTAL AUDITING

A paper presented at the Niagara Institute's Seminar on "Environmental Auditing: The Key to Successful Environmental Management"

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I. INTRODUCTION

With increasing public awareness and concern over environmental issues, various levels of government have put in place more stringent environmental legislation and increased enforcement actions against non-compliant firms. The courts have responded by imposing progressively more severe fines and penalties against polluters. Faced with the threat of substantial financial burden resulting from the issuance of fines, and/or clean-up requirements, the detrimental public image when one is identified as a "bad actor" and the potential long-term liability for health effects to future users of a site, companies have turned towards a complex array of management tools to assist in the administration of environmental affairs.

One of the more common and increasingly popular environmental management tools is the environmental audit. Since the initial audits were undertaken in the mid 1970's, environmental auditing has undergone rapid development with numerous practices and activities commonly grouped under the umbrella of environmental auditing.

Some confusion has therefore arisen over the precise meaning of the term "environmental audit". At a fundamental level, an environmental audit has been defined as a systematic, documented, periodic and objective review by a firm, outside consultant or regulatory agency of a facility's operations and practices as they relate to environmental requirements.[1]

There is a lack of agreement on what activities, and at what level of detail, should and should not be included within the scope of environmental auditing. The widely divergent requirements of industry, in terms of the need for and comprehensiveness of audit activities, are partly responsible for this lack of consistency.

Recognizing these differences, a classification scheme which groups audits into four generic classes has been developed. These classes are: the compliance audit; the management system/risk assessment (MS/RA) audit; the waste minimization audit and the real estate audit. Within each class, the level of detail and comprehensiveness can be tailored to the individual requirements of the subject firm. A brief explanation of each class follows.[2]

The primary intent of the compliance audit is to ensure adherence to all relevant environmental laws, standards and guidelines including: restrictions on discharges and waste disposal practices, permit and reporting requirements, regulatory limitations on operations (e.g. hours of operation), monitoring requirements and self-reporting of violations, when required.

The compliance audit is a relatively concentrated activity in that the review is limited strictly to an assessment of operations with respect to regulatory compliance. Typically, air, water, waste management and material storage (e.g. underground tankage) practices are the focus of the audit although industrial hygiene aspects may be included in some compliance audits. Compliance audits may also be extended to cover an assessment of compliance with internal corporate policies and procedures.

In addition to an evaluation of regulatory compliance, the MS/RA audit addresses the effectiveness of in-place environmental management systems and corporate policies and the risks associated with materials and practices which, although not currently regulated, may result in detrimental environmental consequences such as spills or releases of toxic gases. The MS/RA audit is designed to ensure adherence to both the letter and the spirit of the law. As such, it is similar to, but more comprehensive than, the compliance audit.

The MS/RA is more valuable than the compliance audit as it provides the opportunity for a company to develop proactive practices and policies to minimize the risk of environmental excursions. Compliance audits, on the other hand, provide data on current non-compliant activities and, as such, result in a form of crisis management as a company strives to bring itself back into compliance. The MS/RA can therefore be considered as a higher level audit. Typically, companies begin their auditing program at the level of the compliance audit to identify immediate needs and gradually raise the standards to that of the more proactive management system/risk assessment audit.

The waste minimization audit is a specialized class of environmental audits with the particular goal of reducing waste generation rates and disposal costs. The audit consists of an in-plant survey and detailed analysis of processes and waste streams, including the identification of sources, quantities and types of generated wastes. Production processes and material use are reviewed to identify areas of inefficiency, excess wastage, potential re-use opportunities and waste reduction alternatives. Based on audit findings, a cost/benefit analysis is undertaken to determine promising, cost effective waste reduction alternatives for implementation.

Real estate audits focus on the identification of potential liabilities associated with existing structures (e.g. asbestos, property, and past practices (e.g. on-site waste disposal) which may either require remediation or adversely affect the value of the property under consideration. These audits are somewhat unique in that they are usually one-time-only undertakings typically, but not always, associated with real estate transactions and/or plant closures. Real estate audits can, however, be commissioned during any phase of a facility's life cycle.

From the above the legal importance of environmental audits is readily inferred. They are of great benefit in promoting corporate compliance with environmental requirements hence reducing potential liabilities and allowing early identification of environmental problems before they get out of control.

This paper will address briefly the legal status of environmental audits before turning to a discussion of the Regulatory framework covering hazardous materials. New regulatory programs and future directions will also be examined.

II. LEGAL STATUS OF ENVIRONMENTAL AUDITS

Since the 1978 decision of the Supreme Court of Canada in R. v. Sault Ste. Marie [3] an accused can avoid liability for environmental harm under most of our environmental legislation by establishing that he took all reasonable care to avoid it. The availability of this due diligence defence depends on whether the directing mind of the corporation prepared for all the foreseeable problems, whether or not they were actually foreseen by plant staff. A defendant cannot show such due diligence if its management was not aware of potential problems that would have come to light through an inspection or environmental audit. Hence, an audit will make management aware of its due diligence responsibilities while providing evidence that such due diligence has been carried out.

Moreover, common law and government policy statements suggest that environmental auditing is becoming a necessary management tool for a corporation's effective compliance with environmental legislation. Courts considering whether reasonable care has been taken have found that the following can serve as evidence of due diligence.

- upper management endorsement of compliance with the law (for example, a corporate policy statement);
- instructing managers and supervisors of the duties and requirements of the Act in question and providing appropriate staff training;
- adequacy of the staff to perform the function required under the Act;
- adequacy and accessibility of supplies enabling compliance;
- the existence of operating manuals;
- programs which show regular and continuous compliance checks, supervision and written records to evidence the same;
- compliance with industry standards as a minimum;
- continuous updates, notices and reminders; and
- documentation to record system and events.[4]

Audits were first considered to be evidence of due diligence in R.v. Placer Developments Ltd. where the Yukon Territorial Court found:

> A reasonable alternative to minimize risk in operations such as in this case is a formalized system of inspection of all potential risks... The cost of inspection, opportunity for inspection, the relative expertise of parties involved foreseeability of harm, and the potential magnitude of harm, all define the kind of inspections reasonable care warrants.[5]

Of course the problem of who may have access to information to material generated in the course of an audit is of serious interest to corporate management who have looked to various levels of government for direction. There is a relative fear that an audit, once conducted, would be of substantial interest to the relevant regulatory authority or other third party in establishing corporate environmental liability.

A. Ontario Provincial Policy

Mr. Bradley, the former Minister of the Environment of Ontario, stated in January 1987 that:

> At this time, the Ministry does not propose to develop a formal policy on environmental audits. It does however, encourage the use of audits as the best means of ensuring compliance with environmental laws, regulations and statutory instruments such as orders and approvals...Our views are generally consistent with the policy of the Environmental Protection Agency, which has evolved a policy following careful deliberation and after receiving full input from the[5a] public and persons likely to be affected by it.

In talking with Ministry personnel it would appear that the Ontario Government has used 'auditing' type processes when reviewing corporate compliance. That is, auditing has been used to determine corporate compliance status, to determine potential emission risks and the effectiveness of equipment. However, to date, the Ministry has not routinely required disclosure of corporate environmental audits.

B. U.S. Federal Policy

The U.S. Environmental Protection Agency has taken steps to encourage voluntarily initiated audits. In July of 1986 an Environmental Auditing Policy Statement was published in the hope that clarification of EPA's position regarding auditing would help encourage entities to establish audit programs or update systems already in place.[5b] In this policy statement, the EPA

addresses the question of requests for reports, lists elements of effective environmental auditing from their perspective, comments on the complementary role of audits and regulatory inspections and expressly states that it is not their intent to mandate auditing. A further elaboration of the applications of environmental audits within the U.S. federal regime is presented in section V. towards the end of the paper.

C. Canadian Federal Policy Position

In its "Compliance and Enforcement Policy" under the Canadian Environmental Protection Act (CEPA), Environment Canada has defined the circumstances in which its inspectors and investigators will require the production of an environmental audit. It is worth quoting the operative part of the policy in full:

> Environment Canada recognizes the power and effectiveness of environmental audits as a management tool for companies and government agencies, and intends to promote their use by industry and others.
>
> To encourage the practice of environmental auditing, inspections and investigations under the Canadian Environmental Protection Act will be conducted in a manner which will not inhibit the practice or quality of auditing. Inspectors will not request environmental audit reports during routine inspections to verify compliance with the Act.
>
> Access to environmental audit reports may be required when inspectors or investigation specialists have reasonable grounds to believe that:
>
> - an offence has been committed;
>
> - the audit's findings will be relevant to the particular violation, necessary to its investigation and required as evidence;
>
> - the information being sought through the audit cannot be obtained from other sources through the exercise of the inspector's investigation specialist's powers.
>
> In particular reference to the latter criterion, environmental audit reports must not be used to shelter monitoring, compliance or other information that would otherwise be accessible to inspectors under the Canadian Environmental Protection Act.
>
> Any demand for access to environmental audit reports during investigations will be made under the authority

> of a search warrant. The only exception to the use of a search warrant is exigent circumstances, that is, when the delay necessary to obtain a warrant would likely result in danger to the environment or human life, or the loss or destruction of evidence.[6]

The last paragraph only repeats some of the requirements of s. 101 of CEPA as they relate to environmental audits. The policy does provide some comfort to companies as the circumstances in which an investigator will require the production of an audit will necessarily be very limited. First, he must know enough before asking for the audit to have reasonable grounds to believe an offence has been committed. He must, on the other hand, need further information which is not available, either from his original source of information which gave him those reasonable grounds, or from other sources. These other sources may include documents (other than audits) which may be seized under a search warrant. The investigator must go further. Not only must he know or believe that an audit has been conducted; he must have reasonable grounds to believe that its findings will be relevant and required as evidence. How can he know all these things unless some one has told him about the audit and its findings?

Other than general confidentiality or trade secret arguments, the main avenue for non-disclosure of environmental audits is solicitor-client privilege. Such a privilege may be available for an environmental audit, if properly structured and successfully argued. It should be emphasized that a claim of solicitor-client privilege will not automatically provide an unchallengeable answer to a request for an environmental audit; however, a well-designed structure to create privilege can provide the basis for a legal argument for privilege.

The other area of solicitor-client privilege covers communications in pending or contemplated litigation. The case law in Ontario is not clear on the exact scope of this branch of privilege; however, it would appear that communications will be subject to the privilege only if the main purpose of the communication is connected with pending or contemplated litigation.

On the basis of these principles and the principle of commercial confidentiality, the following guidelines prepared by Cotton[7] should be of assistance in preparing for a valid argument on this basis:

> (a) The solicitor must be involved from the beginning of the audit, preferably as the "focal point", as coordinator or as team leader. It is especially critical to obtaining privilege for an environmental audit that counsel be retained as early as possible. There is authority that a

document which is prepared before a lawyer is consulted by the client does not acquire privilege when it is sent to the lawyer for an opinion.

(b) An initial written communication from the client to the solicitor requesting legal advice as to compliance or non-compliance with environmental laws or regulations should be on file. A statement to the effect that "information necessary to develop an audit report is known only by middle or lower-level employees" would be useful in such a situation.

(c) A reply communication from the solicitor to the client indicating that legal advice is to be so provided, with further information as to requirements for distribution, etc. should be on file.

(d) Requests for information from employees clearly state that such information is required by counsel to render legal advice on environmental compliance or potential liabilities arising from corporate actions.

(e) All documents should be labelled "privileged" or "confidential". A statement of confidentiality should be added to cover pages of reports or questionnaires.

(f) Personnel on the audit team and employees interviewed during the audit should be instructed to keep findings confidential and to report them only to the audit team or to counsel.

(g) A separate client file for each environmental audit should be kept and marked as "privileged" or "confidential".

(h) Distribution of all materials should be limited, to the greatest extent possible, to those individuals with corporate or facility decision-making authority or to individuals responsible for approval of financing for audit programs, or both.

(i) All outside consultants should be hired as agents of the solicitor, and consultant-produced materials should be delivered to and remain the exclusive property of the solicitor, to the extent possible. Further, consultants should sign confidentiality agreements to prevent disclosure of information generated by the audit.

D. Summary

The risks associated with disclosure can be reduced but not eliminated although enforcement policies such as those adopted by Environment Canada under CEPA may provide some additional comfort. The rules relating to privilege should be clearly understood if any advantage can be gained from them at all. In the context of environmental audits, however, the protection of privilege will only be available in certain circumstances. Where litigation has been commenced or is anticipated, the solicitor-client privilege will protect documents generated for counsel's use in connection with the litigation, provided that is the dominant purpose for which the documents are prepared. This rule applies to documents labelled "environmental audit" as much as to any other type of document. In the usual case, however, it cannot seriously be said that litigation is contemplated when an environmental audit is prepared; still less that the use of the audit report by counsel in the litigation is the dominant purpose for which it is prepared.

III. THE REGULATORY FRAMEWORK

Many industries manufacture, transport, or use hazardous substances or generate and dispose of hazardous wastes. If these substances or wastes escape uncontrolled into the water, soil or air, including the air enclosed by a building and elements already polluted, they could cause injury to human, animal or plant life, or otherwise contaminate the environment. Ontario and many other jurisdictions have adopted the policy that the "polluter must pay". This includes occupiers who can inspect before occupancy. The polluter and a subsequent owner or occupier may face an imposing array of laws.

A. Environmental Offences

Various federal and provincial statutes provide for prosecution of persons or companies, including employees involved in the commission of the offence, with large monetary fines and possible imprisonment on conviction, for the following offences:[8]

1. Pollution

Liability may result if anyone discharges, or causes or permits the discharge of a contaminant into the natural environment in excess of permitted levels or is likely to cause an adverse effect on the environment.[9]

Anyone, whether director, officer, employer, employee, hirer or contractor, who in a given situation is in a position of influence or control and who could have prevented the discharge will be subject to prosecution.

2. Reporting

Failure to report forthwith the escape or discharge of a contaminant by a person who commits, causes or permits the discharge of the contaminant, by the person responsible for the source of the contaminant and by the person having control of a spilled pollutant;[10]

Audit results can sometimes trigger reporting requirements. Thus, if an audit reveals that a spill has occured on the site of a facility, management must report it to the relevant government authority.

Professional engineers, whether consultants or employees, have a professional obligation to report a situation which may endanger the safety or welfare of the public;[11]

3. Clean-up Responsibility

Failure by the owner of a pollutant and the person having control of a pollutant that is "spilled" and is likely to cause adverse effects to do everything practicable to prevent, eliminate and ameliorate the adverse effects and to restore the natural environment;[12]

4. Waste Prohibitions

There are three prohibitions under the Waste Management provisions of the EPA which are the key to the handling and disposal of wastes in Ontario. "Waste" is given an inclusive definition and so can include any substance which is of no use or purpose.

(a) Deposit of waste in any place which has not been approved as a waste disposal site and except in accord with the approval;[13]

(b) Use of any facilities or equipment for handling waste that is not approved as a waste disposal system and except in accord with the approval;[14]

(c) Use of any land, or land covered by water, which has been used for the disposal of waste within 25 years after such land ceased to be so used except with MOE approval.[15] This provision would prohibit excavation of, construction or other use of any site, approved or unapproved, on which any waste

has been deposited during the preceding 25 years.

(d) Regulations

There are two principal regulations which supplement the foregoing prohibitions.

The General Waste Management Regulations[16] classify wastes, waste disposal sites and waste management systems. They require every person who generates hazardous or liquid industrial waste, as defined in the regulation, to file a waste generator report. They require records respecting generation, retention and disposal of wastes, and prohibit disposal except in accord with this regulation. They also require preparation, carrying and filing of waste manifests when shipping wastes.

The PCB Regulations[17] govern the management of PCB waste, including liquids and materials containing PCBs and equipment or drums which contained PCBs. The regulation contains rigid requirements respecting reporting and MOE approval for storage, transport and disposal of PCB wastes. If a site on which PCB waste is located is offered for sale or lease, or its possession is offered to another, the offerer must:

(i) notify the prospective purchaser, tenant or person taking possession of the existence of the site and the regulatory requirements respecting the site; and

(ii) notify the MOE of the sale, lease or change in possession when the sale, lease or other change of possession occurs.

The purchaser, tenant or person taking possession must notify the MOE in writing within 10 days thereafter of the location of the site and the nature and quantity of the PCBs.

5. Regulatory Approvals

Failure to obtain requisite certificate of approvals, file Waste Generator Reports or comply with other regulatory requirements such as the following:

(a) Certificate of Approval prior to construction or change of works or processes which may cause pollution, or are intended to control pollution (including sewage works), or of sewers or watermains on multi-residence and commercial developments.[18]

(b) Certificate of Approval for establishment, use, operation or extension of a waste disposal site or a waste management system.[19] Waste disposal site approvals usually require registration on title.

(c) Approval of the Minister of Environment for the use of land which has been used for disposal of waste (including unauthorized disposal) within 25 years from when the land ceased to be so used.[20]

Failure to comply with a condition or term of a certificate, approval, licence or permit under the EPA is an offence.[21]

6. Transportation of Dangerous Goods

Failure to comply with requirements for packaging,[22] safety marks, shipping documents, general safety requirements, handler training and permits in connection with transportation and related handling of goods classified by regulation as "dangerous" or "wastes".[23]

7. Sewers

Discharging hazardous wastes to municipal storm sewers or sanitary sewers without agreement of the municipality (and payment of a fee) or contrary to applicable sewer use by-laws.[24] In addition to fines under the by-law, enforcement can include a prohibition order by the court, breach of which could result in substantial fines and imprisonment;[25]

8. Corporate Liability

An act or omission by an officer, employee or agent of a corporation in the course of his employment or the exercise of his powers or the performance of his duties is deemed to be also an act or omission of the corporation for the purpose of the EPA and CEPA.[26] It is not necessary to establish that the officer or employee is a "directing mind of the corporation" or manager in respect of the activity, as required in a prosecution for a criminal offence.[27]

9. Directors, Officers and Employees

(i) Officers and directors for failing in their duty to take all reasonable care to prevent their corporation from causing or permitting an unlawful discharge or emission of a contaminant;[28]

(ii) Employees or other individuals who commit or participate in the commission of an offence are liable to prosecution for the offence.

(iii) In some situations an officer or director may be in a position of sufficient control to be found guilty of causing or permitting pollution or to be liable to clean up a spill and compensate those who suffer damage from a spill.

In R v. Blackbird Holdings Ltd., George Crowe, President of Blackbird Holdings Ltd., resident in the Trenton area was convicted of having polluted the local groundwater and of operating a waste disposal site without first obtaining a Certificate of Approval from the Ministry of the Environment. Both Crowe and his company were convicted resulting in a fifteen day jail sentence for Crowe and a $30,000 fine for Blackbird.[29]

B. Civil Liability

Civil Liability for clean-up costs and damages suffered by others:

1. Spills - Clean-up

Absolute, joint and several, liability of the owner and the person in control of a contaminant to clean up or pay the costs of cleaning up an abnormal discharge of the contaminant ("spill");[30]

2. Spills - General Liability

(i) Strict, joint and several, liability of the owner and person in control of a spilled contaminant for the damage caused to others by the spill;[31]

(ii) Liability for damage and investigation costs resulting from conduct contrary to CEPA;[32]

(iii) Injunction;[33]

3. Directors, Officers and Shareholders

Directors and Officers of corporations have a duty to act honestly and in good faith with a view to the best interests of the corporation and to exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.[34] The corporation's interests include those of the shareholder and the creditors.[35] Remedies for breach of these duties can be enforced by a derivative action on behalf of the corporation or by an application for use of the "oppression remedy" by any security holder, creditor, officer, director or other "proper person."[36]

Failure to disclose in financial statements, prospectuses or by timely disclosure material liabilities for environmental damage or costs could result in claims by investors and prosecution.[37] Directors, officers and shareholders may also be liable to persons beyond the corporation. Liability can rest in tort for inducing breach of contract or conspiracy to injure. They could be liable for participating in a tort by the corporation or for breach of a constructive trust. A shareholder could be liable where the corporation is the agent, extension or alter ego, or acting at the direction, of the shareholder and the circumstances would justify breach of the corporate veil.[38] The statutory duty of due diligence on directors and officers to ensure that their corporation does not pollute and other regulatory standards may establish the standard for an independent duty of care to third parties.[39]

4. Order on CEPA Conviction

Order on conviction under the CEPA to compensate for the loss or damage suffered by an aggrieved person as a result to the commission of the offence.[40]

C. Regulatory Orders

In addition to prosecution for offences, owners and occupants of land and operators of businesses face the costs of compliance with regulatory orders:

1. Control Order

Issued by the MOE requiring the "person responsible for a source of contaminant" to control or eliminate the contamination and to undertake investigations and measures within a stipulated time to achieve the objectives.[41]

2. Clean-up Order

(a) This is directed to a person who "causes or permits" the discharge of a contaminant that damages the environment to do all things necessary to repair the damage,[42]

(b) In respect of a "spill", this is directed to:
(i) the owner or person in control of a pollutant,
(ii) owner or person having management or control of affected real property, or
(iii) any person who may be adversely affected by the pollutant, to prevent, eliminate or ameliorate the adverse effects of the spill and restore the natural environment.[43]

3. Preventive or Clean-up Order

The policy of our law is that the polluter pays to clean up the mess he makes. If the polluter has disappeared or is insolvent, the regulatory authorities will look to the person who has management or control of the property. The MOE can issue a preventive or clean-up order against:

(a) "a person who owns or who has management or control of an undertaking or property" (not restricted to the person who polluted the land) which is a potential source or contaminant to take preventive action or to clean up the MOE's satisfaction, contaminated land to prevent further environmental damage;[44] and

(b) "the occupant or the person having charge and control" of land on which waste has been deposited that has not been approved as a waste disposal site to remove the waste and restore the site.[45]

4. Waste Disposal Compliance Order

Requires the "owner" to bring a waste disposal site or waste disposal system into conformity with regulatory requirements.[46]

5. Stop Order

> Issued by the MOE to the person responsible for the source of a contaminant where in the opinion of the MOE the source is discharging a contaminant which constitutes an immediate danger to human life or health or to property.[47]

If a person fails to comply with a clean-up order, the MOE can perform the clean-up and claims the costs from the owner or occupant as a debt due to the Crown.[48]

How clean is clean? There are no prescribed standards to which the land must be cleaned. The MOE has developed Decommissioning Guidelines as an indication of what will normally be contained in an order[49] but these guidelines do not have the force of law and contemplate orders which are site specific. If no limits are prescribed in the Guidelines, the MOE will require that the property be cleaned up to "background" levels unless they can be persuaded that clean-up to a lesser standard, will be sufficient.

Any such order may require the person to whom it is directed to take such action and steps as are related to the action required or prohibited by the order.[50] Any order or approval under the EPA is binding upon the successor or assignee of the person to whom it is directed.[51] This would include a successor owner or tenant. Failure to comply with an order is an offence.[52]

The MOE may obtain an injunction to prevent contravention of the EPA or OWRA and may, following a conviction for an offence, obtain a prohibition order, breach of which could result in a contempt order and heavy fine or imprisonment.[53]

D. Conditions of Regulatory Approvals and Orders

Ministry orders and approvals or approvals by the Environmental Assessment Board or Joint Board for major projects, waste disposal sites or systems may be made conditional on requirements for studies, regular monitoring and reporting and preventive or clean-up measures.

The MOE may require financial assurance to secure compliance with any certificate of approval, permit, order, notice or direction. This can take the form of deposit with the MOE of cash, securities, letter of credit, bond, guarantee or other agreement. The MOE often makes waste disposal site and waste management approvals, and control orders against impecunious polluters conditional on financial assurance being provided. Failure to provide the financial assurance is grounds for revocation on any approval and for an MOE order prohibiting or restricting the operation or use of the

works in respect of which the financial assurance is required.[53]

It is a condition of every licence, permit, certificate or approval under the EPA that the holder must, on request, permit provincial officers to carry out inspections authorized under the EPA and related statutes of any place to which such licence, approval, etc. relates.[55]

E. Other Statutes

In addition to the foregoing, there are numerous federal and provincial statutes and regulations directed to specific substances or situations.[56] For example, the Health Promotion and Protection Act[57] deals with the protection of public health including nuisances. "Nuisance" is defined as any condition existing in a locality that is or may become injurious or dangerous to health or that may prevent or hinder in any manner the suppression of disease. Powers are given to the local Medical Officer of Health to inspect situations and to make orders to prevent and abate nuisance and charge the cost to the owner or occupier of the premises.

The Gasoline Handling Act[58] regulates the construction and operation of service stations, marinas, bulk plants and gasoline carriers. It requires the licensing of service stations, etc. and of installers, repairers, servicers and removers of equipment.

F. Contract Rights and Obligations

Where land or buildings are being sold or leased, the contract could, explicitly or by implication, create environmental obligations.

1. Land Purchase Agreements

The purchaser of land may assume a covenant restricting uses of the land. Breach of the covenant could result in liabilities to the vendor or neighbouring owners for damages and a court order prohibiting the offending activity.

Most agreements will provide for representations and warranties by the vendor, breach of which will give rise to liabilities of the vendor.[59]

2. Leases

(a) There may be expressed or implied covenants in a lease respecting the fitness of the land for the

tenant's proposed use, prohibitions against improper use by the tenant and covenants by the tenant or the owner to put in good repair and to keep and leave in good repair, and to keep clean and in good order and condition. Their interpretation will depend on all the relevant circumstances. A breach may give rise to damages and a court order prohibiting the offending activity.

(b) A tenant who commits or permits the tort of waste resulting in damage to the property without the lessor's tacit permission will be liable for the damage to the extent of the value of the lessor's reversionary interest in the land and the lease could be forfeited or the offending activity prohibited.[60]

3. Latent Hazards/Deceit

"Caveat emptor" applies to the sale of land in respect of non-title matters. In general, no warranties will be implied (except on sale of a house by the builder) and purchasers are only protected by express provisions in the agreements. Vendors are under no obligation to disclose the existence of defects to purchasers, except hidden or latent defects which constitute a potential hazard (but not patent or obvious defects or latent defects which are not potentially hazardous) of which the vendor is aware. Latent defects are those which would not be revealed by an inquiry which the purchaser is in a position to make before entering into the contract for purchase.

Disclosure must be made prior to signing the agreement to sell. The obligation may continue up to closing in respect of dangerous latent defects discovered after signing the agreement and prior to closing.

Latent potentially dangerous defects of which the vendor is aware must be disclosed if it would be a fraud not to disclose or if it would be a breach of warranty or contractual condition. Fraud is an elastic concept but involves a statement or representation knowing it to be false or being recklessly careless as to whether it is true or false. If the premises were dangerously unfit for the purchaser's intended use of which the vendor was aware the vendor may, depending on the circumstances, have a duty to disclose the defect. This will have the effect of substantially reducing the price or even making the property unmarketable until the defect is remedied.

I. Enforcement

1. Increased Prosecution and Fines

The Ontario government has given a mandate to the MOE to increase enforcement of Ontario environmental laws and the CEPA may be an indication of federal resolve.[61] The MOE has increased the staff and capabilities of its investigation and enforcement section and its legal branch. These laws give inspectors and investigators broad powers to enter, search and inspect premises and to make copies and take tests and seize evidence. Voluntary compliance is encouraged by the confidentiality required of Ministry employees.[62]

Audit reports can be seized under these broad inspection powers. Sections 126 and 127 of the EPA empower Provincial Officers to make inspections without warrants or court orders and gives them the power to require the production of any document that is related to the purposes of the inspection. The officers are under an obligation outlined in section 130, to preserve the confidentiality of the information in these documents with the exception of information in respect of the deposit, addition, emission or discharge of a contaminant into the natural environment. The broad wording of this section clearly encompasses certain types of information that may be contained in an environmental audit.

Employees are protected from (and employers can be prosecuted for) harassment by the employer for refusal to commit an offence under an environmental statute, complying with a ministry order or permit, whistleblowing (reporting an employer offence) and seeking ministry enforcement of the EPA. Aggrieved employees can pursue redress of illegal employer disciplinary action by the Ontario Labour Relations Board. Consequently, the MOE feels little compunction in prosecuting employees whose acts or omissions constituted an offence while, or instead of, prosecuting the employer.[63]

Penalty provisions under the EPA are set out in Appendix B.

2. Corporate Defences

Environmental and occupational safety statutes and by-laws are considered public welfare laws. In a prosecution for breach of such laws the prosecution

must produce evidence to prove each element of the offence beyond a reasonable doubt. The prosecutor need not (except in a criminal prosecution) establish a guilty mind or that the accused had intent or full knowledge of what he was doing. Aside from raising doubts as to the credibility of the prosecution's evidence, there are few defences available to the accused company, employee or director to avoid a conviction.[64]

The principal defence available to a person accused of a serious regulatory offence is that of due diligence. The accused must establish on the balance of probabilities that he took all reasonable care or the care that any reasonably prudent person would have taken in the circumstances to prevent the occurrence of the circumstances constituting the offence.[65] The foreseeability of the resultant damage or harm is irrelevant. This is the standard duty of the officer and director. It is also the standard required to defend a claim for damages resulting from a spill.[66] It is an imprecise standard which will be applied with the benefit of hindsight to the probability of the hazard occurring and the potential severity of its consequences.

This defence is not available for a claim based on absolute liability such as for costs to clean up a spill.[67]

In addition to the penalties set out in Appendix A, the court may impose as an additional fine, over any maximum imposed, an amount equal to the monetary benefit acquired by or that accrued to the accused as a result of the commission of the offence.[68]

3. Private Prosecution

Our laws permit prosecutions by individuals, such as environmental activists, subject to the power of the Attorney-General to stay proceedings.[69]

J. Limitation Periods

i. Civil Law

A person who has suffered injury, property damage or economic loss can sue many years after the alleged fault or resulting damage occurred. However, he must commence his action in the courts within 6 years after he first knew or ought to have known, with the use of reasonable diligence, of injury or damage, the person

who caused it and the other material facts on which the action is based.[70]

2. Spills

A person who chooses to bring a claim arising out of a spill under the EPA, as opposed to reliance on the common law, must bring the action within 2 years after he knew or ought to have known of the loss or damages or incurred expense to comply with an order. There is an indeterminate limitation period where the defendant is claiming contribution from a third party. [71]

3. Prosecution

A prosecution for a statutory offence must normally be brought within 2 years after the date on which the offence was or is alleged to have been committed or the date on which evidence of the offence first came to the attention of a person under section 4 of the EPA.[72] The offence of pollution contamination is probably committed when the contamination leaks or escapes from the property, not when it is first deposited or spilled.

IV. NEW REGULATORY DEVELOPMENTS

A. The Clean Air Program (CAP)[73]

According to former Environment Minister Jim Bradley, the Clean Air Program proposed by the Ontario government would force 20,000 of Ontario's worst polluters to reduce their toxic air emissions.

The Clean Air Program which would amend Regulation 308, calls for stiff penalties and tougher limits on toxic discharges released into the environment. The proposal is presently the subject of public consultation.

This reform addresses problems such as the long-range transportation of air pollution, with the toughest controls required on polluters which emit chemicals which persist in the environment, accumulate in living things and move up the food chain to threaten human beings.

The regulation would require controls on all significant stationary sources of atmospheric emissions to minimize releases into the environment and proposes controls commensurate with the known or suspected hazard of the contaminant being emitted.

It also calls for certificates of approval, which must be renewed every 10 years, for all significant new and existing sources of

emissions and recommends provisions which would ensure that community air standards are met throughout Ontario.

The regulations that would be established under the Clean Air Program would achieve those aims by: implementing systems to classify contaminants according to their potential impact; a three-level system of emission control requirements, and through requirements for certificates of approval to construct and run operations which can cause air pollution.

It also proposes the use of state-of-the-art computer models to estimate the impact of emissions on communities, revisions to existing procedures for granting air approvals and monitoring and quality assurance requirements.

A spokesman for the provincial air resources branch said the proposed regulation would carry the same penalties as the Municipal-Industrial Strategy for Abatement (MISA) which deals with water pollution. Under MISA, polluters can face jail terms and fines of up to $200,000.[74]

B. The Municipal Industrial Strategy for Abatement (MISA)[75]

The MISA program, introduced in June 1986, has as its goal the virtual elimination of toxic contaminants in municipal and industrial discharges into Ontario waterways. This program signifies a shift from past water pollution control strategies which have primarily been aimed at conventional pollutants such as suspended solids, BOD, ammonia, and phenols. Because of the evidence of toxic contaminants in Ontario waterways and the fact that these chemicals pose a risk to fish, plants, wildlife and humans even at low concentrations and are often persistent and bioaccumulate, a need was seen to focus regulatory efforts on these toxic contaminants.

The program has two distinct phases: a monitoring phase designed to identify and quantify all pollutants in the effluent being discharged and a control phase, which will result in specific limits being prescribed for the concentration and total amount of any contaminant being discharged. Nine industrial sectors and the municipal sector are covered by the program.

These regulations are being developed on an individual industrial sector basis. The monitoring regulations are now in place for the petroleum, organic chemicals, iron and steel, inorganic chemicals, pulp and paper, mining and smelting industries, metal casting and foundries, hydro and industrial minerals.

The effluent monitoring regulations will provide the basis for prescribing specific effluent limits to control the quality of industrial discharges by sector. Specific reporting requirements for relevant contaminants are set out in each regulation in

addition to common requirements for sampling, analysis, toxicity testing, and reporting which are set out in a general effluent monitoring regulation.

After the development and promulgation of monitoring regulations, effluent limits will be set by regulation for each industrial sector and the municipal sector. These limits will be developed on the basis of Best Available Technology Economically Achievable (BATEA). The regulations will specify allowable concentrations and amounts of toxic substances for each discharger.

Presently the MOE is consulting with industry and the public on a number of issues surrounding the development of the BATEA regulations. A number of these issues are very technical including flow measurement accuracy and quality assurance/ quality control procedures. Other issues are more policy oriented including the controversial definition of virtual elimination.[76]

The MOE anticipates that the effluent limits regulation will be applied to individual plant sites through the issuance of site-specific Certificate of Approval. In addition, it is anticipated that the Certificate of Approvals could have more stringent conditions than the regulation requirements to protect local water quality.

MISA will also address the reduction of toxic waste water discharges to municipal sewer systems. Amendments to the EPA and OWRA to provide for the legislative framework for this program will be necessary. The proposed amendments would allow the MOE to set sector-wide limits for indirect dischargers; and perform audits of industrial compliance and municipal enforcement. Amendments to the Municipal Act to allow municipalities to enforce provincial regulation requirements will also be necessary.[77]

Existing OWRA and EPA prohibitions will continued to be enforced with respect to the impairment of water quality or the environment. However, the effectiveness of MISA will be measured by the enforcement of the proposed monitoring and effluent limit regulations. The MOE expects to learn of effluent limits violations through notification by dischargers; review of data submitted; and MOE sampling during inspections.

C. Canadian Environmental Protection Act (CEPA)

CEPA was proclaimed in force on June 30, 1988.[78] Although it was introduced with much fanfare as "the most comprehensive piece of legislation in the western world," this is not the case. In reality, CEPA was largely a consolidation and replacement of several existing statutes into one piece of legislation. These included the Clean Air Act, Part III of the Canada Water Act, the

Ocean Dumping Control Act and the Environmental Contaminants Act. The only significant changes are found in Part II dealing with toxic substances and in the penalty sections. New substances are dealt with under sections 25-32 of the Act. CEPA requires the Minister to compile a list of substances (a) manufactured in or imported into Canada in a quantity of at least 100 kilograms in any one year or (b) in Canadian commerce. The relevant dates are January 1, 1984- December 31, 1986. This list will be known as the Domestic Substances List (DSL). Section 26 provides that no one can import or manufacture a substance not found on the Domestic Substances List unless the person has provided the Minister of the Environment with a package of information in accordance with the testing regulations.

In order for a chemical to be regulated as a toxic substance, there are a number of steps that must be taken under CEPA. First of all, the Ministers must compile a list known as a "Priority Substances List. If the Ministers determine that a substance is toxic or capable of becoming toxic, they are required to prepare a report and publish a summary of it in the Canada Gazette. The two Ministers may then recommend that a substance be added to the List of Toxic Substances. An order adding a substance to the Schedule I list of Toxic Substances is only effective once Regulations are passed. In order for a regulation to be passed, a number of hoops and hurdles must be overcome, including comments by a federal-provincial advisory committee and provision that a regulation can be made inapplicable to a province where the Minister and provinces agree in writing that the province has an "equivalent" regulation. To date, there are nine substances on the Schedule I List of Toxic Substances. These include asbestos, lead, mercury and vinyl chloride which were previously regulated under the Clean Air Act and mirex, chlorofluorocarbons, PCBS, PBBS and PCTs which were previously regulated under the Environmental Contaminants Act. The first Priority Substances List Assessment Report on Polychlorinated Dibenzodioxins and Polychlorinated Dibenzofurans was released in the fall of 1990.[79]

The Minister is given broad powers to collect data and conduct investigations in order to determine whether a substance is toxic. Under section 17, there is a duty imposed on any person dealing with substances to provide any information forthwith that reasonably supports the conclusion that the substance is toxic or capable of becoming toxic. He is also given the authority to make interim orders where immediate action is required.

Any person who owns or has charge of a toxic substance or who causes or increases the likelihood of its release must report and take all reasonable emergency measures to clean- up or mitigate the effects of an imminent or actual release of the substance (ss. 36, 57). The Crown can recover from such persons its cost of so doing without prejudice to their rights of indemnity from others (ss. 39, 60).

Part VII of CEPA contains the offence sections of the Act. Inspection powers, and search and seizure procedures are set out in this Part. The level of fines provided by CEPA are significantly higher than the fines in the statutes that CEPA repealed. Maximum fines range to one million dollars and imprisonment up to five years depending on the offence. A due diligence defence has been provided for under section 125.

There are also a number of innovative sentencing tools. Pursuant to s. 129, the court may impose an additional fine in an amount equal to the court's estimate of the amount of monetary benefits acquired or accruing to the offender as the result of the commission of the offence. The court is also given wide-ranging powers to make a number of interesting orders including: directing the offender to take action to remedy or avoid any harm to the environment; publication of the facts relating to the conviction; directing the offender to compensate the Minister for the cost of remedial action taken by the Minister; directing the offender to perform community service; or directing the offender to pay an amount for the purposes of conducting research into the ecological use and disposal of the substance in respect of which the offence was committed.[80]

As mentioned earlier an Enforcement and Compliance Policy was finalized at the same time as CEPA was promulgated in June 1988. Unfortunately from the period June 30, 1988 - May 30, 1990 there have only been seven prosecutions under CEPA, three under the ocean dumping regulations and the other four in relation to PCBs. This is not surprising given the current paucity of regulations under CEPA. It therefore remains to be seen if Environment Canada's present enforcement practices will result in environmentally sound management of toxic substances.

D. The Green Plan

The Green Plan has a brief mention of environmental audits in the section entitled "Starting in Our Own House." The Government states that beginning in 1992, in co-operation with the Office of the Comptroller General, federal departments and agencies will implement policies and procedures for environmental auditing.[81] In regard to CEPA, the Government states that one of its goals is to complete the assessment of 100 priority substances of most concern by the year 2000 and to enact regulations for all those substances found to be toxic. It will be interesting to see whether the government can meet this timetable.[82]

V. THE U.S. REGULATORY SCENE

No chapter of the United States Code, nor any part of the Code of Federal Regulations, is entitled "Environmental Auditing." There is no Federal Environmental Auditing Act, nor are there any direct environmental audit requirements. While the Environmental

Protection Agency (EPA) has issued an environmental auditing policy statement,[1] it is carefully limited to the voluntary rather than the mandatory.[2] Yet environmental auditing is inescapably linked to and driven by the regulatory scheme. Wholly apart from the continuing debate over whether environmental regulations are too lax or too stringent, their very existence compels corporate environmental self-assessments. This section provides a brief sketch of the ways in which the present regulatory scheme requires rigorous environmental self-assessment in particular, and committed environmental management in general.

To some extent the new interest in environmental audits is attributable to a significant increase in the number and size of the penalties, both financial and personal, for non-compliance. This rise reflects no underlying legal change, but a more serious enforcement effort coupled with steadily expanding tort liability.[3] Similarly, it took a while for it to become clear that Superfund imposes liability which is both expansive and expensive.

Perhaps the more important forces, however, have not involved compliance issues. There has been increasing appreciation of the benefits of environmental management other than compliance with a complicated set of regulations: improved risk management, lower premiums or more readily available insurance, good public relations, better operating performance, sounder planning, and reduced costs through recycling, waste minimization, and material substitutions, the opportunity for which would otherwise have gone unnoticed.[4] In particular the 1986 Emergency Planning and Community Right to Know Act (EPCRA)[5] and its attendant publicity have significantly changed the climate in which corporations operate. Without imposing any substantive requirements limiting discharges, the right-to-know provisions gave a huge boost to the need for thorough information on risk and potential health, safety, and environmental harms. Thus, by focusing on the regulatory scheme, it would be unwise to slight the important factors other than concerns about liability, which are equally or more significant spurs to committed environmental management.

A. Compliance and Enforcement

Environmental regulations are nothing if not far reaching. Essentially every type of discharge is subject to generally applicable standards and/or specific permit requirements. Any manufacturing operation will have to comply with a wide variety of regulatory standards and obtain more permits than one would have thought possible. This is not the forum to detail the substance of these requirements.[6] It is important, however, to understand their scope and the consequences of their violation.

1. Compliance

The extensiveness of environmental regulations can be glimpsed by considering for example, the regulations applicable to a new energy-from-waste incinerator. Under the Clean Air Act alone, the incinerator must comply with seven different regulations ranging from operating practices, emission limits for a half dozen pollutants, sampling, monitoring, and reporting requirements, best available technology for emission limits, the provision of one year's worth of ambient air monitoring data, and the proponent must demonstrate that all other facilities owned by the operator are in compliance with the legislation.[7] These standards represent a fraction of the regulations which would apply to such an operation when one includes the range of State and local laws to be applied.[8]

Although the current regulatory scheme is in many ways lax and riddled with loopholes, there is no denying that it is complex, intrusive, and far reaching. Careful, detailed examination of both the legal requirements and the company's actual operations is necessary just to find out what requirements apply, let alone whether they are being satisfied.

2. Sanctions

There is more than a moral imperative behind the concern with compliance. Administrative and civil penalties for non-compliance can be severe. For example, violations of the Clean Water Act can result in civil penalties of $25,000 per day and administrative penalties of $10,000 per violation after an abbreviated hearing, or $10,000 per day after a full-fledged administrative hearing.[9] These figures are typical for the federal statutes.[10] Increasingly, civil enforcement actions are resulting in penalties in the millions of dollars.[11] Furthermore, penalties can be assessed not merely for failure to adhere to the substantive standards, but also for violation of monitoring and reporting requirements.[12]

Nor is it just the government that a company must worry about. The critical federal environmental statutes each create a cause of action for citizens' enforcement suits.[13] These have been a potent enforcement tool, leading to hefty penalties payable to the Federal Government or to settlements under which funds are expended on environmental projects.

Finally, penalties for violation of regulatory requirements are not only civil. The Department of Justice and the

states have steadily increased criminal prosecutions under environmental laws.[14]

3. Reporting Requirements

Regulatory standards do not create the need for self-assessment, only indirectly, via the need to comply, but also directly. Three sets of requirements stand out.

First, as stated above, any discharge permit will include monitoring and testing requirements. These are in essence explicit, albeit limited, environmental auditing requirements.

Second, requirements for the management of hazardous wastes are replete with record keeping and reporting provisions. These include the manifest system for tracking shipments, the identification number process and the biennial report on the quantities and nature of hazardous waste generated and disposed of, among others.

Third, EPA may simply request information from a company wholly apart from pre-existing monitoring or reporting requirements. Consider, for example, the Clean Air Act, which states that "The Administrator may require any facility ... to establish and maintain such records, make such reports, install, use and maintain such monitoring equipment or methods, sample such emissions, and provide such other information as he may reasonably require."[15] To date the agency has not pushed this authority very far, but it is a potentially powerful tool, both to compel audits and to obtain results of an audit a company has performed on its own initiative.

Although the EPA has not transformed its information gathering powers into full-fledged audit requirements, EPA information requests must be taken seriously. Recently EPA has pressed for information hardest under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).[16] Section 103(e) of CERCLA requires Potentially Responsible Parties to provide information on the substances they may have contributed to the site, the extent of any release, and their ability to pay for a clean up. Section 104(e) authorizes EPA to request such information.

B. Permit Applications

In any situation where the regulated entity must apply for a permit, and there are many, the need for complete and accurate environmental information is especially pronounced. First, the grant of a permit by a federal agency is an action to which the

National Environmental Policy Act (NEPA), Environmental Impact Statement (EIS) requirement applies.[17] In theory, the lead agency prepares the EIS. As a practical matter, the applicant will do most of the ground work and provide much of the information for the EIS, which is likely to be actually prepared by a consultant. The EIS will be more accurate and convincing if it is based on a thorough knowledge of the applicant's other facilities or projects, and if the avoidance of adverse environmental harms it promises is based on an established track record of sound environmental management. Moreover, the NEPA process begins, not with the EIS but with the Environmental Assessment (EA) which indicates whether an EIS is necessary.[18] Unlike the EIS, the EA can be prepared by the applicant himself.[19] Thus, the applicant's own efforts in compiling and presenting information on environmental impacts is central to the NEPA process. In fact, the entire NEPA process is itself a critical aspect of environmental management. That is, it is a period in which the company and regulators directly focus on the company's environmental performance.

C. Identifying Risks

Several federal laws require corporations to generate and disclose information about their activities with regard to the environment and actual and potential environmental liabilities.

1. Emergency Planning and Community Right-to-Know Act

In a more or less direct response to the Bhopal disaster, EPCRA requires state and local governments to adopt response plans for emergency situations involving chemical releases[20] and seeks to ensure that chemical risks are fully communicated to the public. In essence this constitutes an environmental auditing requirement period. Companies producing or using designated hazardous chemicals must provide state and local committees and EPA with information about the chemicals, accident risks, spills, and any actual releases of the chemicals.[21] Although the reporting requirement applies only to designated chemicals, the designations are broad and reach many substances that are otherwise wholly unregulated.[22]

Predictably, the new availability of relatively complete information on chemical releases has led to increased pressure for more stringent regulation, prompted voluntary reductions, and caused significant concern over public health and safety.

2. Security Clause

Publicly traded companies often must prepare and disclose information regarding environmental compliance and liabilities as part of their obligation under the security clause to disclose all information relevant to investors' decisions. Disclosures must be made in a variety of documents, the most important of which are the registration statement for publicly traded securities and the company's quarterly and annual reports. Specific disclosure requirements are set out in regulation S-K.[23]

In practice, the statements made to satisfy the S.E.C. disclosure requirements, frequently seem empty, perfunctory, and vague. The reader is often left with the sense that s/he has no greater knowledge of underlying environmental liabilities than before s/he saw the disclosure. This defect of actual disclosures is in part the reflection of strong incentives in this context towards the vague and optimistic. But it also underscores the very real difficulties with the concept of "disclosure" generally, and with pinning down with any precision just what environmental liabilities exist and just how they are likely to affect the firm's business. Making that evaluation is the basic challenge of environmental management.

D. The Future of Environmental Management in the U.S.A.

The following comments include some speculations as to what the future may hold for the U.S. regulatory scene. As the environmental regulatory program changes in the years to come, the need and opportunity for effective environmental management will only grow.

It is likely that the future for U.S. companies holds many more direct regulatory environmental auditing requirements. The pending Environmental Crimes Act[24] is one indication of this trend. Similarly, at the federal level, discussion continues on the use of environmental audit requirements as part of consent decrees or administrative settlements.[25]

A corollary development is the increasing emphasis on risk communication and the public dissemination of information. Under contemporary "information economics," the trend in both common and statutory laws is toward wide distribution of information so that the electorate, the market, and the liabilities system can act on it. This tendency will only increase as the information age and the computer age continue to prod each other along with the resultant incremental legal adjustments. The days of keeping things quiet are gone.

Finally, it would appear that the watchwords of environmental regulation in the 1990s will be "pollution

prevention". Recently the EPA has received a draft of new legislation premised on pollution prevention ideas and abandoning the medium-specific approach that characterizes the current regulatory octopus.[26] The EPA had already established a Pollution Prevention office, and much of the attention the agency gave environmental auditing five years ago seems now focused on pollution prevention.[27]

At present actual pollution, prevention, recycling, and waste minimization requirements are minimal. RCRA does, however, require that a generator of hazardous waste must certify that it "has a program in place to reduce the volume or quantity and toxicity of such waste to the degree determined by the generator to be economically practicable."[28] This is an easy enough thing to certify but a much harder thing to do. Nonetheless these requirements, though meagre, are likely a sign of things to come. EPA has shied away from recommending or imposing a flat source reduction requirement in the hazardous waste setting. It is increasingly interested, however, in extracting pollution prevention programs and settlement enforcement actions.[29] In addition, Congress recently passed a sketchy Pollution Prevention Act[30] and state waste minimization initiatives are proliferating.[31]

While the regulatory consequences of the new emphasis on pollution prevention remain minor and as yet unclear, environmental regulation has already rendered pollution prevention an economic mandate. Across the board the greater expense of complying with increasingly stringent standards has finally begun to make people realize the complex and tight controls may cost more to purchase, operate, and maintain than would a change in production techniques.

Pollution prevention is a classic example of a task that requires effective and informed environmental management. It will not happen by itself. The firm must have someone who is aware of the goal and has the mandate and the information gathering tools necessary to meet it. For a company with effective environmental management, the increasing emphasis on pollution prevention will be an opportunity, not a burden.

VI. CONCLUSIONS

The environmental audit has gained in popularity during the past few years. An audit can serve a number of purposes and can be a benefit to the companies utilizing this management tool. This paper has outlined briefly the legal status of audits and has discussed the complex regulatory framework that surrounds hazardous substances. It is likely in the future that there will

be more, rather than less regulation of activities that may harm the environment. There may even be legislation that regulates audits in a variety of situations. For example, California has recently provided for a mandatory audit process for generators of hazardous wastes- the purpose being the reduction of such waste. That State has also instituted a program for the registration of persons conducting audits.

New Jersey, on the other hand, through its Environmental Cleanup Responsibility Act requires a form of environmental audit to be conducted before certain sites can be closed or transferred. The Act is based on the theory that it is necessary to impose cleanup procedures prior to the closing or transfer of certain property in order to ensure that potential risks are addressed and mitigated. Failure to comply with the legislation is a ground for the voiding of the sale and can result in a prosecution.

Finally, there is the New Jersey Toxic Catastrophe Prevention Act which requires facilities which handle certain hazardous chemicals to register with the State and to develop a risk management program. The purpose is the minimization of risks from hazardous accidents.

Whether such legislation will come to Canada is uncertain, but it is clear that audits will continue to have an important role in the future.

1. EPA Environmental Auditing Policy Statement, 51 Fed. Reg. 25,004 (1986)(hereafter EPA Auditing Policy).

2. For a full discussion of the EPA Policy, see "Environmental Auditing Policy Statement" 1986, Federal Register, Vol. 57.

3. For example, the past year saw a record $32 million in civil penalties go to the Federal Government. EPA recently announced a tougher RCRA enforcement policy, with more fines at the $25,000 maximum and insistence on each day being a separate violation. 21 Env.'t Rep. (BNA) 1129 (Oct. 5, 1990). The Department of Justice obtained 134 criminal endictments in 1990, the most ever. Although still a drop in the bucket, this marks a critical change from the not-so-distant past when criminal liability for corporate managers under environmental laws was a wholly theoretical possibility.

4. See Earl, "Environmental Auditing: What Your Client Doesn't Know Hurts the Most," 60 Florida Bar Journal, Jan. 1986, at 47-48.

5. EPCRA Pub. L. No. 99-499, 100 Stat. 1613 (1986) (Codified at 42 U.S.C. 11001-11050) (1988).

6. For full treatments see W. Rogers, Environmental Law (1988).

7. EPA Standards for Performance for Municipal Waste Combusters, 56 Fed. Reg. 5488 (1991).

8. See generally Recycling and Incineration: Evaluating the Choices, 246-267 (R. Dennison and J. Rustin, eds., 1990).

9. 33 U.S.C. 1319.

10. See also the Clean Water Act, the Resource Conservation and Recovery Act, and the Toxic Substances Control Act.

11. See United States v. Environmental Waste Control, 710 F.Supp. 1172 (N.D. Ind. 1989), confirmed 917 F. 2d 327 (7th Cir. 1990) ($2.18 million RCRA penalty).

12. See for example, 33 U.S.C. 1319(g).

13. For example, in Chesapeake Bay Foundation v. Bethlehem Steel Corporation, 608 F. Supp. 440 (D.Md. 1985), after the Court made a finding of liability, the parties settled for a $1.5 million payment to support local environmental projects, in addition to increased treatment and monitoring.

14. See supra note 3.

15. 42 U.S.C. 6922(a)(5), 6923(a), 6924(a)(2); 40 CFR 262.20.

16. 94 Stat. 2767(1980) (codified at 42 U.S.C. 9601-9675 (1988)).

17. 42 U.S.C. 4332(c)(1988).

18. See 1501.3, 1501.4(c), 1508.9.

19. See 1506.5(b).

20. 42 U.S.C. 11003(1988).

21. 42 U.S.C. 11021, 11022, 11004.

22. See 42 U.S.C. 11023.

23. See 17 S.F.R. 229.23.

24. H.R. 3641, 101st Congress First Session (1989). This proposed law would require that after a felony conviction or second misdemeanour conviction under the Act, the organization would be placed on probation and required to pay for an independent audit as a condition of the probation.

25. See Kiesche, "Facing up the Hidden Liabilities", Chemical Week, Feb. 14, 1990, 58.

26. See 21 Env.'t Rep. (BNA) 1205 (Oct. 26, 1990).

27. See for example EPA Pollution Prevention Policy Statement, 54 Fed. Reg. 3845 (1989).27.

28. 42 U.S.C. 6922(b).

29. See for example 21 Environment Reporter (BNA) 364, 365 (June 22, 1990).

30. See the Pollution Prevention Act of 1990, Pub. L. No. 101-508, 6601-10, 104 Sdat. 1388 (1990).

31. Thirty-five states now reportedly have programs or legislation dealing with waste reduction. 21 Env.'l Rep. (BNA) 364, 365 (June 22, 1990).

VII. END NOTES

1. Rankin, N. "An Overview and Discussion of Liability for Environmental Problems and Solutions" in Cleaning Up Contaminated Sites (Toronto: Insight Conference, January 24, 1990).
2. Beechinor, J. "Perceiving and Understanding Potential Environmental Problems" in Insight Conference supra note 1.
3. [1978] 2 S.C.R. 1299.
4. MacDonald, Janette M.F. "Environmental Audits" in Corporate Environmental Responsibility and Liability (Toronto: CBAO Continuing Legal Education, May 22, 1987) compiling the effects of the following decisions: R.v. Petro-Canada Inc., (1984), 13 C.E.L.R. 106 (B.C. Prov. Ct.); R. v. Texaco Canada Inc., (1984), 13 C.E.L.R. 124 (Ont. Prov. Ct); R. v. District of North Vancouver (1982), 11 C.E.L.R. 158 (B.C. Prov. Ct.); R. v. MacMillan Bloedel Industries Ltd. 41 D.L.R. (3d) 247 (B.C. Prov. Ct.); Ministry of Environment v. Exolon Co. of Canada Ltd. (1981), 36 O.R. (2d) 530 (Prov. Ct.); R. v. Spataro Cheese Products Ltd. (1981), 10 C.E.L.R. (Ont.Prov. Ct.).
5. (1983), 13 C.E.L.R. 42 (Yuk. Terr. Ct.) at p. 51.

5a. McCaffrey, L. See her contribution to "Avoiding the Legal and Economic Perils in Hazardous Waste" (Toronto: Insight Conference, 1989).

5b. "Environmental Auditing Policy Statement" 1986, Federal Register, Vol. 57, No. 131, p.25004.

6. Environment Canada, Canadian Environmental Protection Act Enforcement and Compliance Policy, (Ministry of Supply and Services: May, 1988).
7. Cotton, R. "Environmental Audits" in L.S.U.C. Conference Liabilities for Environmental Contamination (June 13, 1989).
8. Provincial Offences Act, R.S.O. 1980 c.400, ss. 77, 78; Environmental Protection Act, R.S.O. 1980, c. 141 as amended ("EPA") ss. 146-147; Ontario Water Resources Act, R.S.O. 1980, c. 361 ("OWRA") s. 16; Fisheries Act, R.S.C. 1985, c.F-14 and Canadian Environmental Protection Act, S.C. 1988, c.C-22 ("CEPA"). The amount of the fine can vary with the offence and can be as much as $1,000,000 (first conviction) to $2,000,000 (subsequent conviction) under Ontario statutes, and under CEPA $1,000,000.
9. EPA ss. 5, 13; OWRA s. 16 (1); Fisheries Act, s. 33; See also regulations under CEPA s. 34, 107, 108.
10. Transportation of Dangerous Goods Act, R.S.C. 1985, c. T-19, as amended, ("TDGA") s. 17; EPA ss. 12, 14, 80; OWRA s. 16; Fisheries Act s. 33.2; See also CEPA s. 36.
11. O. Reg. 538/84, s. 86 (2) (c), 91.2 (i) under Professional Engineers Act, S.O. 1984, c. 13.
12. EPA s. 81; Fisheries Act s. 33.2; See also CEPA s. 36, 39. 40.
13. EPA s. 39.
14. EPA s. 40.

15. EPA s. 45.
16. EPA, Reg. 309; as am. to O. Reg. 750/88; O.Reg. 138/90; O. Reg. 162/90 (General- Waste Management).
17. Waste Management Regulations - PCBs Regulation, O. Reg. 11/82 as am. to O. Reg. 575/84.
18. EPA s. 8; OWRA s. 23,24 respecting sewage works. EPA s.64 creates an offence for failure to obtain a certificate of approval for small sewage systems.
19. EPA ss. 26, 27, 39, 40.
20. EPA s. 45.
21. EPA s. 146 (1B).
22. Regulations concerning packaging, product classification placarding and labelling have been substantially adopted from the regulations which attach to the federal Transportation of Dangerous Goods Act, R.S.C. 1985, T-19 by virtue of O. Reg. 460/89. For a fuller discussion of this legislation at the federal and provincial levels see Madras, M. "The Transporation of Dangerous Goods: Law and Regulation" in Environmental Law and Regulation in Ontario (Toronto: Canadian Institute Conference, 1990).
23. TDGA Regulations; EPA General Waste Management Regulations.
24. See for example, Metropolitan Toronto By-law No. 148-83.
25. Municipal Act, R.S.O. 1980, c.302, s. 210(77) 128-134, 147 and s.326; R.v. B.E.S.T. Plating (1987), 1 C.E.L.R. (N.S.) 145 (Ont. C.A.; R.v. Jetco Manufacturing Ltd., (1987), C.E.L.R. (N.S.) 243 (Ont. C.A.); Municipality of Metropolitan Toronto v. Siapas (1988), 3 C.E.L.R. (N.S.) 122 (C.A.).
26. EPA s. 146f; CEPA s. 124
27. Canadian Dredge and Dock v. The Queen, 1 S.C.R. 662.
28. EPA s. 147a; OWRA s. 75. CEPA follows traditional approach of requiring director to have "directed, authorized, assented to, acquiesced in or participated in the commission of the offence": s. 122.
29. R v. Blackbird Holdings Ltd. (unreported, May 8, 1991, Ont. Ct. Justice). On May 30, 1991, the Ontario Court of Appeal denied the Crown leave to appeal the reduced sentence which was originally set at 6 months by the Ontario Provincial Offences Court in an unreported decision handed down June 22, 1990.
30. EPA s. 85, 87; TDGA s. 18.
31. EPA s. 131, 136.
32. CEPA s. 36, 39, 130, 131. See also US v. Maryland Bank and Trust (Supra).
33. EPA s. 87.
34. Ontario Business Corporations Act, 1982, S.O. 1982, c.4, ("OBCA") s. 142; Canada Business Corporations Act, Stat, Can. 1974-1975, c. 33, ("CBCA") s. 117.
35. See Gower, The Principles of Modern Company Law, Stevens, 4th ed. 1979, as updated by 2nd Cumul. Suppl. 1988, p. 634.
36. OBCA s. 245, 247; CBCA s. 232, 234; Securities Act (Ontario), R.S.O. 1980 c. 466, s. 118, (1 yr, $1,000,000 fine and treble profit) 126, 127, 131.
37. OBCA s. 255, 257; CBCA s. 250, 251.

38. See Constitution Insurance v. Kosmopoulos (1987), 34 D.L.R. (4th) 208 (S.C.C.) per Wilson, J. at 213; The courts will lift corporate veil for fraud or "where the interests of justice and equity require"; and John Keefe, "Tearing Away The Corporate Veil", Canadian Bar Association-Ontario CLE Program, March 30, 1989.
39. The Queen v. Saskatchewan Wheat Pool, [1983] 1 S.C.R. 205.
40. CEPA ss. 130, 131.
41. EPA ss. 5,6, 113-115; OWRA ss. 51-2; Fisheries Act s. 33.2. Proposed EPA Air Regulations will require decennial review. Neither federal nor provincial legislation goes as far as some U.S. jurisdiction which provide a superlien giving a security interest in the land for clean-up costs which will have priority over all other secured claims to the land. Some such liens need not be registered.
42. EPA s. 16.
43. EPA s. 85.
44. EPA s. 17; CEPA s. 36.
45. EPA s. 41; CEPA s. 36.
46. EPA s. 42. See also Fisheries Act s. 33.2; EPA s. 40. For a discussion of the United States, CERCLA definition of "the owner and operator" of a site who are liable to reimburse the Superfund for clean-up costs see U.S. v. Maryland Bank and Trust, 16 ELR 20559 (D. MD. 1986).
47. EPA s.7; CEPA s. 39; Fisheries Act s. 33.2
48. EPA s. 41, 42. Contrast the Canadian priority of a liability to the Crown with the "Superliens" of some U.S. states e.g. Ark., Conn., Maine, Mass., N.H., N.J., Ore., and Tenn., some of which give a super priority over lender security to an unregistered lien for clean-up costs. Some extend the lien to other realty and personalty owned by the responsible party.
49. Ministry of the Environment. Guidelines for the Decommissioning of Sites in Ontario (February 1989). Any such order may be subject to attack in the courts if the MOE exceeds its jurisdiction under the EPA and general administrative law principles of natural justice and fairness.
50. EPA s. 149.
51. EPA s. 18.
52. EPA s. 146 (1a); OWRA s. 66(2).
53. EPA s. 144; OWRA s. 56(2).
54. EPA s. 119a - 119f.
55. EPA s. 127g.
56. See Appendix A to this paper.
57. S.O. 1983, c.10.
58. R.S.O. 1980, c.185.
59. Conveyancing and Law of Property Act, R.S.O. 1980, c.90, s.295-32; Williams and Rhodes, Canadian Law of Landlord and Tenant, p. 11-14 to 11-19.
60. McGrath v. McLean (1979), 22 O.R. (2d) 784 (C.A.). For a recent summary of this law and its application to soil in a residential subdivision contaminated by radioactive waste, see Sevidal v. Chopra, (1987), 64 O.R. (2d) 169 and

Heighington v. The Queen (1987), 60 O.R. (2d) 641 at 654; affirmed (1989), 69 O.R. (2d) 484.

61. (a) See MOE Policy "Uniform Environmental Enforcement" No. 05-05 and Environment Canada "Canadian Environmental Protection Act Enforcement and Compliance Policy", May 1989. (b) The need for industries to compete with those in other jurisdictions and the more relaxed approach to enforcement of environmental laws in some other jurisdictions may increase the "economic reality" in enforcement of provincial environmental laws. On the other hand, the need for economic survival will probably depend on vigilant enforcement of measures to prevent further deterioration of the environment, if not to improve the environment.
62. EPA s. 126-130, as amended June, 1988.
63. EPA s. 134b, 146f; CEPA s. 124.
64. The circumstances might occasionally allow for the accused to establish defences of: (a) reasonable belief in a mistaken set of facts which would render the act or omission innocent; (b) officially induced error; (c) statutory authority; (d) unforeseeable act of God or a third party; (e) unknown latent defect; (f) necessity; (g) public benefit; and (h) compliance with a control order or program approval. See EPA s. 146 (2) which effectively allows a valid control order or program approval to constitute a licence to commit the offence respecting the matters dealt with therein.
65. R. v. Sault Ste. Marie, [1978] 2 S.C.R. 1299; R. v. Chapin, [1979] 2 S.C.R. 121. Section 146 of the EPA, s. 75 of OWRA and s. 124 of the EPA prevent the defence by a corporation that it is not responsible for acts or omissions of junior employees who are not the directing mind and will of the corporation. The "due diligence" defence is provided in CEPA s. 125.
66. EPA s. 87; CEPA s. 125.
67. However, there is a due diligence defence to a claim for clean-up costs under the TDGA s. 18(2). The CERCLA defence of "act of a third party" provided the defendant used due care and took reasonable precautions against foreseeable third party acts and omissions, is not available in a claim for clean-up costs under Ontario legislation. It is specifically excluded in respect of clean-up costs of a spill: EPA s. 87 (4) (b).
68. EPA s.146; OWRA s.67. Under CEPA s. 116 the general penalty provides a maximum fine of $200,000 and 6 months imprisonment for each day the offence continues. Other penalties under CEPA range up to $1,000,000 and imprisonment for up to 5 years.
69. Provincial Offences Act. Pt III. Judicial discretion can refuse the information or issuance of the summons. See also CEPA requirements for Ministerial investigation on sworn complaint by two citizens who believe an offence has been committed.
70. Limitations Act, R.S.O. 1980, s. 45; Kamloops v. Nielsen, [1984] 2 S.C.R. 2; Central Trust v. Rafuse.

71. EPA s. 87 (13), (14).
72. EPA s. 148; OWRA s. 54 (1); See standard limitation period of 6 months under the Provincial Offences Act, s. 76; cf. "2 years after the time the Minister became aware" under EPA s.117.
73. Ontario Ministry of the Environment. CAP Clean Air Program, Draft Regulation, Appendices 1 and 2; CAP Clean Air Program, Draft Regulation, Appendices 3-7 (August 1990); Estimation of Additional Abatement Costs for the Proposed Revisions to Regulation 308 (July 1990); Monitoring Auditing and Administration Costs for Revisions to Regulation 308 (July 1990) Environmental Policy and Law Vol. 1, No. 8, 1990.
74. Environmental Policy and Law, Vol. 1, No.8, 1990.
75. Ontario Ministry of the Environment. Municipal-Industrial Strategy for Abatement (MISA): A Policy and Program Statement of the Government of Ontario on Controlling Municipal and Industrial Discharges into Surface Waters (June 1986).
76. See Ontario Ministry of the Environment. MISA Issues Resolution Process: Background (February 1990) and Ontario Ministry of the Environment. MISA Issues Resolution Process: Issue Resolution Committee Reports (June 1990).
77. Ministry of the Environment. MISA - Controlling Industrial Discharges to Sewers. (1989).
78. Except for sections 26-30 and 147(2) dealing with new chemicals and section 146 repealing section 6(2) of the Department of Environment Act.
79. Environment Canada. Canadian Environmental Protection Act. Priority Substances List Assessment Report. No. 1, Polychlorinated Dibenzodioxins and Polychlorinated Dibenzofurans (Ottawa: EC, 1990).
80. CEPA, s.130.
81. Government of Canada Canada's Green Plan (Ottawa; 1990) at 164.
82. Ibid. at 46.

APPENDIX A

ENVIRONMENTAL STATUTES

Province of Ontario

Conservation Authorities Act
Environmental Assessment Act
Environmental Protection Act

Regulations:

- Air Contaminants from Ferrous Foundries
- Air Pollution Control (General)
- Ambient Air Quality Criteria
- Asphalt Paving Plant
- Classes of Contaminants
- Containers
- Designation of Waste
- Disposable Containers for Milk
- Waste Management - General
  - PCBs
- Hauled Liquid Industrial Waste Disposal Sites
- Marina
- Mobile PCB Destruction Facilities
- Municipal Sewage and Water and Roads Class Environmental Assessment
- Ontario Hydro
- Sewage System
- Sewage System Exemptions
- Spills
- Sulphur Contents of Fuels
- Transfers of Liquid Wastes
- General Effluent Monitoring
- Sector Specific Effluent Monitoring Regulations:
  - Petroleum Refining
  - Organic Chemical Manufacturing
  - Iron and Steel Manufacturing

Fire Marshalls Act
- Proposed Pt. IV of Ontario Fire Code

Lakes and Rivers Improvement Act
Municipal Act and Municipal By-Law
Occupational Health and Safety Act

Regulations respecting:

Construction Projects
Industrial Establishments
Mines and Mining Plants

Designated Substances
- Lead

- Mercury
- Vinyl Chloride
- Coke Oven
- Asbestos
- Isocyanates
- Silica
- Benzene
- Acrylonitrile
- Arsenic
- Ethylene Oxide

Inventory of Agents or Combinations of Agents
Critical Injury Defined
Fire Fighters Protective Equipment
Elevated or Suspended Work Places on Building Facades
X-Ray Safety
Diving Operations
Roll-over Protective Structures
Hazardous Materials Inventory
Control of Exposure to Biological or Chemical Agents
Workplace Hazardous Materials Information System (WHMIS)

Ontario Water Resources Act
Pesticides Act
~~Public Health Act~~
Public Utilities Act
Transboundary Pollution Reciprocal Access Act
Health Promotion and Protection Act

Federal

Access to Information Act; Privacy Act
Arctic Water Pollution Prevention Act
Atomic Energy Control Act
- Atomic Energy Control Regulations

Canada Labour Code

Canada Shipping Act
- Air Pollution Regulations
- Garbage Pollution Prevention
- Maritime Pollution Claims Fund
- Oil Pollution Prevention
- Pollutant Substances

Canadian Environmental Protection Act

Schedule I - Priority Toxic Substances List
1. Chlorobiphenyls
2. Dodec. decane (Mirex)
3. Polybrominated Biphenyls
4. Halogenated Chlorofluorocarbons
5. Polychlorinated Terphenyls
6. Asbestos
7. Lead

8. Mercury
9. Vinyl Chloride

Schedule II - Pt.1 - Prohibited Substances
- Pt.2 - Toxic Substances Requiring Export Notification
- Pt.3 - Hazardous Wastes Requiring Export or Import Notification

Schedule III - Prohibited and Restricted Substances for Ocean Dumping

Substances for which Control Options being developed:
- carbon dioxide
- halons
- oxides of nitrogen
- oxides of sulphur
- volatile organic compounds
- chlorophenate releases from wood treatment

Priority Substances List
Substances being assessed for toxicity, possible listing on a schedule and regulatory treatment

Interim Orders (*also regulations under Environmental Contaminants Act)

- Asbestos Mines and Mills Release
- Chlor Alkalai Mercury Release
- Chlorobiphenyls*
- Chlorofluorocarbons*
- Mirex*
- Polybrominated Biphenyls*
- Polychlorinated Terphenyls*
- Secondary Lead Smelter Release
- Vinyl Chloride Release
- Storage of PCB Wastes

Regulations (formerly under Clean Air Act)

- Ambient Air Quality Objectives
- Asbestos Mining and Milling National Emission Standards
- Chlor Alkali Mercury National Emission Standards
- Fuels Information
- Leaded Gasoline
- Lead Free Gasoline
- Metallurgical Industries
  - -Arsenic Information
  - -Mercury Information
- Packaged Incinerators
  National Emission Guidelines
- -Secondary Lead Smelter
  National Emission Standards
- Thermal Power Generation Emissions - National Guidelines
- Vinyl Chloride National Emission Standards
- Wood Pulp Industry National Emission Guidelines

Phosphorous Concentration Control Regulation (formerly under Canada Water Act)

Canadian Petroleum Resources Act

Criminal Code

Environmental Contaminants Act - s.9(s.4(6))
Mandatory reporting of first time of manufacture or import of a chemical exceeding 500 kg per yr.

Fisheries Act
Liquid Effluent Regulations:
- Chlor Alkali Mercury
- Meat and Poultry Products Plant
- Metal Mining
- Petroleum Refinery
- Potato Processing Plant
- Pulp and Paper

Fish Toxicant Regulations

Food and Drug Act

Hazardous Materials Information Review Act
Hazardous Products Act

National Energy Board
- Gas Pipeline Regulations

Northern Inland Waters Act

Oil and Gas Production and Conservation Act
Oil and Gas Spills and Debris Regulations
Liability Regulations
Pest Control Products Act
Territorial Lands Act
Transportation of Dangerous Goods Act

APPENDIX B

PENALTY PROVISIONS UNDER EPA*

	FIRST	SUBSEQUENT
General Offence (s. 146)+		
Individual	$10,000	$ 25,000
Corporation	$50,000	$100,000
SUBJECT TO THE FOLLOWING:		
Actual Pollution s. 13 (OWRA s.16) Violating Stop Order s. 119 s. 146a		
Individual	$10,000 plus 1 year	$ 25,00 plus 1 year
Corporation	$ 2,000-200,000	$ 4,000-400,000
Hauled liquid or hazardous waste: s. 147		
General:		
Individual	$ 2,000-10,000 plus 1 year	$ 4,000-25,000 plus 1 year
Corporation	$ 2,000-100,000	$ 4,000-100,000
If adverse effects:		
Individual	$ 2,000-50,000 plus 1 year	$ 4,000-100,000 plus 1 year
Corporation	$ 2,000-1,000,000	$ 4,000-2,000,000
Director or Officer s.147a and s.146(3)++	$10,000	$25,000
Additional Fine fo Monetary Benefit s. 146(c)		

*Section references are to EPA provisions. There are complementary provisions under the OWRA and the Pesticides Act.

+OWRA s. 67
++OWRA s.75

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