

C O M M E N T S

Quality Assurance in EHS Audits and Audit Programs: The New BEAC Standards

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How does a chief executive officer (CEO) know when he or she certifies to the accuracy and completeness of the company's annual report, filed with the U.S. Securities and Exchange Commission (SEC), that all of the company's environmental liabilities have been identified and properly characterized and evaluated? If the answer is that he or she relied on a bunch of environmental audit reports prepared by employees or a consulting firm who said they knew the relevant laws, how does the CEO know they got it right? For the auditors, the entities who design and implement auditing and compliance assurance programs, and CEOs and other users, help is on the way.

The practice of environmental, health, and safety (EHS) compliance auditing developed in the late 1970s in response to the wave of complex environmental laws and regulations enacted during that decade by federal and state governments. These regulations carried civil penalties of up to \$25,000 per day of violation, comparable criminal penalties plus jail time for "knowing" violations, and injunctive and administrative sanctions.¹ Especially for companies with facilities in multiple states, each with its own set of air, water, and hazardous and solid waste regulations, keeping abreast of these regulatory requirements was simply not possible without some kind of compliance system backed up by a "self-assessment" or auditing program. Some companies developed compliance assurance programs in-house and others called on law firms or environmental engineering firms to assist in designing and implementing such programs, including the performance of compliance audits.

As long as the persons who were being asked to design the program or conduct the audits demonstrated reasonable familiarity with the relevant laws and regulations, generally no one inquired further as to their qualifications. Over time, many lawyers and environmental engineers gained substan-

tial experience in this field. Their websites and individual curricula vitae were proof enough for most companies, lenders, insurers, and other customers that these individuals were qualified to do the job.

Today, as a result in part of the certification requirements in the Sarbanes-Oxley Amendments of 2002 and the prospect of a renewed emphasis on environmental enforcement under the Barack Obama Administration, there is an increasing need for published standards setting forth the minimum requirements for the conduct of an EHS compliance audit consistent with best practices, and comparable standards for those who design and implement auditing programs, to provide assurance to those engaged in these fields that if they comply with these standards they will have "gotten it right." More specifically, they need to have a high degree of confidence that the conduct of the audit, and the design and implementation of the audit program itself, produce reports that are complete, accurate, and reliable.

The Board of Environmental Health and Safety Auditor Certifications (BEAC) is the largest organization in the country that certifies the professional qualifications of an EHS auditor based on experience and a written test.² In December 2008, BEAC issued its *Performance and Program Standards for the Professional Practice of Environmental, Health & Safety Auditing*. This followed a three-year process during which BEAC's Standards Board, of which I am a member, conducted a complete review and rewrite of BEAC's original auditing and program standards, which had been issued in 1999. Those standards were merely skeletal by today's measures. Most of their content was in the nature of "guidance." The new standards, by contrast, are both comprehensive and flexible.

This Article will discuss first the need for such standards, then summarize their principal provisions and provide some practical suggestions regarding their use. These stan-

1. See, e.g., Clean Air Act, 42 U.S.C. §7413, ELR STAT. CAA §113; Clean Water Act, 33 U.S.C. §1319, ELR STAT. FWPCA §309; Resource Conservation and Recovery Act, 42 U.S.C. §6928, ELR STAT. RCRA §3008.

2. For more information about BEAC, see BEAC home page, <http://www.beac.org>.

dards are designed to help auditors, companies, and others identify noncompliance with regulatory requirements and other objectives and ensure appropriate and timely corrective action. This should minimize potential liability and, in the long run, reduce compliance costs. As will be discussed below, auditing programs can be incorporated within a broader EHS management system or compliance program. For any such program to be successful, however, it is essential that the audits be properly done and the reports properly written and acted upon.

I. Early Development of EHS Auditing Standards

In 1982, a group of environmental auditors from consulting firms and corporations with auditing programs got together to form the Environmental Auditing Roundtable. Subsequently, the name was expanded to Environmental, Health & Safety Auditing Roundtable because, increasingly, members were being asked to audit for compliance with Occupational Safety and Health Administration and other health and safety regulations and codes. Today, the organization is known simply as the Auditing Roundtable. It is the largest professional organization of EHS auditors in the country and is international in scope. Membership includes lawyers, government officials, and a few nongovernmental organizations, as well as the larger constituency of auditors with an engineering or business background. In 1993, the Roundtable published a simple set of standards for the performance of EHS audits.³ These *Standards for Performance of Environmental, Health and Safety Audits* are concise but flexible and were designed to provide guidance to its members and anyone else who might find them useful. They focus on auditor proficiency, defining “due professional care” and independence, and the basic steps in planning and carrying out an EHS audit, including preparation of a written report at the conclusion.

In 1997, the Auditing Roundtable adopted a *Standard for the Design and Implementation of an Environmental, Health and Safety Audit Program*,⁴ recognizing that many of its members were with corporations and other entities interested in designing an effective and comprehensive audit program. Typically, an audit program is a component in an EHS management system (EMS) or a broader compliance assurance program, which can cover some or all of a company’s legal obligations, policies, programs, and objectives. The 1997 standards emphasize the need for a senior management commitment to the program and a clearly written set of policies and program objectives and scope. Scope includes both the geographic and business entity scope and the subject matter covered by the program. In addition to auditor qualifications and program independence, the basic procedures for selecting audit sites, subject, and frequency are addressed. The standards require appropriate planning, the use of checklists, gathering of information, and corrective action for

planning and tracking following an audit. Early on, it was recognized that if you are going to audit your facilities and document apparent violations, you need to ensure that such violations are promptly corrected, otherwise the audit report in the company’s file is effectively an admission of knowing and continuing noncompliance.⁵ These two sets of standards served the profession well for many years.

Recognizing the need to provide formal training and certification for professional auditors, the Auditing Roundtable and the Institute of Internal Auditors (IIA) in 1997 formed BEAC. BEAC promptly developed EHS auditor certification programs and, in 1999, published a set of *Standards for the Professional Practice of Environmental, Health and Safety Auditing*.⁶ The 1999 standards consisted of three parts. The first was referred to as “General Standards,” which were mandatory for those holding themselves out as conforming to BEAC Standards. They consisted of five one-sentence statements regarding auditor independence, proficiency, the performance of audit work, the scope of an audit program, and management of the EHS auditing function. These were supplemented by “Performance Standards,” which elaborated on the General Standards and provided strongly recommended procedures to comply with them. The Performance Standards were described as “a means for conforming with the General Standards,” but by their terms, they were not mandatory. The third component was a more detailed set of “Performance Practices,” which were in the nature of guidance. Next came the jolt of Sarbanes-Oxley in 2002.

II. The Impact of Sarbanes-Oxley

When the U.S. Congress passed the Sarbanes-Oxley Amendments in 2002, it included in §302(a) the requirements that:

The principal executive officer or officers and the principal financial officer or officers, or persons performing similar functions, certify in each annual or quarterly report filed or submitted under [the Securities Exchange Act of 1934] that:

- (1) the signing officer has reviewed the report;
- (2) based on the officer’s knowledge, the report does not contain any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which such statements were made, not misleading;
- (3) based on such officer’s knowledge, the financial statements, and other financial information included in the report, fairly present in all material respects the financial condition and results of operations of the issuer as of, and for, the periods presented in the report;
- (4) the signing officers—

5. A number of companies try to protect audit reports from discovery or disclosure by involving a lawyer and invoking the attorney-client or attorney work product privileges. Others mark them as “confidential” and treat them as confidential business information. Because the success of such efforts has not been definitively determined, it is wise not to assume that audit reports are immune from discovery or a government subpoena and to guide your conduct accordingly.
6. See BEAC home page, *supra* note 2.

3. For information on the Auditing Roundtable, including the text of its standards, see The Auditing Roundtable home page, <http://www.auditing-roundtable.org>.

4. See *supra* note 3.

- (a) are responsible for establishing and maintaining internal controls;
- (b) have designed such internal controls to ensure that material information relating to the issuer and its consolidated subsidiaries is made known to such officers by others within those entities, particularly during the period in which the periodic reports are being prepared;
- (c) have evaluated the effectiveness of the issuer's internal controls . . . ; and
- (d) have presented in their report their conclusions about the effectiveness of their internal controls based on their evaluation.⁷

The section further requires that the signing officers disclose to the company's auditors and audit committee of the Board of Directors any deficiencies in the design or operation of their internal controls system and any fraudulent conduct involving any persons with a "significant role" in those controls, and identify corrective actions taken to address such deficiencies.⁸

Environmental liabilities, including contingent liabilities, are an important part of any company's financial statements. Actual and anticipated costs and liabilities that may be regarded as "material" by a potential investor, and any "proceeding" involving a government agency that may involve monetary sanctions of \$100,000 or more, must be disclosed in any SEC filing.⁹ In light of these certification requirements and the exposure to criminal penalties for a false or noncompliant certification,¹⁰ companies and their accountants moved quickly to evaluate companies' institutional controls to be sure that both in design and implementation they would provide the assurance that a CEO or chief financial officer (CFO) would need before signing the required certification. For most companies, these internal controls include, expressly or by reference, EHS compliance assurance programs or their functional equivalent, including their auditing programs.

Even before Sarbanes-Oxley, an important stockholders' derivative case against individual directors, *In re Caremark International, Inc. Derivative Litigation*,¹¹ held in 1996 that a company must have in place an information and reporting system that provides "timely, accurate information sufficient to allow management and the Board . . . to reach informed judgments concerning both the corporation's compliance with the law and its business performance."¹² The court made clear that the topics that must be the subject of the information flow include "corporate compliance with external legal requirements, including environmental, financial, employee

and product safety, as well as assorted other health and safety regulations."¹³

That case involved approval of a settlement of claims that directors had failed to monitor the corporation's activities in entering into illegal contracts with health care providers, which led to a criminal investigation, indictments, and civil and criminal penalties. The court held that a company's failure to have such a program in place can subject its directors to individual liability. This provided a particularly strong incentive to corporate Board members to ensure the reliability of their internal auditing and reporting programs.

III. The BEAC Standards

With that backdrop, the BEAC Board of Directors decided in 2005 that it was time to review and substantially revise their existing standards. Apart from the impact of Sarbanes-Oxley and *In re Caremark*, the practice of environmental auditing had evolved significantly since 1999. The members of the Standards Board brought substantial experience, and a variety of perspectives, to the task.¹⁴ In the course of revising the 1999 edition, many of the former "performance standards" and some of the "performance practices" were moved into the body of the standards themselves.

The standards are organized into four main sections addressing (I) Independence, (II) Due Professional Care (qualifications), (III) Performance of Audit Work, and (IV) Audit Program Design. Compliance with the standards is mandatory for anyone who wants to represent that he or she has conducted an audit in compliance with the BEAC Standards, or any entity that wants to represent that its program conforms to the BEAC Standards. The standards recognize that companies, facilities, and audit assignments all come in a variety of different shapes and sizes, and will generate a variety of needs. Therefore, the language of the standards is flexible and avoids a prescriptive level of detail. They are broadly worded so as to be adaptable to any set of circumstances. At the end of the standards text in each of the four sections, we have set forth guidance designed to provide practical tips and information on best practices for use in complying with the standards.

In developing the latest edition of the standards, the authors drew on a variety of sources, including the Auditing Roundtable's standards and the U.S. Environmental Protection Agency's (EPA's) various policies on environmental auditing, including in particular the "Elements of Effective Environmental Auditing Programs" published as part of EPA's Environmental Auditing Policy Statement in 1986,¹⁵ which were reexamined by EPA in 1994 and reaffirmed.¹⁶ The substance of the EPA "Elements" is included in Section IV of the BEAC Standards. In addition, the American

7. 15 U.S.C. §7241(a) (West 2009).

8. Internal controls are further addressed in Sarbanes-Oxley §404, 15 U.S.C. §7262 (West 2009).

9. See 17 C.F.R. §§229, 230 (2009). More specifically, see 17 C.F.R. §§229.101, .103, .303. These disclosure requirements preceded Sarbanes-Oxley by several decades.

10. See 18 U.S.C. §1350 (West 2009).

11. *In re Caremark Int'l, Inc. Derivative Litig.*, 698 A.2d 959 (Del. Ch. 1996).

12. *Id.* at 970.

13. *Id.* at 969.

14. The members of the Standards Board are James C. Ball of Ashland, Inc., Cynthia Chiles of Convergence Consulting, LLC, Frank B. Friedman of Frank B. Friedman & Associates, LLC, and the author.

15. Environmental Auditing Policy Statement, 51 Fed. Reg. 25004 (July 9, 1986).

16. Restatement of Policies Related to Environmental Auditing, 59 Fed. Reg. 38455 (July 28, 1994).

Society for Testing and Materials (ASTM) issued a *Standard Practice for Environmental Regulatory Compliance Audits* in 2006,¹⁷ which provided a useful benchmark. Most importantly, drafts of the standards were circulated widely for comment across a broad range of auditors and audit users with a variety of experience and perspectives. Numerous revisions were made to those drafts so as to achieve a broad base of support. The final document was not only approved by the BEAC Board of Directors but endorsed by the Boards of Directors of the Auditing Roundtable and the Institute of Internal Auditors. An introduction is included that discusses the purpose and objectives for the standards, as well as the process by which they were developed.

One of the stated goals of the standards is “to provide a basis for promoting consistency and quality in the performance of EHS audits.”¹⁸ Another is to codify recognized “best practices” in the profession, and a third is to provide reliable auditing procedures, reports, and programs to satisfy the needs of senior management, as reflected in *In re Caremark* and Sarbanes-Oxley.

A. Independence and Due Professional Care

Section I entitled “Independence” provides, in separate subsections, requirements for auditors and audit programs to ensure independence and objectivity. Specifically, auditors must be free from any conflict of interest or any pressures or incentives that might cause their perspectives and findings to be anything other than objective. As to the audit program, responsibility is placed with the Board of Directors to “ensure the independence and integrity of the auditing function.”¹⁹ Specifically, the auditing function or program “shall be independent of the function or entity which is being audited.”²⁰ This is necessary to ensure that any inappropriate pressure to modify or compromise findings is avoided.

Section II is entitled “Due Professional Care,” which is defined as “applying the skill and judgment expected of a reasonably prudent and competent EHS auditor appropriate to the nature and complexities of the audit.”²¹ This definition is consistent with the standard of care that has for many years been applied to providers of services in various professions and, more recently, to environmental consultants. It derives from common-law negligence, which requires the use of “reasonable care” under all the relevant circumstances.²² The

standards specify that “Due professional care” means “reasonable care and competence, not infallibility. . . .”²³

The standards then require that auditors shall have adequate qualifications, technical knowledge, training, experience, and proficiency to perform their assigned audit tasks. This places responsibility on both the auditor and any organization by which the auditor is employed, and also on the “Director” or manager of any corporate auditing program, to ensure that auditors are properly qualified and are not asked to perform audits for which they lack the requisite skill.²⁴

Many companies with an in-house audit team find it an ongoing challenge to keep their auditors properly trained, informed on the latest regulations, and familiar with the various business operations at each of the corporate facilities that may be subject to environmental requirements. This is compounded when facilities are bought and sold, and cost-cutting is a priority. The problems are particularly difficult for companies operating facilities around the globe. These challenges are among the subjects addressed in the guidance, as is the related subject of when to use outside auditors as opposed to in-house auditors.

B. Performance of Audit Work

The objectives of the audit, as well as the substantive and geographic scope, are established by the company or other “customer” for each audit. The planning process includes identification of the categories of applicable legal and other requirements or objectives that will be the subject of the audit, selection of the audit team, scheduling, the selection or design of appropriate checklists and protocols (which may include computerized protocols and databases), and other technologies to be used. The guidance to Section III includes a discussion on identifying and evaluating risk in the context of an audit and the use of risk assessment in planning and scoping the audit.

With respect to conducting the audit, the standards recognize that gathering the relevant information typically includes document and record reviews, personnel interviews, site inspections, “and any other appropriate procedure for the gathering, evaluation and recording of information relevant to the scope and objective of the audit.”²⁵ The standards require that procedures be followed that will maximize

17. AMERICAN SOCIETY FOR TESTING AND MATERIALS: STANDARD PRACTICE FOR ENVIRONMENTAL REGULATORY COMPLIANCE AUDITS, E 2107-06 (2006). This standard is specifically limited to environmental compliance audits and uses a highly structured format.

18. BD. OF ENVTL., HEALTH & SAFETY AUDITOR CERTIFICATIONS, PERFORMANCE AND PROGRAM STANDARDS FOR THE PROFESSIONAL PRACTICE OF ENVIRONMENTAL, HEALTH AND SAFETY AUDITING 11 (2008) [hereinafter BEAC STANDARDS].

19. *Id.* §1.4, at 14.

20. *Id.* §1.5, at 14.

21. *Id.* §II.1, at 17. See also *id.* §II.G1-G5, at 20-25.

22. See, e.g., *Waterford LLC v. Garlick*, 2009 WL 248093, *2 (N.D. Fla. 2009) (in discussing the standard of care applicable to environmental consultants, the court stated: “A claim for professional negligence is similar to a claim for ordinary negligence except that the standard of care is based on ‘the standard of care used by similar professionals in the community under similar circumstances.’”); *Grand St. Artists v. Gen. Elec.*

Co., 19 F. Supp. 2d 242, 248, 29 ELR 21053 (D.N.J. 1998) (“[I]t is well settled that an environmental consultant must conform to a standard of care possessed by members of the profession in good standing. . . .” and holding that the duty runs only to those persons who would foreseeably rely on a consultant’s performance and resulting auditing report); *DB Feedyards v. Env’tl. Scis., Inc.*, 745 N.W.2d 593, 606 (Neb. Ct. App. 2008) (affirming the trial court holding that the environmental consultant “owed a duty to perform its services to DB Feedyards as a reasonable environmental consultant with specialized knowledge, skill, training and experience would perform them under similar circumstances.”); RESTATEMENT (SECOND) OF TORTS §299A (1965) (“Unless he represents that he has greater or less skill or knowledge, one who undertakes to render services in the practice of a profession or trade is required to exercise the skill and knowledge normally possessed by members of that profession or trade in good standing in similar communities.”).

23. BEAC STANDARDS, *supra* note 18, §II.1, at 17.

24. *Id.* §II.2-4, at 6-7.

25. *Id.* §III.6, at 30.

the likelihood that all relevant information will be gathered. At the conclusion of the audit, unless the entity requesting the audit directs otherwise, a written report is to be prepared by one or more of the members of the audit team in which findings of noncompliance are specifically and clearly stated, including the violated requirement or criterion and the non-compliant condition or activity.

Many companies include within the scope of their auditing “criteria” (topics audited) not just violations, but conditions that appear to pose significant risk to the company—financial, reputational, or other—or conditions that may not themselves be violations but which, if not addressed, could become violations or otherwise expose the company to liability. In addition, as discussed below, the scope of the program to be audited may include other areas of law such as labor and employment, government contracting laws, or other subjects. The same auditing practices and procedures are applicable regardless of the scope.

Recognizing the wide variety in the nature and scope of audits and in the type of facilities to be audited, there is a prefatory note at the outset of Section III that provides as follows:

Note: An auditor may depart from one or more of the provisions of this Section III of these Standards where particular circumstances make that necessary or appropriate as long as the reason for the departure is documented, and the resulting alternative provision is consistent with generally accepted sound professional practices for EHS auditing.²⁶

A similar note appears at the outset of Section IV relating to audit program design and implementation. These provisions were adopted in response to a number of commenters on early drafts who pointed out that despite the broadly worded and flexible language of the standards, this additional “safety valve” was highly desirable precisely because not every conceivable situation can be anticipated in drafting standards that are as specific as these.

C. Audit Programs

Section IV entitled “Audit Program” sets forth the standards for the design and implementation of an effective EHS auditing program. The purpose, authority, and responsibilities of the EHS auditing function are to be defined in a formal written document, referred to in the standards as the “Charter,” though of course it may be called by any name an entity chooses. Responsibility is placed with senior management to establish and periodically review the policies, goals, and objectives for the organization’s EHS programs and for the audit program itself.²⁷ The Board of Directors must also periodically review the scope and content of the audit program and provide appropriate guidance to senior management.²⁸ These reviews by senior management and the Board are

similar to requirements in the ISO 14001 EMS Standards,²⁹ and are also designed to help companies satisfy the “timely information flow” requirements of *In re Caremark*. As noted earlier, while the minimum scope of these standards is compliance with EHS regulatory requirements, any other subjects may be included.³⁰

The standards contemplate that specific programs and procedures will be developed by the Audit Program Director to carry out the policies, goals, and objectives established by senior management and the Board. It is also the responsibility of the Audit Program Director to ensure that individual audits are scheduled, designed, and conducted consistent with the program scope and objectives and that auditor standards for proficiency and independence are complied with.³¹ Detailed guidance on the typical contents of an audit program is provided.³² Additional topics for which specific guidance is provided include training and education, information systems and communications, addressing repeat findings and root cause analyses, and the use of external auditors, guest auditors, and service providers.

Following the completion of each audit, reports are to be written, as described in Section III above, and senior management “shall provide for procedures to develop and implement corrective actions to address all audit findings and verify their completion.”³³ Corrective action plans are to be promptly prepared by the responsible persons within the auditee facility (or other responsible persons) and that level of management within the organization that is primarily responsible for ensuring compliance. The process should include consultation with the auditors, as appropriate, since auditors often have useful suggestions on the nature of the needed corrective action. The corrective action plan must include a description of the corrective action, a deadline or schedule for completion, and the names of one or more persons responsible for performing the corrective action.³⁴

Responsibility is with senior management, and ultimately the Board of Directors, to ensure that adequate resources are provided “to reasonably assure that the program is properly implemented consistent with the scope, goals and objectives.”³⁵ The guidance recognizes that audit programs are frequently part of a larger EHS management system or compliance assurance system, and that management system audits are normally conducted to ensure that the system itself is working and supported by adequate resources, as distinct from ascertaining compliance with legal requirements.³⁶ The BEAC Standards are applicable to both “compliance” audits and “management systems” audits.

It is also specifically noted that these standards do not apply to environmental site assessments (ESAs), which are distinct from EHS compliance audits (although often it is wise when

29. ISO 14001: ENVIRONMENTAL MANAGEMENT SYSTEMS REQUIREMENTS WITH GUIDANCE FOR USE §4.6 (2004).

30. BEAC STANDARDS, *supra* note 18, at 44.

31. *Id.* §IV.5, .6, .8, at 44-46.

32. *Id.* §IV.G4, at 49-50.

33. *Id.* §IV.9, at 47.

34. *Id.* §IV.10, at 47.

35. *Id.* §IV.12, at 47.

36. *Id.* §IV.G2, at 48. *See also id.* §IV.G10-12, at 52.

26. *Id.* §III, at 29.

27. *Id.* §IV.2-.3, at 43-44.

28. *Id.* §IV.3, at 44.

acquiring another facility to perform a focused compliance audit along with the ESA).³⁷ An ESA is often referred to as a “Phase 1” site assessment to distinguish it from a Phase 2 assessment, which involves gathering media samples. ESAs are addressed in the *ASTM Standard for Environmental Site Assessments: Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process*, ASTM E1527-05 (2005) as well as in EPA’s “All Appropriate Inquiry Rule.”³⁸ Finally, the guidance recognizes the usefulness of corporatewide ethics programs, training employees to “do the right thing” even when there is not a specific regulation or company procedure in place that applies to a particular situation that may arise.³⁹

The last part of the standards is a Dictionary of Terms covering the important terms used throughout the standards.

IV. Significance and Usefulness of These Standards

Since 1993, anyone requesting an ESA has been able to specify that it be done in compliance with the ASTM Standard Practice mentioned above. Even when a customer does not so specify, typically the environmental auditor who conducts the ESA will follow the ASTM Standard and say so in the report that follows. Yet, up until this time, there has been no comparable comprehensive standard, or codification of best practices, that users or providers of an EHS audit might reference. The earlier standards mentioned above have never gained traction for this type of use. This seems odd, in light of the fact that a compliance audit demands a far broader range of knowledge and experience for all but the simplest of facility audits than an ESA.

The BEAC Standards Board hopes that the new BEAC Standard will fill this role and become for compliance auditing what the ASTM Standard has been for the ESA. By codifying existing best EHS auditing practices in a set of straightforward and flexible standards that are easy to read and not difficult to comply with, these standards have an excellent chance of accomplishing this. Moreover, they come at a time when those who rely on the audit reports, including senior management of companies, boards of directors, insurers, and lending institutions, among others, need more than ever the assurance that the auditing procedures on which the reports are based have been properly followed by auditors who have the relevant knowledge, skill, and experience.

Similarly, Section IV of the standards should be of particular value to those who design and implement audit programs, either as a stand-alone program or as part of a broader

companywide compliance assurance program or management system. Here again, senior management needs to know that its auditing program is designed and implemented in such a way that audits are being properly done, findings of noncompliance are being corrected, root cause and frequency analyses are being conducted and responded to programmatically, and that information regarding potential liability is accurately and timely provided to senior management and the board of directors for appropriate action as required by *In re Caremark*.

For many years, it has been EPA and the U.S. Department of Justice policy to give credit in the enforcement context to companies who are implementing effective environmental auditing and compliance assurance programs. This includes decisions on whether to proceed criminally or civilly, the size of penalties and other relief to be sought, and even in the exercise of prosecutorial discretion not to commence a formal action.⁴⁰ If a company can demonstrate that it has in place an effective compliance assurance program, and that the particular violation was simply an aberration, it will fare much better than a company that can make no such showing. Having a well designed and implemented compliance assurance program, of which an auditing program is an essential component, must therefore be a high priority for any corporate manager committed to minimizing environmental violations and the resulting exposure to civil and criminal penalties, reputational damage, and transaction costs. A program that is designed and implemented in conformance with Section IV of the BEAC Standards should materially assist any regulated entity in achieving these objectives.

37. *Id.* §IV.G19, at 56.

38. The ASTM Standard Practice was initially developed in 1993 and has been revised since, most recently in 2005, to incorporate all substantive requirements of EPA’s All Appropriate Inquiry Rule, 40 C.F.R. §312 (2008), which in turn implements provisions of the Superfund Brownfield Amendments of 2002 that provide a shield from Superfund liability for innocent landowners, bona fide prospective purchasers, and contiguous property owners if they conduct “all appropriate inquiry.” See 42 U.S.C. §§9601(35), 9601(40), 9607(q), 9607(r), ELR STAT. CERCLA §§101(35), 101(40), 107(q), 107(r).

39. BEAC STANDARDS, *supra* note 18, §G20, at 56-57.

40. See, e.g., U.S. EPA, Position Statement on Environmental Management Systems (EMSs), 71 Fed. Reg. 5644 (Feb. 2, 2006); Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations, 65 Fed. Reg. 19618 (Apr. 11, 2000) (the Audit Disclosure Policy) (amended by Interim Approach to Applying the Audit Policy to New Owners, 73 Fed. Reg. 44991 (Aug. 1, 2008) to provide enhanced incentives for voluntary disclosure by companies that acquire facilities where preexisting violations are found); Environmental Auditing Policy Statement, 51 Fed. Reg. 25004, 25007 (July 9, 1986), reviewed and reaffirmed, Restatement of Policies Related to Environmental Auditing, 59 Fed. Reg. 38455 (July 28, 1994); Memorandum from John Peter Suarez, Assistant Adm’r for Enforcement & Compliance Assurance, U.S. EPA, Guidance on the Use of Environmental Management Systems in Enforcement Settlements as Injunctive Relief and Supplemental Environmental Projects (June 12, 2003); Memorandum from Earl E. Devaney, Dir., Office of Criminal Enforcement, U.S. EPA, The Exercise of Investigative Discretion (Jan. 12, 1994), available at <http://www.epa.gov/compliance/resources/policies/criminal/exercise.pdf>; Memorandum from U.S. Dep’t of Justice, Factors in Decisions on Criminal Prosecutions for Environmental Violations in the Context of Significant Voluntary Compliance or Disclosure Efforts by the Violator (July 1, 1991). See also Draft Corporate Sentencing Guidelines for Environmental Violations, reprinted in 24 ENV’T REP. (BNA) No. 30, at 1378, (Nov. 16, 1993). These were developed by an Advisory Working Group for the United States Sentencing Commission and set forth mitigating factors to be considered by judges in the sentencing context, including whether a company has in place an effective program to prevent and detect violations. The guidelines were never finalized, but have been used by a number of companies in designing environmental compliance programs, since they are widely believed to reflect the types of factors that the Department of Justice, U.S. Attorneys, and courts consider. See, in particular, Chapter 9, Part D: Commitment to Environmental Compliance.

As noted at the beginning of this Article, many companies have developed, or are developing, the “internal controls” programs required by Sarbanes-Oxley. All of them should include EHS compliance assurance, but how many of them include an auditing program that provides senior management with the information it needs, and with the high degree of accuracy and reliability, required by both Sarbanes-Oxley and *In re Caremark*? For those designing, implementing, or evaluating such programs, the BEAC Standards should provide useful and welcome guidance.

Turning to the auditors themselves, pressures have steadily mounted on them to make sure that they identify and properly characterize every apparent violation and that their reports are complete and accurate. Given the complexity of the operations and activities at various facilities and the complexity and, in some cases, the ambiguity of regulatory requirements, auditors are understandably concerned about being charged with professional malpractice if they miss something. Of course, perfection cannot be required and, as noted above in discussing “due professional care,” that is not required either by law or by the BEAC Standards. An auditor who follows the procedures in Section III, and does so using the “due professional care” specified in Section II, should be deemed to have performed the work properly. While obviously no guarantees can be given, compliance with the BEAC Standards should be a defense against any claim of professional negligence or malpractice that might be brought against an auditor.⁴¹

V. Conclusion

While the new BEAC Standards are not the first of their kind, they are the latest and most comprehensive. They are designed not only to codify existing best practices but to respond to the very real needs of both EHS auditors and those who must be able to rely on their reports. It is hoped that they will obtain widespread visibility, attention, and use.

41. This expectation is supported by the relevant case law discussed in note 22, *supra*.