

# BEFORE SUSTAINABILITY: ENVIRONMENTAL COMPLIANCE IN THE HOSPITALITY INDUSTRY

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# WHY ENVIRONMENTAL COMPLIANCE?

»Continued merger of Environmental Sustainability and Compliance Functions creates efficiencies, but can result in loss of expertise and increased compliance risk  
» Failure to Comply with Environmental, Health, and Safety Laws can result in substantial remedial costs as well as civil or criminal penalties.

- The Trump Administration has re-focused EPA on investigations and enforcement – downplaying EPA’s previous focus on sustainability and climate.
- Potential criminal penalties raise the stakes for company executives

»Environmental obligations may be identified during Due Diligence, but typically arise during both construction and day-to-day operations, including.

- Waste Generation & Disposal
- Stormwater Obligations
- Spill Prevention Control & Countermeasures (SPCC)
- Clean Air Act – Air Pollution Control
- Lead-Based Paint & Asbestos
- Mold/Bacteria

**Environmental  
Sustainability Is the Next  
Frontier in Luxury Travel**

Samantha Shankman, Skift - Jul 18, 2017 12:00 pm



# WHAT ARE THE RISKS?

»Risks include potential civil and criminal penalties for both the company and executives – as well as significant reputational harm.

»Civil Penalties are assessed on a “per-violation” basis, which are often applied for each day violation continues.

- EPA and State Agencies typically settle for far less than statutory maximums, but only through negotiation – litigation is typically cost-prohibitive and can result in much higher civil penalties.
- EPA Administrative Complaints are limited to aggregate penalties of \$200,000.

»There is a low “knowledge” standard for environmental criminal offenses and DOJ policy encourages prosecution of individual company employees and officers

- Respondeat Superior Doctrine
- Responsible Corporate Officer Doctrine
- Alternative Fines
- DOJ/DOL “Worker Endangerment Initiative”

»Even if there are no penalties, Reputational Harm can result from even perceived impacts to the environment identified by media, even if they do no actual harm.

# Risk Management During Transactions – Due Diligence

## What is Environmental Due Diligence?

- » The evaluation of potential risk in any transactions related to potential liability associated with impacts to Human Health & Environment and compliance with associated local, state, and federal laws and regulations.
- » Includes identification of:
  - ❖ Historic Impacts to Real Property, adjoining property, and estimated remediation costs.
  - ❖ Determining regulatory compliance status
  - ❖ Permits (present and up to date)
  - ❖ Exceedances/Violations
- » Evaluating business environmental risk — these issues can be costly
  - ❖ In improvements – ie. Asbestos & Lead, Vapor
  - ❖ In surrounding environment – Vapor intrusion
  - ❖ In processes – Waste Streams
- » Best Practices Include:
  - ❖ “All Appropriate Inquiries” regarding Real Property
  - ❖ Compliance Audit of Continuing Operations
- » Continuum of practices: Desktop Review → Phase I and/or Compliance Audit → Phase II

# Common Environmental Issues

## » Soil and Groundwater Contamination from:

- USTs and/or ASTs
- Manufacturing Operations
- Dry Cleaners
- Vehicle Maintenance
- Pesticides/Herbicides



## » Outdated or improper permits, or lack thereof

## » Improper compliance practices, particularly:

- waste generation and disposal (RCRA)
- water and air permit management
- required inspections and recordkeeping.



## » Historic or ongoing administrative actions:

- EPA can take a **LONG TIME** to bring a Complaint!

# Regulatory Compliance

## »Liability for both:

- ❖ Past Violations/Investigations that have not yet received complaints; &
- ❖ Post-Closing Regulatory Non-Compliance
- ❖ Ongoing operations of both the Hotel, and any subcontractors working on-site.

## »General due to:

- ❖ Operating Issues such as: Waste handling, labeling, record-keeping, pre-construction notification regarding Lead-Based Paint (LBP) or Asbestos-Containing Materials (ACM)
- ❖ Permitting: including both having necessary permits (SWPP, Air, etc.) & ensuring permits are up to date, and required inspections/records maintained.
- ❖ Emergency Planning and Community Right-to-Know Act (EPCRA) disclosures

# Waste Generation: Dry Cleaning and Other Risks

» Dry Cleaning Operations, Fluorescent Bulbs, and common household cleaning products are all subject to regulation under the Resource Conservation & Recovery Act (RCRA)

» Key Example: Ritz-Carlton,, New Orleans, March-November, 2016

- Allegations: EPA conducted a two-month investigation, finding that the hotel exceeded 100kg a month of waste generated from its dry cleaning facility from 2011-2014, without registering as a small quantity generator.
- Results: EPA and the Ritz-Carlton agreed to a Consent Agreement in November, 2016. The Ritz agreed to:
  1. Pay \$22,660 in penalties
  2. Undertake a supplemental Environmental project (“SEP”) – installing a new Dry Cleaning Plant, or paying an additional \$150,000.





# Drinking Water and Stormwater

»The Safe Drinking Water Act regulates water systems in operations at campgrounds, resorts, and other facilities in the lodging sector'

»Example: **Jackson Hole Campground, Wyoming, August 2017**



- Allegations: EPA alleged that Campground provided piped water to the public for human consumption, but failed to conduct annual nitrate monitoring required under National Drinking Water Regulations, and then failed to report their failure to EPA.

- Results: EPA imposed additional monitoring and reporting requirements and ***deferred a penalty of \$54,789/day*** for any future failure to report or monitor.

»Any grading or other earthmoving activity impacting in excess of 1-acre requires coverage under a stormwater permit issued pursuant to the Clean Water Act (CWA)

»Example: **Villa Montana Hotel &Spa, Puerto Rico, November 2008**

- Allegations: EPA alleged that a resort in Puerto Rico failed to comply with its stormwater permit.
- Results: The parties agreed to an Expedited Storm Water Settlement Agreement under which the resort paid a settlement of \$4,950.



# Lead-Based Paint & Asbestos

»EPA and OSHA Regulate work Impacting Lead-Based Paint and Asbestos

❖ EPA Renovation, Repair, and Painting Rules do not apply to “zero-bedroom dwellings” but do apply to hotel suites that provide a sleeping area that is separate from the living area (a “Suite”)

»Disclosures Requirements apply to all housing rented for 100 days or more and at sale of a property.

» **123 civil** lead-based paint administrative actions filed by EPA between October 2016 and September 2017.

»Example: **Carrington Real Estate Services, LLC, November 2008**

- Allegations: EPA alleged that a management company failed to ensure that individuals performing renovation activities were either certified renovators or had been trained by a certified renovator, and failed to retain records of disclosures for long-term renters and during property sales.



- Results: Carrington agreed to pay a civil penalty of \$19,976 and to spend a minimum of \$59,929 to donate at least twenty-one (21) LeadCare II blood lead analyzers to various EPA-approved non-profit community health clinics.

# Air Permits: Boilers, Generators, and Other Equipment

»Boilers, generators, and other equipment that generates hazardous air pollutants (HAPs) are regulated under the National Emission Standards for Hazardous Air Pollutants ("NESHAPs").

»Equipment with Reciprocating Internal Combustion Engines (RICE) are subject to distinct air emission limits.

## »Example: Champlin's Marina Resort, Block Island, RI, April, 2017

- Allegations: EPA conducted an inspection of the Marina at the resort in July, 2015 and identified two diesel-powered generators on-site providing primary (not backup) power to the Marina. The Marina had not submit the required notice or annual emissions reports to MADEQ or EPA.
- Results: EPA issued a Notice of Violation ("NOV") in February, 2016 and – after over a year of negotiation - the Marina agreed to settlement, paying a \$29,900 civil penalty.



# Trends in Enforcement

## » Trump Administration Focus on Enforcement

❖ “[W]e are going to continue with a strong program of environmental law enforcement, on both the civil and criminal sides - DOJ Environment & Natural Resources Division Acting Assistant Attorney General Jeffrey Wood on 11/16/2017

– June 2017 – DOJ Directive ending “community service” payments in connection with criminal guilty pleas.

– October 2017 EPA Directive limiting “sue & settle” consent decrees with private parties that impose SEPs

## »FY 2017 \$14 billion – a 700% Increase in Civil and Criminal Fines

❖ 123 civil lead-based paint administrative actions filed by EPA between October 2016 and September 2017.

# “Effective” Corporate Compliance Programs (USSG § 8B2.1)

- » Exercise due diligence to prevent and detect criminal conduct.
- » Promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law.
- » Program shall be reasonably designed, implemented, and enforced.
- » Established standards and procedures to prevent and detect criminal conduct.
- » Governing authority knowledgeable about the content and operation of the compliance and ethics program.
  - ❖ Exercise reasonable oversight.
    - » Specific individuals within high-level personnel assigned overall responsibility.
    - » Specific individuals within the organization delegated day-to-day operational responsibility.
    - » modify compliance & ethics program.

# “Effective” Corporate Compliance Programs (USSG § 8B2.1)

- » Report periodically to high-level personnel / governing authority.
- » Given adequate resources, appropriate authority, and direct access to the governing authority.
- » Keep bad actors out of management.
- » Communicate standards and procedures / effective training programs for management, employees, agents.
- » Monitoring and auditing.
- » Periodically re-evaluate the effectiveness of the program.
- » Have and publicize a confidential reporting system / no retaliation.
- » Incentives for compliance / discipline for failures.
- » Respond appropriately to / prevent further similar criminal conduct.
- » Periodically re-assess risks and

# Best Practices: “All Appropriate Inquiries”

- » “All Appropriate Inquiries” required for Bona Fide Prospective Purchaser Defense –ie. Phase I ESA and recommended Phase IIs
  - ❖ Not generally applicable to Petroleum Contamination (State Brownfield Programs may apply)
- » Absolutely Necessary if transfer of real property
- » Not a defense to past liability if Stock Purchase Transaction, or if Asset Purchase with Continuing Operations
  - ❖ But provides baseline for future contribution actions against prior owners & negotiation with environmental regulators.
- » ASTM Standards accepted as meeting requirements of AAI by EPA
  - ❖ ASTM E 1527-05/-13, Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process
    - Requires update after 180 days
    - Must meet standard for Site visit, etc.
  - ❖ ASTM E 1903-11, Standard Practice for Environmental Site Assessments: Phase II Environmental Site Assessment Process



# Best Practices: Regular Compliance Auditing

» Compliance Audits related to past violations and future operations should be used to establish a baseline following acquisitions;



❖ This will ensure future operations comply with regulatory requirements, including operational activities and if necessary, up to date, permits.

» A Regular Audit Program should be implemented to identify non-compliance in a timely manner.

– Retaining third-party auditors through counsel provides increased protection

» EPA incentivizes this approach via its audit policy, some states have audit privilege/immunity from prosecution if disclosed:

– Provides substantial penalty mitigation – “Clean Slate” approach to new owner operations if past non-compliance disclosed, and reduced penalties if self-disclosed following identification via a regular audit program.

– New eAudit program includes some automatic penalty mitigation for minor non-compliance (EPCRA Violations)



# Best Practices: Responding to Inspections (1 of 2)

»The EPA, state environmental agencies, OSHA, state occupational health and safety agencies and criminal investigators have the authority to inspect Hotels in order to verify compliance with environmental, health and safety laws

»In the Hospitality Industry, key points of emphasis for inspectors may include:

- Waste Generation, Handling, Storage and Disposal
- Stormwater (for construction areas) and SPCC Compliance
- Compliance with Lead-Based Paint & Asbestos Work Practices and Notification Requirements (NESHAP)
- All types of training records, as well as other EHS Records

»Inspectors focus will depend on whether they are conducting a general compliance visit, or whether they are responding to a complaint or “tip” – but their goals are generally the same.

- To interview managers and employees, particularly maintenance personnel
- To review training records, permits, work orders
- In sum — to collect evidence for enforcement

# Best Practices: Responding to Inspections (2 of 2)

»All managers should be trained on what to do if approached by an inspector, and all other employees should know to direct an inspector to an available manager.

»Managers training should include the following key information:

- Inspectors have the legal authority to inspect a facility that is required to comply with government regulations. Inspectors may provide advanced notice, but others may not – and it is not required.
- Managers **should not** request a warrant – the inspector can easily obtain one and it irritates enforcement personnel – Instead, the manager should obtain their credentials and notify counsel as soon as an inspector is identified on-site
- A designated representative should always be available in the event of an inspection, to answer questions and accompany the inspector.
  - ***Most enforcement actions result from untrained personnel giving an inspector bad information.***
- An inspector should never be left alone, and split samples, duplicate pictures, and notes should be retained and provided to counsel as soon as possible.
- A Manager should never agree to take any specific action requested by the inspector without confirming with counsel or otherwise admit any wrong doing.

# Emerging Issues in Environmental Practice

## » EPA Enforcement Initiatives – New Focus on:

- ❖ Air Pollution
- ❖ Accidental Releases at Chemical/Industrial Facilities
- ❖ Industrial Pollutants in Waters.

## » Budget Constraints

- ❖ EPA has 15-20% FEWER enforcement personnel, but 40% more enforcement initiatives...delay is inevitable.

## » “Emerging contaminations” represent new concern

- ❖ For example, Perfluorooctane Sulfonate (PFOS) are used in foams used to extinguish flammable liquid fires, but have been newly identified as impacting human metabolism, and do not biodegrade in the environment.

