# 6B Document Retention Issues in Environmental Law

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Companies are more aware than ever of the importance of effective document retention policies to corporate governance. In the environmental, health and safety arena, in particular, specific statutory requirements govern maintenance of certain corporate records, and these mandates must be integrated with a company's overall document retention program. This chapter seeks to explain some of the most important of these requirements and to discuss special challenges facing the environmental, health and safety (EHS) practitioner who must advise a client on these issues.

## SYNOPSIS

## PART A: LEGAL BACKGROUND



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* The authors are lawyers in the Washington, D.C. office of Jones Day. The views expressed in this article are those of the authors, and not necessarily those of Jones Day or its clients. The authors would like to thank James McOmber and Ashley Minney for their assistance in researching and preparing this chapter.

## PART B: PROCEDURAL GUIDE

## PART C: REFERENCE GUIDE

## PART A: LEGAL BACKGROUND

### § 6B.01 Statutory Document Retention Requirements

Document creation and retention requirements are articulated under a variety of statutes and regulations. This chapter describes significant document retention mandates for the EHS practitioner. In Part A of this chapter, the chemical management and release reporting focus of TSCA,[1] EPCRA[2] and FIFRA[3] will first be discussed, followed by the related requirements for worker protection set forth in the OSH Act.[4] Disposal and emissions tracking mandates described in RCRA,[5] the CWA[6] and the CAA[7] will complete the section.[8]

### § 6B.02 Toxic Substances Control Act

The Toxic Substances Control Act (TSCA)[9] provides the Environmental Protection Agency (EPA) with authority to obtain information about chemical substances before the materials are sold and to regulate the handling of these substances, as appropriate. Document retention mandates under TSCA focus on inventory reporting, records regarding adverse effects and pre-manufacture notifications.

The statutory basis for inventory reporting requirements is found in TSCA section 8(a).[10] Under this authority, EPA requires manufacturers and importers of chemical substances on the TSCA master inventory to provide documentation of the amount of TSCA-reportable substances at the plant every four years, typically when used in amounts of 10,000 pounds or more.[11] Documents supporting these

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[1] Toxic Substances Control Act, 15 U.S.C. §§ 2601–2692.

[2] Emergency Planning and Community Right-to-Know Act, 42 U.S.C. §§ 11001–11050.

[3] Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. §§ 136–136y.

[4] Occupational Safety and Health Act, 29 U.S.C. §§ 651–678.

[5] Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901–6992k.

[6] Clean Water Act, 33 U.S.C. §§ 1251–1387.

[7] Clean Air Act, 42 U.S.C. §§ 7401–7671q.

[8] Documentation requirements under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601–9675, focus on release reporting under sections 102 and 103, 42 U.S.C. §§ 9602–9603, and on responses to document requests received pursuant to section 104(e), 42 U.S.C. § 9604(e). Absent litigation, CERCLA does not mandate the sort of ongoing document management responsibilities that are contemplated under the other environmental statutes described in this chapter.

[9] 15 U.S.C. §§ 2601–2692.

[10] 15 U.S.C. § 2607(a); *see also* 40 C.F.R. pt. 710.

[11] 40 C.F.R. § 710.28. In addition, TSCA contains individual reporting requirements for specific

inventory reports must be maintained for the subsequent four years, beginning with the effective date of the particular reporting period.[12]

Under TSCA section 8(c),[13] all manufacturers and processors of chemical substances (other than entities engaged solely in extraction) are required to keep records of "significant adverse reactions to health or the environment . . . alleged to have been caused by the substance or mixture."[14] Such reactions include:

- Long-lasting or irreversible damage, such as cancer or birth defects;
- Partial or complete impairment of bodily functions, such as reproductive, neurological, or blood disorders;
- Impairment of normal activities experienced by all or most of the people exposed at one time; and
- Impairment of normal activities experienced each time an individual is exposed.[15]

Companies need not record human health effects that are "known," meaning those described in scientific articles, on product labels or on Material Safety Data Sheets (MSDSs).[16]

Significant adverse reactions to the environment that must be reported include:

- Gradual or sudden changes in the composition of animal or plant life (including fungal or microbial organisms) in an area;
- Abnormal number of deaths of organisms (*e.g.*, fish or birds);
- Reduction in the reproductive success or vigor of a species;
- Reduction in agricultural productivity (crops or livestock);
- Alterations in the behavior or distribution of a species; and
- Long-lasting or irreversible contamination of components of the physical environment, especially ground and surface water and soil

chemical substances, such as PCBs and asbestos. *See* 40 C.F.R. pt. 761 (PCBs); 40 C.F.R. pt. 763 (asbestos).

[12] 40 C.F.R. § 710.37. For inventory of less than 10,000 pounds, no reporting is required, but documentation supporting that determination must be retained for at least four years. *Id.* TSCA further contains a general requirement that a chemical manufacturer, processor or distributor report to EPA any information that "reasonably supports the conclusion that the chemical substance or mixture presents a substantial risk of injury of health or the environment," TSCA § 8(e), 15 U.S.C. § 2607(e), but no specific document retention mandates accompany this reporting requirement.

[13] 15 U.S.C. § 2607(c).

[14] 15 U.S.C. § 2607(c); *see also* 40 C.F.R. pt. 717.

[15] 40 C.F.R. § 717.12(a).

[16] 40 C.F.R. §§ 717.12(b), 717.3(c).

resources with limited self-cleansing capabilities.[17]

Environmental releases reported under another environmental law need not be reported under TSCA;[18] however, detailed information regarding simple "allegations" of adverse health or environmental effects must be recorded.[19] Most such records must be retained for five years; those that discuss significant adverse reactions to employee health must be retained for 30 years.[20] These records must be made available for inspection by EPA, and if requested, copies of these records must be submitted to the Agency.[21]

Any company planning to manufacture or import a "new chemical substance" must comply with pre-manufacture notification (PMN) requirements.[22] A "new chemical substance" is simply a defined "chemical substance" that is not listed on the master TSCA inventory. Minor exceptions for research and test marketing are provided.[23] Notice of the intent to manufacture or import a new substance must be given to EPA at least 90 days in advance,[24] and that notice must include:

(1) The specific chemical identity of the substance and its molecular formula;

(2) The substance's anticipated impurities and by-products;

(3) Known synonyms or trade names of the substance;

(4) The estimated maximum production amounts for the first three years;

(5) Intended categories of use and percent production volume per category of use;

(6) Identity of manufacturing, processing, or use sites;

(7) Description of manufacturing, processing and use operations;

(8) Worker exposure information;

(9) Information on release of the substance into the environment and

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[17] 40 C.F.R. § 717.12(d).

[18] 40 C.F.R. § 717.12(d). Some industrial operations (principally specified chemical manufacturers and petroleum refineries) are further required to report all health studies conducted by, known to, or ascertainable by that entity, whether or not a "significant adverse reaction" is shown. TSCA § 8(d), 15 U.S.C. § 2607(d); 40 C.F.R. § 717; 63 Fed. Reg. 15765 (Apr. 1, 1998) (Model Reporting Rule).

[19] 40 C.F.R. § 717.15.

[20] 40 C.F.R. § 717.15(d).

[21] 40 C.F.R. § 717.17.

[22] 40 C.F.R. pt. 720; *see also* 40 C.F.R. § 20.1.

[23] 40 C.F.R. § 720.38.

[24] 40 C.F.R. § 720.40(b).

control technologies used to limit such releases;

(10) All test data within the submitter's possession and control related to the effects on health or the environment of any manufacture, processing, distribution, commerce, use, or disposal of the substance (or any mixture or article containing the substance); and

(11) Other test data concerning the health and environmental effects of the substance known or reasonably ascertainable by the submitter.[25]

After receiving the PMN, EPA has 90 days to evaluate the risks posed by the chemical.[26] If the review identifies no concern, EPA will notify the manufacturer that it may begin production of the chemical and will add the substance to the master TSCA inventory. If EPA decides that it needs more information, the Agency may extend the review period or propose an order to regulate or prohibit manufacture.[27]

Manufacturers and importers who submit a PMN must retain records supporting the information in the notice, including "other data" concerning the health and environmental effects of the new chemical; records of the volume of production or importation of the chemical for the first three years of production or import; and documentation of the date of commencement of manufacture or importation. The entity submitting the PMN must retain these records for five years from the date of commencement of manufacture or importation.[28]

Manufacturers and importers who are exempt from the PMN requirements because of their "research and development" or "test marketing" activities must keep records documenting that status for five years after the chemical that otherwise would have been subject to these requirements is manufactured or imported.[29] Likewise, companies that plan to manufacture, process or import an existing listed chemical for a "significant new use" — a SNUR — must keep documentation of the information contained in the significant new use notice for five years from the date of submittal to EPA.[30]

For further discussion of requirements under TSCA, see Chapter 27 below.

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[25] 40 C.F.R. § 720.45.

[26] 40 C.F.R. § 720.75.

[27] 40 C.F.R. § 720.75.

[28] 40 C.F.R. § 720.78. Correlative data concerning imported chemicals *not* subject to the PMN regulations must likewise be retained for five years. 19 C.F.R. § 162.1a(a)(2), .1b, .1c.

[29] 40 C.F.R. § 720.36(c).

[30] 40 C.F.R. § 721.40.

## § 6B.03 Emergency Planning and Community Right-to-Know Act

The Emergency Planning and Community Right-to-Know Act (EPCRA) was enacted as title III of the Superfund Amendments and Reauthorization Act of 1986 (SARA).[31] EPCRA requires creation and retention of documents that provide information on hazardous chemicals that are stored, used or released into the environment, as well as documentation of emergency planning measures.

EPCRA emergency planning requirements mandated creation of State Emergency Response Commissions (SERCs),[32] which, in turn, designated Local Emergency Planning Committees (LEPCs) to:

- Develop a local emergency response plan for chemical emergencies;
- Receive notifications pursuant to EPCRA §§ 302–304, 311 and 312;[33] and
- Make reports and notifications available to the public.[34]

Each LEPC's emergency response plan must include information about the facilities and hazardous substances at issue, potentially at-risk facilities that are nearby, the manner in which any release will be contained, and how the public will be notified. These plans must be updated annually and must be accessible in the event of an emergency. The local fire department is often the entity required to retain these documents. Under EPCRA section 311,[35] an owner or operator of a facility required to maintain MSDSs for hazardous chemicals under the Hazard Communication Standard[36] of the Occupational Safety and Health Act (OSH Act) similarly must submit those MSDSs — or a list of the chemicals grouped by EPCRA hazard category — to the SERC, the LEPC and the local fire department.[37] Likewise, EPCRA section 312[38] requires such owners and operators to submit an annual inventory of hazardous chemicals present at the facility during

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[31] Pub. L. No. 99-499, 100 Stat. 1613 (2000) (codified at 42 U.S.C. §§ 11001–11050). Relevant EPCRA regulations are set forth at 40 C.F.R. pts. 350, 355, 370, and 372.

[32] To the extent possible, SERCs are composed of persons with technical expertise in the emergency response field. EPCRA § 301, 42 U.S.C. § 11001.

[33] 42 U.S.C. §§ 11002–11004, 11021–11022.

[34] EPCRA § 303, 42 U.S.C. § 11003.

[35] 42 U.S.C. § 11021.

[36] 29 C.F.R. § 1910.1200(c).

[37] Chemicals in the following categories are exempt from these reporting requirements: EPCRA exemptions under 40 C.F.R. § 370.2 (definition of hazardous chemical); chemicals exempt from the OSH Act's Hazard Communication Standard under 29 C.F.R. § 1910.1200(b); and chemicals transported pursuant to EPCRA § 327, 42 U.S.C § 11047.

[38] 42 U.S.C. § 11022.

the prior calendar year to the SERC, the LEPC and the local fire department.[39]

Additional document retention responsibilities are imposed on EPCRA "covered facilities," which are defined as plants using or storing an "extremely hazardous substance" in excess of a specific "threshold planning quantity."[40] A covered facility must provide a one-time written notice to the SERC and the LEPC of the presence of an extremely hazardous substance in an amount equal to or greater than the threshold planning quantity — in other words, notification that it is a covered facility. A copy of that notice should be retained at the facility. New notifications must occur within 60 days after an extremely hazardous substance arrives at a facility.[41] Each covered facility must designate a facility emergency coordinator to implement its responsibilities under the local emergency response plan. That individual should retain a current copy of the local emergency response plan, as well as current copies of any additional documentation provided to the LEPC by the facility, such as storage specifications and MSDSs.[42]

The owner or operator of a facility must immediately notify the SERC and the LEPC of any release of a reportable quantity of a listed substance.[43] This requirement applies to both "covered facilities" and any additional plants at which such a release occurs.[44] Oral notice of a release must occur immediately and must include, among other information, the chemical name, quantity and duration of the release, known hazards, and necessary medical and other emergency responses.[45] As soon as practicable after a release requiring notice, a written follow-up emergency notice is required to update the original notice and provide additional information on: (1) actions taken to respond to and contain the release; (2) known

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[39] EPCRA § 324, 42 U.S.C. § 11044, provides for public access to MSDSs and inventory form information through the SERC and LEPC.

[40] EPCRA § 302(a), 42 U.S.C. § 11002. Both the included "extremely hazardous substances" and their threshold planning quantities are set forth in 40 C.F.R. pt. 355, appendix A. EPA may revise the list as appropriate, taking into account toxicity, reactivity, volatility, dispersability, combustibility, or flammability of a substance. EPCRA § 302(a)(4), 42 U.S.C. § 11002.

[41] A state governor or a SERC may also designate a facility as being a "covered facility," after public notice and comment. EPCRA § 302(b), 42 U.S.C. § 11002.

[42] EPCRA § 303, 42 U.S.C. § 11003.

[43] EPCRA § 304, 42 U.S.C. § 11004.

[44] Emergency release notifications are required for releases of reportable quantities of extremely hazardous substances (listed at 40 C.F.R. pt. 355, appendices A and B) or CERCLA hazardous substances (listed at 40 C.F.R. pt. 302, table 302.4). If a release is a federally permitted release, as defined in § 101(10) of CERCLA, the reporting requirement does not apply. The requirement likewise does not apply to any release that results in exposure to persons solely within the site or sites on which a facility is located. EPCRA § 304(a)(4), 42 U.S.C. § 11004(a)(4). Additional exemptions are set forth at 40 C.F.R. § 355.20 (definition of hazardous chemical).

[45] EPCRA § 304, 42 U.S.C. § 11004.

anticipated acute or chronic health risks; and (3) where appropriate, advice regarding medical attention for exposed individuals.[46] Owners or operators of facilities must also fully report expected releases of toxic materials that are continuous and stable in quantity and rate to the EPA.[47] Any documentation supporting these disclosures must be kept for one year.[48]

In addition to emergency planning and response procedures, EPCRA mandates and implements the Toxic Release Inventory (TRI), also known as the "Form R" program.[49] Substances covered under the TRI are listed at 40 C.F.R. § 372.65, and all facilities using any of these substances in an amount greater than 25,000 pounds per year must report:

- The name, location and principal business activity at the facility;
- For each listed chemical, whether the chemical is manufactured, processed or otherwise used, and the general category or categories of use;
- An estimate of maximum amounts present at any one time;
- Certification by an appropriate management official of accuracy and completeness;
- For waste streams, the waste treatment or disposal methods used and an estimate of the treatment efficiency; and
- The annual quantity of the toxic chemical entering each environmental medium.[50]

Information required under the TRI may be designated as a trade secret, subject to agency review.[51]

In addition, notification to parties who receive, purchase or transport toxic chemicals must be provided by facilities that: fall within Standard Industrial Classification (SIC) Codes 20 through 39; are manufacturers or processors of a toxic chemical; and sell or otherwise distribute a mixture or trade name product containing a toxic chemical. Such notification must be in writing and include:

- A statement that the mixture or trade name product contains a toxic chemical or chemicals subject to the reporting requirements of EPCRA

[46] EPCRA § 304, 42 U.S.C. § 11004.

[47] 40 C.F.R. § 302.8.

[48] 40 C.F.R. § 302.8.

[49] EPCRA § 313, 42 U.S.C. § 11023; 40 C.F.R. pt. 372.

[50] EPCRA § 313, 42 U.S.C. § 11023.

[51] EPCRA § 322, 42 U.S.C. § 11042.

section 313[52] and 40 C.F.R. part 372;

- The name and Chemical Abstracts Service (CAS) registry number of each chemical; and
- The percent, by weight, of each toxic chemical present in the mixture or product.[53]

For mixtures or products that must be accompanied by an MSDS, the requisite notification must be attached to the MSDS. Thereafter, the notification and MSDS are not to be separated.[54]

Each facility subject to the above reporting and notification requirements must retain the following records for a period of three years from the date of the submission of the report or notification:

(1) A copy of each report submitted under 40 C.F.R. § 372.30;

(2) All supporting materials and documentation used to make the compliance determination that the facility or establishment is a covered facility;

(3) All documents supporting the determination to submit a notification, all notifications submitted, and any accompanying MSDSs; and

(4) All documents that support the report filed, including:

(i) Documents supporting any determination that a claimed allowable exemption applies;[55]

(ii) Data supporting the determination of whether a threshold for a toxic chemical applies;

(iii) Documents supporting the calculation concerning the quantity of each toxic chemical released to the environment or transferred to an off-site location;

(iv) Documents supporting the "use indications" [intended uses] and quantity on-site reporting for each toxic chemical;

(v) Documents supporting the basis for estimates used for release or off-site transfer for each toxic chemical;

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[52] 42 U.S.C. § 11023.

[53] 40 C.F.R. § 372.45.

[54] 40 C.F.R. § 372.45.

[55] Exemptions include: (1) a chemical mixture or trade name product that contains toxic chemicals in only *de minimis* amounts; (2) "articles," which are items formed to specific shapes or designs that do not release toxic chemicals during normal use; (3) foods, drugs, cosmetics, alcoholic beverages, tobacco and tobacco products; and (4) consumer products packaged for distribution to the general public. 40 C.F.R. §§ 372.38, 372.3.

(vi) All receipts or manifests associated with the transfer of each toxic chemical to off-site locations; and

(vii) Documents indicating the waste treatment procedures that were used.[56]

For further discussion of requirements under EPCRA, see Chapter 28 below.

## § 6B.04 Federal Insecticide, Fungicide and Rodenticide Act

The Federal Insectide, Fungicide and Rodenticide Act (FIFRA),[57] as most recently amended by the Food Quality Protection Act (FQPA),[58] governs the registration and use of pesticides. Document retention mandates under FIFRA focus primarily on support for various required testing procedures, inventory management and pesticide disposal.

Numerous testing records must be retained. First, testing facilities conducting studies to support applications for research or marketing permits for pesticides regulated by EPA must maintain records of the training, experience and job descriptions for every individual involved conducting the study.[59] Second, the testing facility must provide documentation of inspections, calibration and repair of equipment used in the pesticide testing, and all defects in equipment must be documented.[60] Third, the facility must maintain a historical file of the testing and record all operating procedures.[61] Fourth, testers must maintain a written protocol for the study, which should include information on the study's funding sources, defined scope, the records to be kept during the study, start and end dates, and a description of design methods, among other things.[62] Fifth, facilities must preserve a master schedule sheet, copies of protocols and records of quality assurance inspections.[63] Finally, testing facilities must maintain all raw data, documentation, final reports, and any correspondence or writing related to the interpretation and evaluation of the data.[64]

All documentation must be maintained for at least two years from the submission of the study, and perhaps much longer:

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[56] 40 C.F.R. § 372.10.

[57] FIFRA §§ 2 to 34, 7 U.S.C. §§ 136 to 136y.

[58] Pub. L. No. 104-170, 110 Stat. 1489 (Aug. 3, 1996).

[59] 40 C.F.R. § 160.195(e); 40 C.F.R. § 160.29(b).

[60] 40 C.F.R. § 160.195(f); 40 C.F.R. § 160.63(c).

[61] 40 C.F.R. § 160.81.

[62] 40 C.F.R. § 160.195(d); 40 C.F.R. § 160.120.

[63] 40 C.F.R. § 160.35(c); 40 C.F.R. § 160.195(d).

[64] 40 C.F.R. § 160.195(d); 40 C.F.R. § 160.190.

> [D]ocumentation records, raw data, and specimens pertaining to a study and required to be retained by this part shall be retained in the archive(s) for whichever of the following periods is longest:
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> (1) In the case of any study used to support an application for a research or marketing permit approved by EPA, the period during which the sponsor holds any research or marketing permit to which the study is pertinent.
>
> (2) A period of at least 5 years following the date on which the results of the study are submitted to the EPA in support of an application for a research or marketing permit.
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> (3) In other situations (e.g., where the study does not result in the submission of the study in support of an application for a research or marketing permit), a period of at least 2 years following the date on which the study is completed, terminated, or discontinued.[65]

Documents relating to pesticide testing done on human test subjects must further include "[t]he names and addresses of subjects tested, dates of tests, types of tests, written consent of subjects to test, and all information and instructions given to the subjects regarding the nature and purpose of the tests and of any physical and mental health consequences which were reasonably foreseen therefrom, and any adverse effects of the test on the subjects, including any such effects coming to the attention of the producer after completion of the tests."[66] These records must be maintained for 20 years or may be transmitted to EPA after three years.[67]

Companies producing approved pesticides, or pesticide components, must keep detailed records of the ingredients used, the source and quantity of raw materials, and an accounting of batches produced. Manufacturers must retain records regarding the means of shipment, the brand name of the product shipped, and the quantities shipped.[68] All production and shipment information must be retained for at least two years.[69]

Finally, FIFRA requires maintenance of records regarding pesticide disposal, including:

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[65] 40 C.F.R. § 160.195(b). Wet specimens, test samples, control or reference substances, and specially prepared materials that are relatively fragile and are derived from the experimentation and testing differ markedly in stability and quality during storage. As such, EPA only requires retention of those materials for as long as the quality of the preparation affords evaluation. 40 C.F.R. § 160.195(c).

[66] 40 C.F.R. § 169.2(j).

[67] 40 C.F.R. § 169.2(j).

[68] 40 C.F.R. § 169.2(a)–(d).

[69] 40 C.F.R. § 169.2(a)–(d). Copies of advertising and representations regarding usage must also be retained, for two years and one year, respectively. 40 C.F.R. § 169.2(f)–(g).

> Records on the method of disposal (burial, incineration, etc.) date or dates of disposal, location of the disposal sites, and the types and amounts of pesticides or pesticide active ingredients disposed of by the producer or his contractor. With regard to the disposal of containers accumulated during production, the Agency will consider satisfactory a statement, attested to by a responsible firm official, describing in general terms the method and location of disposal, e.g., all containers are taken periodically to a certain site. Records of deviations from normal practice must be maintained. In addition, any records on the disposal of pesticides or pesticide active ingredients and/or containers specified pursuant to section 19 of the Act and any regulations promulgated thereto shall also be maintained.[70]

This information must be maintained by the manufacturer for 20 years, or transmitted to EPA after three years.[71]

For further discussion of requirements under FIFRA, see Chapter 34 below.

## § 6B.05 Occupational Safety and Health Act

The Occupational Safety and Health Act (OSH Act) was adopted in 1970 to "assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources . . . ."[72] The OSH Act applies to private employers, but federal agencies must maintain programs consistent with OSH Act standards.[73] The OSH Act is principally administered by the Occupational Safety and Health Administration (OSHA).[74]

Most fundamentally with respect to recordkeeping and retention, the OSH Act requires covered employers[75] to record workplace injuries and illnesses. In 2001, OSHA published significant revisions to its rules governing these requirements.[76] Among other things, changes in familiar nomenclature have occurred. The OSHA

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[70] 40 C.F.R. § 169.2(i).

[71] 40 C.F.R. § 169.2(i).

[72] 29 U.S.C. § 651(b).

[73] State and local governments generally are covered under state programs and not the OSH Act. 29 U.S.C. § 652(5). Private employees with fewer than 10 employees at all times during the year are generally exempt from the OSH Act reporting requirements regarding injuries or illnesses (unless a fatality occurs or the hospitalization of three or more employees is required). 29 U.S.C. § 1904.1(a)(1).

[74] The federal OSH Act recordkeeping and record retention requirements are often replicated in state programs, but additional state requirements may apply.

[75] In addition to the general exemption for employers with 10 or fewer employees, this record keeping requirement excludes employers in specific low-hazard retail and service industry sectors, as well as certain three-digit SIC industries if their average lost workday injury (LWDI) rate was at or below 75 percent of the overall private sector LWDI average rate in the most recent Bureau of Labor Statistics occupational injury and illness data. 29 U.S.C. § 657.

[76] 66 Fed. Reg. 5916 (Jan. 19, 2001). The final rule was effective on January 1, 2002.

300 Log has replaced the former OSHA 200 Log of Work-Related Injuries and Illnesses. In addition, the OSHA 300-A (Summary of Work-Related Injuries and Illnesses) has replaced the summary portion of the former OSHA 200 Log and Summary; and the OSHA 301 Injury and Illness Incident Report has replaced the OSHA 101 Supplementary Record of Occupational Injuries and Illnesses.[77]

The revised rule further provides for increased employee involvement. Employees previously had access to the OSHA 200 Log and the annual summary of injuries and illnesses. The new rule provides for greater employee access by requiring employers to:

- Set up a system or procedure for accepting injury and illness reports from employees, and informing employees how to report a work-related injury or illness;
- Post the annual summary for three months instead of one; and
- Provide employees, former employees, and their representatives with the right to obtain one free copy of the 300 Log, the 301 Incident Report for his or her case, and the portion of the 301 Form for all injuries and illnesses at the establishment.[78]

OSHA records previously had to be maintained in the covered workplace (or at a central location), such that employees and their representatives had access to these records and the ability to obtain copies. The revised rule allows all record keeping forms to be kept in an electronic storage medium or at an alternative location, as long as the employer can produce the data within four business hours after it is requested (*e.g.,* for a government inspector, employee or employee representative).[79]

The revised rule requires employers to report any workplace fatality or any incident involving the hospitalization of three or more employees to OSHA within eight hours. However, unlike the earlier rule, the revised rule does not require the employer to report to OSHA fatal or multiple hospitalization incidents that occur on commercial airlines, trains and buses, or from accidents on public highways.[80] Fewer incidents thus will be reported under this provision.

OSHA requires retention of most records for five years, although records regarding employee exposure and medical issues generally must be preserved for the duration of employment plus 30 years.[81] When the employer goes out of

[77] 66 Fed. Reg. 5916 (Jan. 19, 2001).

[78] 66 Fed. Reg. 5916 (Jan. 19, 2001).

[79] 66 Fed. Reg. 5916 (Jan. 19, 2001).

[80] 66 C.F.R. pt. 5916.

[81] Specific health standards may provide additional guidance regarding certain medical records.

business or closes an establishment, the records must be sent to OSHA for retention for the duration of the statutory requirement.[82]

In addition to these broad document retention requirements, many document-related issues are governed by standards applicable to specific workplaces or processes.[83] Some of the most important of these provisions for the EHS practitioner are contained in the Hazard Communication Standard, the Process Safety Management Standard and the Respiratory Protection Standard.

*The Hazard Communication Standard* — the Right-to-Know Rule — was promulgated in 1983[84] and phased in over the next three years to provide workers with information regarding chemicals in their workplaces, through a written hazard communication program, appropriate labeling and availability of MSDSs.

To implement the Hazard Communication Standard, chemical manufacturers and importers first must review scientific information on the chemicals produced in their workplaces or imported by them to determine if the chemicals are hazardous.[85] Second, for each chemical determined to be hazardous, the manufacturer or importer must develop an MSDS and warning labels for the chemical and include these items with chemical shipments leaving the premises.[86] Third, employers must develop a written hazard communication program and provide training to employees regarding hazardous chemicals in their work areas.[87] The records required to be generated and retained under the Hazard Communication Standard are:

- An analysis of the hazard determination procedures used (employers must undertake this responsibility only if they are evaluating the hazardous effects of chemicals themselves, rather than relying on the

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For example under the OSH Act's asbestos standard, records of measurements taken to monitor employee exposure to asbestos must be kept for 30 years, 29 C.F.R. § 1910.1001(m)(1)(iii), and objective data relied upon in support of operations exempted from the asbestos standard must be maintained for the duration of the employer's reliance on such objective data. 29 C.F.R. § 1910.10001(n)(2)(iii).

[82] 29 C.F.R. §§ 1910.1020, 1915.1120.

[83] OSHA regulates through standards and regulations. Standards are broad rules applicable to entire industries or to all industries, and industry-specific standards take precedence. Standards are reviewable in federal appellate courts. Regulations govern implementation of standards and are reviewable in federal district courts.

[84] *See* 29 C.F.R. § 1910.1200.

[85] 29 C.F.R. § 1910.1200(d).

[86] 29 C.F.R. § 1910.1200(f), (g).

[87] 29 C.F.R. § 1910.1200(e), (h).

manufacturer or importer);[88]

- A written hazard communication program (must be maintained by all employers, including chemical manufacturers and importers); and
- MSDSs pertaining to each chemical present at the workplace (must be maintained by all employers). Manufacturers and importers should supply MSDSs to their customers.[89]

This written hazard communication program must include:

- Descriptions of how labeling, MSDS and employee training requirements will be implemented;
- A list of hazardous chemicals in the workplace; and
- A description of the methods the employer will use to inform employees of the hazards involved in the performance of non-routine tasks (*e.g.*, cleaning reactor vessels).[90]

The regulations do not specify any particular retention period for a written hazard communication program, but a current version of the hazard communication program should be in the files of the industrial hygiene or EHS department. Likewise, the Hazard Communication Standard does not specify a retention period for MSDSs, except to the extent required by the Employee Access to Exposure and Medical Records rule.[91]

*The Process Safety Management Standard* applies to any workplace using toxic, reactive, flammable or explosive chemicals above specified quantities, and mandates written documentation of: process hazard analyses, operating procedures, work practices, employee training and participation, pre-startup safety reviews, mechanical integrity procedures, incident investigations, emergency

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[88] This description may be incorporated into the written hazard communication program. 29 C.F.R. § 1910.1200(e).

[89] 29 C.F.R. § 1910.1200(e), (g). All employers must have an MSDS on file for each hazardous chemical used and must ensure that copies are readily accessible to employees during each shift. The use of electronic means is acceptable, although appropriate training to access the information, as well as a backup system, must be provided. In the event of medical emergencies, employers must be able to immediately provide copies of relevant MSDSs to medical personnel.

[90] 29 C.F.R. § 1910.1200(h).

[91] 29 C.F.R. § 1910.1020. In the absence of air sampling data and other exposure information, MSDSs are considered "exposure records" under 29 C.F.R. § 1910.1020(c)(5)(iii), which requires records retention for 30 years. 29 C.F.R. § 1910.1020(d)(1)(ii). An alternative to keeping the MSDSs is provided in 29 C.F.R. § 1910.102(d)(1)(ii)(B), which contemplates a 30-year retention of other information that would identify the chemical name of the substance, where it was used, and when it was used. This alternative would apply only to chemicals not currently used, because MSDSs for currently used chemicals covered by the Hazard Communication Standard must be kept in accordance with 29 C.F.R. § 1910.1200(g).

action plans and compliance audits.[92] Employees must be consulted and provided access to the written information developed under this standard.[93]

More specifically, the process hazard analysis contemplated under the standard requires employers to document that the analysis has been performed in a methodologically appropriate manner,[94] then:

> [E]stablish a system to promptly address the team's findings and recommendations; assure that the recommendations are resolved in a timely manner and that the resolution is documented; document what actions are to be taken; complete actions as soon as possible; develop a written schedule of when these actions are to be completed; [and] communicate the actions to operating, maintenance and other employees whose work assignments are in the process and who may be affected by the recommendations or actions.[95]

Each process hazard analysis must be updated every five years,[96] and these analyses, as well as "updates or revalidations . . . [and] the documented resolution of recommendations"[97] must be retained for the life of the process.[98]

Incident investigations under the Process Safety Management Standard are required whenever an incident "resulted in, or could reasonably have resulted in, a catastrophic release of highly hazardous chemicals in the workplace" and must include: (1) the date of the incident; (2) the date investigation began; (3) a description of the incident; (4) the factors that contributed to the incident; and (5) any recommendations resulting from the investigation.[99] Resolutions and corrective actions must be documented, and incident investigation reports must be retained for five years.[100] Required internal compliance audits must be conducted "at least every three years"[101] and employers must retain the two most recent compliance audit reports.[102]

*The Respiratory Protection Standard* requires employers in general industry (29 C.F.R. part 1910), shipyards (29 C.F.R. part 1915), marine terminals (29

[92] 29 C.F.R. § 1910.119.

[93] 29 C.F.R. § 1910.119(c).

[94] 29 C.F.R. § 1910.119(e)(1).

[95] 29 C.F.R. § 1910.119(e)(5).

[96] 29 C.F.R. § 1910.119(e)(6).

[97] 29 C.F.R. § 1910.119(e)(7).

[98] 29 C.F.R. § 1910.119(e)(7).

[99] 29 C.F.R. § 1910.119(m).

[100] 29 C.F.R. § 1910.119(m)(7).

[101] 29 C.F.R. § 1910.119(o)(1).

[102] 29 C.F.R. § 1910.119(o)(5).

C.F.R. part 1917), longshoring (29 C.F.R. part 1918), and construction (29 C.F.R. part 1926) to implement a written respiratory protection program for employees exposed to potentially harmful dusts, smokes or vapors.[103] The standard specifies that the program include:

(1) Procedures for selecting respirators for use in the workplace;

(2) Medical evaluations of employees required to use respirators;

(3) Fit testing procedures for tight-fitting respirators;

(4) Procedures for proper use of respirators in routine and reasonably foreseeable emergency situations;

(5) Procedures and schedules for cleaning, disinfecting, storing, inspecting, repairing, discarding, and otherwise maintaining respirators;

(6) Procedures to ensure adequate air quality, quantity, and flow of breathing air for atmosphere-supplying respirators;

(7) Training of employees in the respiratory hazards to which they are potentially exposed during routine and emergency situations;

(8) Training of employees in the proper use of respirators, including putting on and removing them, any limitations on their use, and their maintenance; and

(9) Procedures for regularly evaluating the effectiveness of the program.[104]

A written copy of the current respirator program must be retained by the employer and must be available on request to employees and OSHA inspectors for examination and copying.[105] Likewise, records of medical evaluations required under OSHA — such as physical examinations performed in connection with respirator fit testing — must be retained for the duration of employment plus 30 years and made available to employees, their representatives and OSHA.[106]

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[103] 29 C.F.R. § 1910.134.

[104] 29 C.F.R. § 1910.134(c)(1).

[105] 29 C.F.R. § 1910.134(c).

[106] The regulation respects privacy concerns, stating that:

> Except as expressly provided, nothing in this section is intended to affect existing legal and ethical obligations concerning the maintenance and confidentiality of employee medical information, the duty to disclose information to a patient/employee or any other aspect of the medical-care relationship, or affect existing legal obligations concerning the protection of trade secret information.

29 C.F.R. § 1910.1020. Fit testing records and records of respirator certifications must be maintained until the next fit test for an employee. 29 C.F.R. § 1910.134(m)(2)(ii). The current version of the facility Emergency Action Plan under 29 C.F.R. § 1918.100, as well as documents required under the Hazardous Waste Operations and Emergency Response Standard

For further discussion of requirements under the OSH Act, see Chapter 28A below.

## § 6B.06 Resource Conservation and Recovery Act

The Resource Conservation and Recovery Act (RCRA) was enacted in 1976 to regulate the disposal of hazardous wastes on land.[107] RCRA subtitle D addresses household wastes, while subtitle C establishes the "cradle to grave" hazardous waste management system. Subtitle I regulates the storage of petroleum products and other substances in underground storage tanks (USTs).[108]

Both owners of hazardous waste generating facilities and transporters of hazardous waste must obtain permits for their activities.[109] All records and materials used to complete the permit application must be kept for the three years following the submission of a permit application. Once a permit is issued, those supporting documents, along with records of continuous monitoring and facility maintenance, must be retained for the three years following the issuance of the permit.[110]

The Uniform Hazardous Waste Manifest is the key to the hazardous waste tracking system. The manifest is prepared by the hazardous waste generator and provided to all transporters of the waste until it reaches the designated treatment, storage or disposal (TSD) facility. The TSD facility then sends one copy of the manifest back to the generator, thus "closing the loop" and assuring the generator that the waste reached the proper facility.[111]

A generator must inquire about the status of a hazardous waste shipment if it has not received a completed manifest from the TSD facility within 35 days of initial shipment. If after 45 days the generator still does not have the manifest, the generator must file an "exception report" with EPA. The exception report describes efforts to locate the hazardous waste and provides a copy of the original manifest.[112]

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("HAZWOPER"), must also be maintained. "HAZWOPER" sets forth protective measures for employees engaged in certain hazardous material cleanup operations and requires a written safety and health program including medical surveillance, employee training, personal protective equipment measures and spill containment.

[107] 42 U.S.C. §§ 6901–6992k.

[108] 40 C.F.R. pt. 282.

[109] 40 C.F.R. § 270.10.

[110] 40 C.F.R. § 270.30.

[111] 40 C.F.R. § 264.71. A person who imports hazardous waste into the United States becomes the "generator" for purposes of that waste and must initiate the manifest procedure. 40 C.F.R. § 262.60.

[112] 40 C.F.R. § 262.87(b).

A transporter may only accept hazardous waste that is accompanied by a complete manifest, signed by the generator. The transporter must sign and date the manifest and return one copy to the generator before leaving the generating facility. The transporter must keep the manifest with the hazardous waste shipment. When the transporter reaches a subsequent transporter or the TSD facility, it must (1) obtain the signature of the transporter or TSD facility, (2) keep one copy of the manifest for its own files, and (3) give the remaining copies to the person accepting the waste. A transporter delivering hazardous waste for export must sign and date the manifest at the time of export, retain a copy for itself, and return a signed copy to the generator. Upon receipt of a hazardous waste shipment, the TSD facility must sign and date the manifest and return one copy to the transporter. Within 30 days, the TSD facility must mail a copy of the manifest back to the generator.

Generators are required to retain most of these documents for three years, specifically including:

(1) Manifests and all accompanying documents;

(2) Exception reports sent to EPA;

(3) Biennial reports to EPA describing the generator's hazardous waste activities;[113]

(4) Laboratory test data;

(5) Annual reports concerning any hazardous waste export;

(6) Any other reports required by EPA or required in emergency reporting;

(7) Inspection records and reports; and

(8) Records of employee training and annual reviews.[114]

In addition, hazardous waste facilities are required to keep a written "operating record" for the life of the facility. The operating record must include:

(1) A cell-by-cell diagram of the facility;

(2) A description of each hazardous waste that was ever present at the facility, including the quantity, common name, and EPA identification number of the waste;

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[113] These biennial reports must include: the generator's name, address and EPA I.D. number; the period covered by the report; the EPA I.D. numbers for all transporters used by the generator; the name, address and EPA I.D. number of each facility to which the generator sent hazardous waste during that period; the identification of the type and quantity of hazardous waste transported during that period; and a description of the generator's waste minimization efforts during that period. 40 C.F.R. § 262.41.

[114] 40 C.F.R. §§ 262.40, 262.43.

(3) A description of any methods of treatment, storage, disposal, or transport of the waste, including a cross-reference identification to any manifest;

(4) The results of all waste analysis;

(5) Any documentation required due to incidents needing corrective action;

(6) All required permits and certifications; and

(7) All required reports and notifications, including the results of inspections.[115]

In addition, hazardous waste disposal facilities are required to maintain groundwater testing records for the life of the facility and through any post-closure care period,[116] and are further required to conduct periodic inspections and maintain those results for three years.[117] Similarly, both transporters and TSD facilities must conduct employee training and keep the training records for current employees until closure of the facility. Records for former employees must be kept for three years from the date an employee leaves the facility.[118]

Finally, TSD facilities must contemplate closure. A written closure plan for the facility must be kept until closure is completed and certified,[119] and TSD facilities must further develop and retain a post-closure plan for 30 years following facility closure.[120] In order to implement closure requirements, facilities are required to retain records demonstrating that sufficient funds will be available for this purpose.[121] As part of this financial assurance, facilities annually must estimate the costs of closure and post-closure care, as well as amounts for third-party liability, including bodily injury and property damage, coupled with amounts to reflect annual inflation and any other factors that may impact the amount of needed coverage.[122] Facilities may maintain documentation of financial assurance in a variety of ways, including: (1) a trust fund; (2) a financial test of self-insurance; (3) a guarantee from a parent corporation or a corporation with a substantial business relationship with the owner or operator of the facility; (4) a

[115] See 40 C.F.R. § 264.73 for details.

[116] 40 C.F.R. § 265.94.

[117] 40 C.F.R. § 264.15.

[118] 40 C.F.R. § 265.16(d)(4), (e).

[119] 40 C.F.R. § 265.112.

[120] 40 C.F.R. § 265.117. The post-closure plan addresses groundwater monitoring, maintenance of waste containment systems and security. *Id.*

[121] 40 C.F.R. § 265.143.

[122] 40 C.F.R. § 265.147.

surety bond; (5) an irrevocable letter of credit; (6) insurance in a face amount equal to the estimated closure costs which is irrevocable except with regard to nonpayment of premium; (7) state mechanisms; or (8) state-established funds.[123]

The RCRA Underground Storage Tank program, which regulates USTs containing petroleum and hazardous substances, required (as of December 22, 1998) that all tanks have a corrosion protection system,[124] as well as a "release detection system" capable of detecting a release from any portion of the tank. Both systems must be monitored at specified intervals.[125] All written manufacturer claims pertaining to the release detection system must be retained for five years from the date of installation. The results of any sampling, testing or monitoring of the system must be retained for one year, except that results of tank tightness testing must be kept until the next test is conducted. Records documenting all calibration, maintenance and repairs of release detection equipment must be kept for one year.

After a UST is permanently closed or no longer contains petroleum or hazardous substances (a "change in service"), the UST owner or operator must keep records demonstrating compliance with closure requirements, including the results of any site investigation at closure. These records must be kept for three years after completion of the closure or change in service; if the records cannot be maintained at the closed facility, the owner/operator must mail them to EPA or an appropriate state agency.

For further discussion of requirements under RCRA, see Chapter 26 below. For a discussion of storage tank requirements, see Chapter 39 below.

## § 6B.07 Clean Water Act and Safe Drinking Water Act

The Clean Water Act (CWA) governs the "chemical, physical, and biological integrity of our nation's waters,"[126] addressing both point and nonpoint source restrictions. With respect to point sources, an entity holding a permit under the National Pollutant Discharge Elimination Program (NPDES) must record and retain for three years all information resulting from monitoring activities conducted under that permit.[127] Calibration and maintenance records, as well as original strip chart recordings for continuous monitoring instrumentation, must likewise be retained for three years from the date of sample, measurement, report

[123] 40 C.F.R. § 265.143.

[124] Records of compliance with corrosion system requirements must be maintained. 40 C.F.R. § 280.31.

[125] 40 C.F.R. §§ 280.41, 280.31.

[126] 33 U.S.C. § 1251. Many of these requirements are implemented at the state level.

[127] 33 U.S.C. § 1251; 40 C.F.R. § 122.2.

or application that has been permitted.[128] Monitoring must take place at the point of discharge into receiving waters, unless monitoring at that location is infeasible because of pollutant interference, location inaccessibility or dilution.[129]

Likewise, nonpoint source permits to discharge dredged or fill material into waters of the United States require three-year retention of:

- All monitoring information;
- All calibration and maintenance records;
- All original strip chart records for continuous monitoring instrumentation;
- Copies of all reports required by the permit; and
- Records of all data used to complete the application for the nonpoint source permit.[130]

The Safe Drinking Water Act (SDWA)[131] requires owners or operators of public water systems[132] to issue annual reports regarding the water source for the system, any contaminants detected, any violations of control requirements, any variance or exemption received by the system, and any potential health impacts from the water provided.[133] In addition, owners or operators of wells authorized by the SDWA underground injection control program are subject to document retention requirements like those applicable to point and nonpoint source permits, including a three-year retention of monitoring information, calibration and maintenance records, original strip chart records for continuous monitoring instrumentation, copies of reports required by the permit, records of all data used to complete the application, and records regarding the nature and composition of

[128] 40 C.F.R. § 122.41. Industrial storm water discharges must be covered by either a general or, less commonly, an individual NPDES permit, including a storm water management plan designed to prevent the discharge of pollutants in storm water from industrial facilities. Storm water permits typically are granted for five years, and documentation supporting the storm water management plan should be retained for the duration of the permit period. 40 C.F.R. § 122.26.

[129] 40 C.F.R. §§ 122.44(i)(1)(iii), 122.45(h).

[130] 40 C.F.R. §§ 233.4, 501.15.

[131] 42 U.S.C. §§ 300f to 300j-26.

[132] A "public water system" is defined as a "system for the provision of water to the public for human consumption through pipes or other constructed conveyances, if such system has at least fifteen service connections or regularly serves at least twenty-five individuals." SDWA § 1401(4)(A), 42 U.S.C. § 300f(4)(A).

[133] SDWA § 1414(c)(4), 42 U.S.C. § 300g-3(c)(4). EPA may request further information as "reasonably require[d]," SDWA § 1445(a)(1), 42 U.S.C. § 300j-4(a)(1), and the Agency specifically has issued regulations requiring monitoring and recordkeeping for currently unregulated contaminants, to ensure that further analysis and/or regulation is not needed. SDWA § 1445(a)(2), 42 U.S.C. § 300j-4(a)(2).

all injected fluids.[134]

Finally, the CWA, as amended by the Oil Pollution Act,[135] requires facilities using certain amounts of petroleum products or hazardous substances to prepare and submit to EPA a Spill Prevention, Control and Countermeasures (SPCC) plan or a more extensive Facility Response Plan (FRP), depending on the volume of these materials stored at the facility.[136] Both plans are intended to ensure that spills of oil or hazardous substances are contained as quickly and comprehensively as possible. Each plan must describe sources of potential spills, the likely scope of any release, response measures to be employed, and responsible personnel.[137] Written procedures and reports of inspections conducted pursuant to these plans must be retained for three years (SPCC) or five years (FRP).[138] The SPCC plan must be reviewed and any necessary revisions incorporated every five years;[139] the FRP must be updated "periodically" in response to changes at the facility.[140]

For further discussion of requirements under the CWA, see Chapter 18 below and for discussion of requirements under the SWDA, see Chapter 20 below.

## § 6B.08 Clean Air Act

Congress enacted the Clean Air Act "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population."[141] To this end, EPA has promulgated numerous reporting and retention requirements for air-related documents.

Like the CWA, the CAA contemplates shared authority for air quality. EPA is responsible for setting national air quality standards, while states develop programs to meet those standards.[142] In the course of developing these imple-

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[134] 42 U.S.C. § 300(f); 40 C.F.R. pt. 144.

[135] 33 U.S.C. §§ 2701–2761.

[136] 40 C.F.R. § 112.1; 40 C.F.R. § 112.20(a) (FRP required for facilities at which a spill is likely to result in "substantial harm" to the environment).

[137] 40 C.F.R. § 112.7 (contents of SPCC plan); 40 C.F.R. § 112.20(h) (FRP contents). In addition to the requirements of these plans, any release of a reportable quantity of oil or a hazardous substance to navigable waters or adjoining shorelines must be reported to the EPA National Response Center. CWA § 311(b)(5), 33 U.S.C. § 1321(b)(5).

[138] 40 C.F.R. § 112.7; 40 C.F.R. pt. 112, app. F.

[139] 40 C.F.R. § 112.5(b).

[140] 40 C.F.R. § 112.20(g)(3).

[141] 42 U.S.C. § 7401(b)(1).

[142] 42 U.S.C. §§ 7409–7410.

mentation plans,[143] many states have created their own document reporting and retention requirements; however, EPA sets a floor, requiring that state plans contain continuous emissions monitoring for pollutant sources and adhere to other specified procedural requirements.[144] Major sources are required to submit annual compliance certifications, including: (1) identification of the applicable requirement that is the basis of the certification; (2) the method used for determining the compliance status of the source; (3) the compliance status; (4) whether compliance is continuous or intermittent; and (5) such other facts as EPA may require.[145]

40 C.F.R. part 61 sets out national emissions standards for hazardous air pollutants, including the related document mandates. They require that "the owner or operator shall retain at the source and make available, upon request, for inspection by the EPA, for a minimum of two years, records of emission test results and other data needed to determine emissions."[146] Similarly, companies must maintain records of the performance of their emissions testing equipment:

> The owner or operator shall maintain records of monitoring data, monitoring system calibration checks, and occurrence and duration of any period during which the monitoring system is malfunctioning or inoperative. These records shall be maintained at the source for a minimum of two years and made available, upon request, for inspection by the EPA.[147]

The statute goes on to set out particular emissions and document retention requirements for individualized emissions.[148] Companies must comply with the retention requirements for the specific emission at issue unless there are no such requirements. In that case, the corporation must comply with the general retention

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[143] *See* 40 C.F.R. § 52.50 *et seq.* (listing State Implementation Plans).

[144] 40 C.F.R. § 70.6(c). EPA has revised the compliance certification requirements — rather than requiring permit holders merely to certify whether the methods used for determining compliance provide continuous or intermittent data, the regulation now mandates that permit holders certify whether there was compliance with each and every permit term, including all monitoring, recordkeeping and reporting requirements. 68 Fed. Reg. 38518 (June 27, 2003).

[145] CAA § 114(a)(3), 42 U.S.C. § 7414(a)(3). Parallel document retention requirements are required under the acid rain program, 40 C.F.R. pt. 72, where results of continuous emissions monitoring for sulfur dioxide, nitrogen oxides and carbon dioxide must be kept for three years, 40 C.F.R. § 75.54, and most other relevant documents kept for five years. 40 C.F.R. § 72.9(f)(1) ("Unless otherwise provided the owners and operators of the source and each affected unit at the source shall keep on site at the source each of the following documents for a period of five years from the date the document is created. This may be extended for cause, at any time prior to the end of the five years, in writing by the Administrator of the EPA or another permitting attorney.").

[146] 40 C.F.R. § 61.13(g).

[147] 40 C.F.R. § 61.14.

[148] 40 C.F.R. pt. 61, subpt. C (beryllium); 40 C.F.R. pt 61, subpt. M (asbestos).

requirements for national emission standards.[149] Likewise, documents related to regulation of new or recently modified stationary sources — categorized by industry[150] — must be available for the preceding two years.[151]

Additional regulations delineate retention of materials related to fuel and fuel additives, primarily gasoline. Gasoline handlers — refiners, blenders and distributors — must keep records of the transfer, processing and testing of raw materials and refined gasoline for at least five years and produce such documents to EPA as requested.[152] Records regarding the mixture of detergents and other additives to gasoline likewise must be kept for five years.[153]

CAA regulations further restrict the production and importation of ozone depleting substances, *e.g.*, chlorofluorocarbons (CFCs).[154] These restrictions are accompanied by recording and document retention regulations requiring dated records of shipments, imports, production, recycling, and numerous other aspects of the production and importation process.[155] These records must be retained for three years.[156] Companies servicing automobile air conditioning units likewise must maintain records for three years demonstrating that their personnel are qualified to handle CFCs.[157]

Mobile sources — cars and trucks — further are addressed through requirements on automobile manufacturers, who must retain records relating to the design and implementation of emissions standards for each model.[158] These vehicle histories must be kept on file for at least eight years.[159] Routine emissions

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[149] Mary S. Busby, Corporate Counsel's Guide to the Records Retention Requirements of the Clean Air Act, § 2201.068 (Business Laws Inc. 1996) ("These general provisions provide the general [retention] requirements for Part 61 and, unless otherwise prescribed in a subpart, are the presumed requirements.").

[150] *See, e.g.*, 40 C.F.R. § 60.625 (petroleum dry cleaning); 40 C.F.R. § 60.545 (rubber tire manufacturing).

[151] 40 C.F.R. § 60.443.

[152] 40 C.F.R. § 80.74 ("All parties in the gasoline distribution network shall maintain records containing the information as required in this section. These records shall be retained for a period of five years from the date of creation, and shall be delivered to the EPA upon request.").

[153] 40 C.F.R. § 80.157(f) ("All detergent blenders shall retain the documents required to be created by this section for a period of five years . . . .").

[154] 40 C.F.R. pt. 82.

[155] 40 C.F.R. § 82.13.

[156] 40 C.F.R. § 82.13(d) ("Records and copies of reports required by this section must be retained for three years.").

[157] 40 C.F.R. § 82.42(b)(4).

[158] 40 C.F.R. pt. 85.

[159] 40 C.F.R. § 86.094-7(a)(3) ("All records, other than routine emission test records, required

tests of the vehicles must be retained for at least one year.[160]

For further discussion of requirements under the CAA, see Chapter 17 below.

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to be maintained under this subpart shall be retained by the manufacturer for a period of eight years after issuance of all certificates of conformity to which they relate. Routine emission test records shall be retained by the manufacturer for a period of one year after issuance of all certificates of conformity to which they relate."). Vehicles produced before 1994 only required retention of vehicle histories for six years. 40 C.F.R. § 86.091-7(a)(3).

[160] 40 C.F.R. §§ 86.094-7(a)(3), 86.091-7(a)(3).

## PART B: PROCEDURAL GUIDE

### § 6B.09 Developing and Implementing a Document Retention Program

Developing and implementing a document retention policy to address these myriad requirements is far easier to articulate than to accomplish. Part B of the chapter highlights some of the most challenging issues.

In brief, an effective corporate records retention program should identify all pertinent records generated by the company, in both paper and electronic format; create appropriate retention and disposal schedules (taking into account any legal requirements, such as the EHS statutes and regulations discussed); and then manage the system to ensure compliance. A business purpose must drive all corporate efforts regarding document retention, including scheduled document disposal. Certain records — computer databases and e-mail backup servers, for example — may present particularly difficult challenges because the records may be somewhat inaccessible due to outmoded software, because dated materials may inappropriately be stored, and because automatic deletion systems may remove documents that *should* have been stored. These materials will require careful cataloging and management.[161]

After a company has identified its relevant records, the records retention policy should articulate the period of time for retention — for legal, financial, operational or historical purposes. It should also identify the department or individuals responsible for monitoring particular sets of documents and set forth the schedule for systematic disposal of documents dated beyond the specified retention period.[162] Materials stored electronically and on paper both must be addressed,

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[161] *See* Robert G. Heim et al., Judicial Conference Advisory Committee on the Federal Rules of Civil Procedure, *Panel Three: Burdens of Production: Locating and Accessing Electronically Stored Data*, 73 Fordham L. Rev. 53 (2004).

[162] Developing a plan for disposal of unnecessary documents is crucial since the physical retention of all documents, especially electronic documents, can be both daunting and extremely expensive. This quote from counsel at a corporate law firm highlights the expense of retaining documents once litigation has commenced:

> I am outside counsel largely to companies, businesses, and for a moment I am going to welcome you to my world, not speaking on behalf of my clients or my law firm, but giving my own opinions based on how I have seen the law in this area evolve:
>
> "So, Ms. General Counsel, thank you for inviting me to meet with you today. It's a pleasure to have the opportunity to represent your company in this litigation. But before we talk about the defense theories in the litigation, let's talk about your preservation obligations and let's talk about a litigation budget before we get too far along. As you suspend your document retention policy, we need to think also about your electronic evidence. You may need to consider suspending recycling of backup tapes as part of this litigation. . . . . And given the cost of those, I think you probably need to budget about $200,000 for just the cost of those backup tapes. You are also going to need to budget for some retrieval and

since copies of relevant documents generally have the same legal effect as originals. If a retention period is not specified by statute or regulation — or by another external standard, such as a relevant statute of limitations — a legitimate internal rationale must be provided, one that will stand up to potential agency or judicial scrutiny.

## § 6B.10 The Lawyer's Role in Advising Clients on Document Retention

### [1]—The Duty to Preserve and Produce Documents Relevant to Litigation, Government Investigation or Audit

Once the records retention schedules, policies and procedures are created and approved, employees should receive training on these requirements, including specific discussion of mechanisms to halt document disposal and maintain certain records in the event of imminent or ongoing litigation, government investigation or audit. Employees responsible for certain sets of documents may need to be sensitized to guidelines, cases and standards that will govern lawyers involved in the document retention process, particularly when litigation is imminent.

For example, the American Bar Association issued relevant guidelines in August 2004. Standard 10 of the ABA guidelines provides:

> When a lawyer who has been retained to handle a matter learns that litigation is probable or has been commenced, the lawyer should inform the client of its duty to preserve potentially relevant documents in the client's custody or control and of the possible consequences of failing to do so. The duty to produce may be, but is not necessarily, coextensive with the duty to preserve. Because the Standards do not have the force of law, this Standard does not attempt to create, codify or circumscribe any preservation duty. Any such duty is created by governing state or federal law. This Standard is, instead, an admonition to counsel that it is counsel's responsibility to advise the client as to whatever duty exists, to avoid spoliation issues.

The comment to the Standard makes clear that the phrase "in the client's custody or control" . . . "is intended as a reminder to counsel that documents in the control, as well as the custody, of a client should also be the subject of

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> production costs of evidence potentially off of those tapes, . . . let's estimate $200,000 to $300,000 for that particular cost. Now the value of your case as we see it is roughly $250,000 to $500,000. So you've got a case with a value of about half a million dollars and I need you to budget about half a million dollars for the electronic evidence portion of retention and retrieval purely related to disaster recovery systems."
>
> What happens next? My client gets a new lawyer. They keep me but reject my advice. Settlement discussions ensue immediately.

Andrew M. Scherffius et al., Judicial Conference Advisory Committee on the Federal Rules of Civil Procecdure, *Panel Four: Rule 37 and/or a New Rule 34.1: Safe Harbors for E-Document Preservation and Sanctions*, 73 Fordham L. Rev. 71, 76–77 (2004) (statement of Laura Lewis Owens).

counsel's advice with respect to document preservation." This issue will be discussed more fully below. The comment further clarifies that the second sentence of Standard 10 is intended "to indicate that the duty to preserve data prior to litigation may be different from the duties imposed either by agreement or court order once litigation has commenced. . . . Litigants often will be required to produce that which they had no duty to preserve."[163]

**[2]—The Duty to Locate and Preserve Relevant Electronic Information**

Standard 29 of the ABA guidelines notes the broad scope of potential locations where relevant information may be found. It provides as follows:

Preserving and Producing Electronic Information.

a. Duty to Preserve Electronic Information.

i. A party's duty to take reasonable steps to preserve potentially relevant documents, described in Standard 10 above, also applies to information contained or stored in an electronic medium or format, including a computer word-processing document, storage medium, spreadsheet, database and electronic mail. Types of electronic data as to which a duty to preserve may exist include, without limitation:

A. E-mail (including attachments);

B. Word processing documents;

C. Spreadsheets;

D. Presentation documents;

E. Graphics;

G. Animations;

H. Images;

I. Audio, video and audiovisual recordings; and

J. Voicemail.

ii. Electronic data as to which a duty to preserve may exist may be located in the possession of the party or a third person under the control of the party (such as an employee or outside vendor under contract). The platforms on which, and places where, such data may be found include, without limitation:

A. Databases;

B. Networks;

C. Computer systems, including legacy systems

[163] ABA Civil Discovery Standards (1999) & Proposed Revisions (Nov. 17, 2003).

(hardware and software);

D. Servers;

E. Archives;

F. Back up or disaster recovery systems;

G. Tapes, discs, drives, cartridges and other storage media;

H. Laptops;

I. Personal computers;

J. Internet data;

K. Personal digital assistants;

L. Handheld wireless devices;

M. Mobile telephones;

N. Paging devices; and

O. Audio systems, including voicemail.

iii. Electronic data subject to preservation may include data that have been deleted but can be restored.[164]

In addition, in 2004 a legal working group articulated the Sedona Principles, which are designed to complement the Federal Rules of Civil Procedure "by establishing guidelines specifically tailored to address the unique challenges posed by electronic document production."[165] Recognizing that the Federal Rules treat electronic and paper materials equivalently for discovery purposes, the Sedona Principles seek to integrate this goal with the reality of significant differences in paper and electronic files:

> Simply put, the way in which information is created, stored and managed in digital environments is inherently different from the paper world. For example, the simple act of typing a letter on a computer involves multiple (and ever-changing) hidden steps, databases, tags, codes, loops, and algorithms that have no paper analogue. The interpretation and application of the discovery rules, to date, have not accommodated these differences consistently and predictably so that litigants can efficiently and cost-effectively meet discovery obligations.[166]

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[164] However, the guidelines further state that, unless the requesting party can demonstrate a substantial need for it, a party does not ordinarily have a duty to take steps to try to restore electronic information that has been deleted or discarded in the regular course of business but may not have been completely erased from computer memory. ABA Civil Discovery Standards (1999) & Proposed Revisions (Nov. 17, 2003).

[165] The Sedona Principles: Best Practices, Recommendations & Principles for Addressing Electronic Document Discovery iv (Sedona Conference Working Group Series 2004).

[166] *Id.* at iii.

The Sedona Principles accordingly set forth a series of guidelines and comments addressing these issues, including the scope of preservation obligations, issues of "metadata" — potential identification of document editors and edit dates, for example — and electronic document recovery.[167]

Although implementing a document retention program is difficult, an appropriate program can establish the predicate for safe disposal of documents in the ordinary course of business, remove the retention decision from the hands of individuals who may be inclined to keep documents that no longer serve a purpose, and reduce the immense costs of storing documents indefinitely.

## § 6B.11 Documents Held by Consultants and Other Non-Parties in Civil Litigation

### [1]—A Party May Be Required to Produce Documents in Its "Control"

Documents in the hands of consultants may pose particularly thorny issues. EHS practitioners are likely to face these issues because consultants are crucial players in so many environmental, health and safety projects. When managing the communication process among the client, the lawyer and the consultant, ensuring that a consultant is properly informed of all document retention requirements is a first step; however, that process must be supplemented with knowledge of what to do with documents kept in a consultant's files, perhaps for years beyond the original document retention period.

This issue arises most significantly when a discovery request for documents has been filed in litigation. For example, Federal Rule of Civil Procedure 34(a) permits any party to civil litigation to serve a request to produce documents "which are in the possession, custody, or control of the party upon whom the request is served."

### [2]—Some Courts Define "Control" as the Legal Right to Obtain a Document

Federal courts often hold that control includes "the legal right to obtain the documents requested upon demand."[168] This right may arise from a contractual

[167] *See id.* at 21–26, 31 & 41. The Sedona Principles further provide guidance on situations in which the cost burden of producing electronic information may appropriately be shifted, at least in part, to the requesting party. *Id.* at 44–46.

[168] Searock v. Stripling, 736 F.2d 650, 653 (11th Cir. 1984). *But cf.* Clark v. Vega Wholesale, Inc., 181 F.R.D. 470, 472 (D. Nev. 1998) (requiring a party to have "exclusive control" over documents sought in discovery before compelling the party to obtain them); *In re* Kuntz, 124 S.W.3d 179, 181 (Tex. 2003) (noting that Tex. R. Civ. P. 192.7(b) defines "control" as the "right to possession of the item that is equal or superior to the person who has physical possession").

relationship between the party and the non-party.[169] In *Rosie D. v. Romney*,[170] for example, class action plaintiffs propounded a discovery request on administrators of a Massachusetts state Medicaid program for documents in the possession of a non-party manager of behavioral health services.[171] Because the non-party's contract with the state agency required it to maintain records of its performance, the *Rosie D.* court held that the state agency had the right to control and obtain the documents. For this reason, the state agency was obliged to comply with the discovery request.[172]

The legal right to obtain documents also may arise from an agency relationship.[173] In opposing a discovery request premised on an agency relationship, a party must prove that the relationship terminated before receipt of the discovery request.[174] For example, in *McKesson Corp. v. Islamic Republic of Iran*,[175] an employee of plaintiff McKesson sought access to a dairy that was a corporate agent of the Islamic Republic of Iran. Access was requested pursuant to Federal Rule of Civil Procedure 34(a), which applies the same "possession, custody or control" standard to rights of entry as to documents.[176] It was established that the dairy served as Iran's agent in 1982, the year of the alleged injury from which the lawsuit arose.[177] Iran argued that the plaintiff should have to prove the existence of the agency relationship in 1999, the time of the discovery request.[178] The *McKesson* court held that because of the waste of time involved in holding repetitive hearings on the issue of control, Iran had the burden to *disprove* the inference that the agency relationship continued from 1982 to 1999.[179] The court did not suggest, however, that in the absence of a principal/agent relationship, Iran could prohibit entry onto corporate property.[180] Moreover, because Iran's expert witness was permitted entry into the corporate premises, the court inferred that

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[169] Anderson v. Cryovac, Inc., 862 F.2d 910, 927–29 (1st Cir. 1988); Rosie D. v. Romney, 256 F. Supp. 2d 115, 119 (D. Mass. 2003).

[170] 256 F. Supp. 2d 115 (D. Mass. 2003).

[171] *Rosie D.,* 256 F. Supp. 2d at 116, 119.

[172] *Rosie D.,* 256 F. Supp. 2d at 119.

[173] McKesson Corp. v. Islamic Republic of Iran, 185 F.R.D. 70, 77 (D.D.C. 1999); Soto v. City of Concord, 162 F.R.D. 603, 619–620 (N.D. Cal. 1995).

[174] *McKesson*, 185 F.R.D. at 77.

[175] 185 F.R.D. 70 (D.D.C. 1999).

[176] *McKesson*, 185 F.R.D. at 72–73.

[177] *McKesson*, 185 F.R.D. at 77.

[178] *McKesson*, 185 F.R.D. at 77.

[179] *McKesson*, 185 F.R.D. at 77.

[180] *McKesson*, 185 F.R.D. at 78.

Iran had control regardless of the persistence of the agency relationship.[181]

Accordingly, the legal right to obtain documents and the resulting control need not arise from an express agreement between the party and a non-party document holder. Instead, courts may infer the legal right to documents from facts or circumstances, including a continuing relationship between the parties. Other such circumstances may include parent/subsidiary relationships[182] or employer/employee relationships.[183]

### [3]—Other Courts Define "Control" as the Practical Ability to Obtain a Document

Some courts have broadened the concept of "control" under Federal Rule of Civil Procedure 34(a) to include not only the legal right to a document, but also the practical ability to obtain it.[184] Among these cases, *National Union Fire Insurance Co. of Pittsburgh v. Midland Bancor, Inc.*[185] adopted the broadest version of the control test, requiring defendants to disclose bank examination reports even in violation of FDIC regulations.[186]

A similar case, *Prokosch v. Catalina Lighting, Inc.*,[187] is noteworthy in this context because the non-party served as the defendant's consultant.[188] In *Prokosch*, the defendant, American Lighting Industry, Inc., produced halogen lamps. The plaintiff sought pending patents for lamp safety devices that had been

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[181] *McKesson*, 185 F.R.D. at 78. *See also* Bank of New York v. Meridien BIAO Bank Tanzania, 171 F.R.D. 135, 153–54 (S.D.N.Y. 1997) (holding that for purposes of determining control under Fed. R. Civ. P. 34(a), an agency relationship with a party's predecessor-in-interest extends also to the party).

[182] *See, e.g.,* United States v. Faltico, 586 F.2d 1267, 1270 (8th Cir. 1978)

[183] *See, e.g., Soto*, 162 F.R.D. at 619–20. *See also* Bleecker v. Standard Fire Ins., Co., 130 F. Supp. 2d 726, 739 (E.D.N.C. 2000) (discussing various relationships between parties and non-parties that give rise to a legal right to obtain documents).

[184] Nat'l Union Fire Ins. Co. of Pittsburgh v. Midland Bancor, Inc., 159 F.R.D. 562, 566 (D. Kan. 1994). *See also Bank of New York*, 171 F.R.D. at 146; Scott v. Arex, Inc., 124 F.R.D. 39, 41 (D. Conn. 1989); United Nuclear Corp. v. Gen. Atomic Co., 96 N.M. 155, 629 P.2d 231, 246–47 (N.M. 1980); Prokosch v. Catalina Lighting, Inc., 193 F.R.D. 633, 636 (D. Minn. 2000) (defining control in a state case as "practical ability to obtain").

[185] 159 F.R.D. 562 (D. Kan. 1994).

[186] *Nat'l Union Fire Ins*., 159 F.R.D. at 566 (D. Kan. 1994) ("Agency regulations do not abrogate the Federal Rules of Civil Procedure. . . ."); *contra* In re One Bancorp Sec. Litigation, 134 F.R.D. 4, 9 (D. Me. 1991) (holding that when it would violate FDIC regulations to disclose bank records, defendant was not obligated to disclose pursuant to Fed. R. Civ. P. 34(a)).

[187] 193 F.R.D. 633 (D. Minn. 2000).

[188] *Prokosch*, 193 F.R.D. at 635–36.

prepared by Yey, American Lighting's consultant.[189] The *Prokosch* court articulated a rule requiring defendants to provide documents they had the practical ability to obtain.[190] Yet the court offered no ruling as to whether the consulting relationship *a fortiori* created a practical ability to obtain the patents. The *Prokosch* court first suggested that, in itself, the consultant relationship did not imply the ability to obtain documents: "Yey's pending patent, regarding safety features for lamps, is not attributable to American, absent a showing that Yey is more than merely a consultant to American."[191] However, the court immediately added, "On the other hand, to the extent that American, or its agents, have 'care, custody, or control' over patent-related documents that are responsive to the Plaintiffs' requests, they are directed to produce them."[192] Apparently lacking specific evidence of American Lighting's ability to obtain the patent documents, the *Prokosch* court merely directed the company to exercise its own judgment regarding the degree to which it had "control."[193]

**[4]—Available Procedural Remedies May Limit a Finding of "Control"**

Regardless of whether the legal relationship or practical issues are emphasized, many courts cite *Searock v. Stripling*[194] as a yardstick for relevant facts surrounding a finding of "control."[195] *Searock* arose when a fire destroyed defendant Stripling's boat.[196] Stripling claimed at deposition that the fire had also destroyed personal copies of all repair invoices.[197] Against advice of counsel, he offered to contact boat repair shops and to provide Searock with copies of invoices.[198] For the next seven months, Searock repeatedly moved to compel production of the repair invoices, eventually moving for sanctions when Stripling did not deliver all of them.[199]

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[189] *Prokosch*, 193 F.R.D. at 635.

[190] *Prokosch*, 193 F.R.D. at 636.

[191] *Prokosch*, 193 F.R.D. at 636.

[192] *Prokosch*, 193 F.R.D. at 636.

[193] *Prokosch*, 193 F.R.D. at 636.

[194] 736 F.2d 650 (11th Cir. 1984).

[195] *Compare* Cochran Consulting, Inc. v. Uwatec USA, Inc., 102 F.3d 1224, 1229 (Fed. Cir. 1996) (citing *Searock*, 736 F.2d at 653, for the proposition that control refers to the "legal right to obtain the documents requested upon demand") *with Scott*, 124 F.R.D. at 41 (citing *Searock*, 736 F.2d at 653, for the proposition that "a party controls documents that it has the right, authority, or ability to obtain").

[196] *Searock,* 736 F.2d at 651.

[197] *Searock,* 736 F.2d at 651.

[198] *Searock,* 736 F.2d at 651.

[199] *Searock,* 736 F.2d at 651–52.

In exploring whether Stripling had control over repair invoices held by non-party repair shops, the Eleventh Circuit articulated both definitions of "control." Stripling had promised to locate and turn over repair invoices, but had not claimed a legal right to them. The court therefore concluded that Stripling lacked control.[200] The court further argued, however, that the "primary dispositive issue is whether Stripling made a good faith effort to obtain" the documents, as a matter of practicality.[201] Because the *Searock* court could find no evidence suggesting Stripling had a practical ability to obtain the documents, it concluded that Stripling lacked control over them and that sanctions were inappropriate.[202]

Importantly, the *Searock* court noted that Searock could have, but chose not to, subpoena the documents directly from the non-parties pursuant to Federal Rule of Civil Procedure 45(d)(1). Because Searock did not seek the invoices but had merely relied on Stripling, the court concluded that their absence did not substantially prejudice Searock's case.[203] This procedural remedy thus influenced the underlying analysis.

Likewise, in *Bleecker v. Standard Fire Ins. Co.*,[204] the plaintiff sought insurance claims manuals in possession of the defendant insurance company and a non-party company the defendant had retained to adjust the plaintiff's claim.[205] The plaintiff argued that because the defendant had the ability to obtain the manuals from the independent adjuster, the defendant had control over them for purposes of Federal Rule of Civil Procedure 34(a).[206] The defendant argued that because it had no legal right to the documents, the plaintiff could not compel the defendant to produce them.[207]

The *Bleecker* court advanced three arguments in support of the defendant's narrower definition of control as the legal right to obtain documents. First, the court recognized that forcing a party to obtain a document from a non-party might place an undue burden on the party.[208] Second, any such burden would appear wholly unnecessary because the propounding party could simply subpoena the

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[200] *Searock,* 736 F.2d at 654.

[201] *Searock,* 736 F.2d at 654.

[202] *Searock,* 736 F.2d at 654.

[203] *Searock,* 736 F.2d at 654.

[204] 130 F. Supp. 2d 726, 739 (E.D.N.C. 2000) (opting for the narrower definition of "control" as the legal right to obtain documents).

[205] *Bleecker,* 130 F. Supp. 2d at 739; *see also* 130 F. Supp. 2d at 728.

[206] *Bleecker,* 130 F. Supp. 2d at 739.

[207] *Bleecker,* 130 F. Supp. 2d at 739.

[208] *Bleecker,* 130 F. Supp. 2d at 739.

non-party.[209] Finally, the court appealed to a distinction between judicial involvement in party and non-party document requests implicit in the Federal Rules of Civil Procedure: "In drafting the rules, the committee deemed it important to involve the court whenever discovery was requested from a non-party. Adopting the 'ability to obtain' test would usurp these principles, allowing parties to obtain documents from non-parties who were in no way controlled by either party."[210] Thus, because the rules provide alternative routes to obtain a document from a non-party, *Bleecker* adopted a narrow definition of control and denied plaintiff's request to compel the defendant to obtain the manuals from its adjuster.[211]

### [5]—"Control" of a Document Will Affect Both Its Production and Disclosure

The meaning of "control" may determine not only a party's obligation to produce documents, but also its need to disclose their existence. Federal Rule of Civil Procedure 34(a) does not distinguish between documents in a party's possession or custody from those in a party's control but in possession of non-parties. Thus, whether a document is in a party's possession or merely its control, the party faces the same obligations to produce the document in response to a request or a motion to compel, and the same potential for sanctions under Federal Rule of Civil Procedure 37 if it fails to do so.[212]

Because possession and control have the same consequences, a party may become liable for Federal Rule of Civil Procedure 37 sanctions if it fails to "make all reasonable efforts" to comply with a discovery order for documents in its control. In *BankAtlantic v. Blythe Eastman Paine Webber, Inc.*,[213] for example, plaintiffs sought production of correspondence related to litigation between defendant Paine Webber and a non-party.[214] When Paine Webber failed to produce the requested documents, including documents *not* in its possession,

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[209] *Bleecker,* 130 F. Supp. 2d at 739. C*f.* Bachmeier v. Wallwork Truck Ctrs., 507 N.W.2d 527, 532 (N.D. 1993) ("The appropriate method for discovery of items in nonparty possession is by a subpoena duces tecum.").

[210] *Bleecker,* 130 F. Supp. 2d at 739.

[211] *Bleecker,* 130 F. Supp. 2d at 740.

[212] *See* Schwartz v. Mktg. Pub. Co., 153 F.R.D. 16, 21 (D. Conn. 1994) (treating documents not in possession of a party the same as documents in its possession); Super Film of Am., Inc. v. UCB Films, Inc., 219 F.R.D. 649, 655 (D. Kan. 2004) (explaining that because Fed. R. Civ. P. 34(a) requires a party to produce documents in its control as well as its possession, the court must similarly evaluate a propounding party's motion to compel production from the party and its non-party corporate affiliate).

[213] 12 F.3d 1045 (11th Cir. 1994).

[214] *BankAtlantic,* 12 F.3d at 1047.

BankAtlantic moved to sanction Paine Webber and Ruden Barnett, Paine Webber's law firm.[215] Ruden Barnett, in particular, claimed that because it knew nothing about the non-party documents, it should not be liable for sanctions.[216] The *BankAtlantic* court nonetheless upheld the district court's finding that Ruden Barnett had "failed to meet its obligation to search [Paine Webber's] corporate and attorney files for responsive documentation."[217]

## § 6B.12 Contexts in Which Document Requests May Arise

Issues surrounding the retention, disclosure and production of documents in civil litigation are indisputedly critical to the EHS practitioner. However, that focus does not consider other contexts in which an individual or corporation is required to retain and present documents, including regulatory proceedings, criminal investigations and grand jury proceedings.

Government agencies generally obtain documents and other physical evidence in the course of an investigation *via* subpoena or subpoena *duces tecum*. Agencies can use their subpoena power to require the production of documents or force individuals to open their doors to a government investigation. The authority to issue subpoenas must be explicitly granted by statute,[218] but is not necessarily limited to investigations related to an administrative hearing or prosecution. Moreover, an investigatory subpoena need not be issued pursuant to probable cause.[219] Rather, an agency simply must demonstrate that: (1) the subpoena is

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[215] *BankAtlantic,* 12 F.3d at 1047.

[216] *BankAtlantic,* 12 F.3d at 1050.

[217] *BankAtlantic,* 12 F.3d at 1050.

[218] *See* Am. Jur. 2d, Admin. Law § 337 which states:

> An administrative agency has no inherent authority to issue subpoenas but it may be given the statutory authority to do so. The 1981 Model State Administrative Procedure Act specifically provides that the presiding officer at an administrative proceeding may issue subpoenas in accordance with the rules of civil procedure. The Federal Administrative Procedure Act, however, provides only that agency subpoenas may be issued as authorized by law. Subpoena power not expressly conferred on an administrative agency or official will not be implied unless it is essential to the fulfillment of the objectives of a statute.

(Footnotes omitted.) The relevant APA sections are 5 U.S.C. § 555(d) ("Agency subpoenas authorized by law shall be issued to a party on request and, when required by rules of procedure.") and 5 U.S.C. § 556(b)(2) ("Subject to published rules of the agency and within its powers, employees presiding at hearings may— . . . (2) issue subpoenas authorized by law.").

[219] EEOC v. Dillon Companies, Inc., 310 F.3d 1271, 1274–1275 (10th Cir. 2002) ("Although the Supreme Court has advised that the relevance standard must not be interpreted so broadly as to render the statutory language a 'nullity,' we have explained (1) that an EEOC administrative subpoena 'is enforceable even though no "probable cause" has been shown' (2) that even some requests we 'previously considered to be administrative "fishing expeditions" are often permitted,' and (3) that such subpoenas 'may be enforced for investigative purposes unless they are plainly

"issued for a congressionally authorized purpose, the information sought is (2) relevant to the authorized purpose and (3) adequately described, and (4) proper procedures have been employed in issuing the subpoena."[220] The responding party may challenge a subpoena on any or all of these grounds, or as unduly burdensome.

Courts, however, take a limited role in reviewing administrative subpoenas and will refuse to enforce agency requests for documents only in rare circumstances.[221] Failure to comply with judicial enforcement of an administrative subpoena will likely result in a show cause order and ultimately the disobedient party may be held in contempt.[222]

Similarly, the government's primary investigatory tool for documents in criminal matters is the warrant. Police and regulatory agencies engaged in criminal investigations must receive *ex parte* judicial approval prior to the seizure of documents or other physical evidence. Probable cause of criminal activity must be shown before a warrant will issue.[223] Defendants may challenge the search and seizure of documents or other physical evidence after the search has been completed, during the criminal proceedings. A successful challenge, however,

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incompetent or irrelevant to any lawful purpose."' (citation omitted)). *See also In re* Gimbel, 77 F.3d 593 (2d Cir. 1996) which demonstrates the broad subpoena powers of the FDIC:

> [T]he statute that empowers the FDIC to issue subpoenas "places few restrictions on that power." The statute provides that:
>
> The Corporation may, as conservator, receiver, or exclusive manager and for purposes of carrying out any power, authority, or duty with respect to an insured depository institution (including determining any claim against the institution and determining and realizing upon any asset of any person in the course of collecting money due the institution), exercise any power established under section 1818(n) of this title.

*Gimbel*, 77 F.3d at 596.

[220] United States v. Sturm, Ruger & Co., Inc., 84 F.3d 1, 4 (1st Cir. 1996). S*ee also* United States v. Morton Salt Co., 338 U.S. 632, 652, 94 L. Ed. 401, 70 S. Ct. 357, 46 F.T.C. 1436 (1950).

[221] Generally, a district court's role in enforcing administrative subpoenas is "sharply limited": The Supreme Court has characterized the relevancy requirement as "not especially constraining." Rather, "the term 'relevant"' will be "generously construed" to "afford[ ] the Commission access to virtually any material that might cast light on the allegations against the employer." We determine relevancy "in terms of the investigation" rather than "in terms of evidentiary relevance." Courts defer to an agency's own appraisal of what is relevant "so long as it is not 'obviously wrong."'

EEOC v. Lockheed Martin Corp., 116 F.3d 110, 113 (4th Cir. 1997) (citations omitted).

[222] Shea v. Office of Thrift Supervision, 934 F.2d 41, 45–46 (3d Cir. 1991) ("As a result, prior to the filing of an action to enforce an administrative subpoena, a party upon whom a subpoena has been served faces only the threat of action. The subpoenaed party faces actual harm only after a successful enforcement action has been brought and, as a result of such action, the subpoenaed party has been ordered to comply.").

[223] *See* United States v. Froman, 355 F.3d 882, 889 (5th Cir. 2004).

will only exclude the seized evidence from the criminal proceeding; any evidence obtained in the search, even an illegal search, can be used in future civil proceedings.[224] The failure to possess documents or evidence that investigators are seeking, however, would not result in sanctions unless — as with agency civil investigations — the documents were knowingly disposed of or destroyed for the purpose of obstructing a judicial proceeding or government investigation. Possible obstruction of justice sanctions are discussed more fully below.

The most common process used to seek documentation and other evidence is, of course, civil discovery. Discovery under the Federal Rules of Civil Procedure (as well as under some correlative state rules) requires a substantial initial disclosure to the opposing party,[225] and sets out procedures for the collection of additional materials through oral or written depositions, written interrogatories, requests for production of documents, permission to enter upon land for inspection purposes, physical and mental examinations, and requests for admissions.[226] Failure to comply with discovery pursuant to the Federal Rules opens a party to sanctions under Rule 37. In addition, the loss or destruction of documents or physical evidence relevant to the claims or defenses presented is sanctionable as spoliation in the course of the civil action, as long as the litigation is currently pending or the party upon whom the request was made reasonably anticipated the commencement of litigation.

## § 6B.13 Penalties for Document Alteration or Destruction

### [1]—Civil Penalties and Sanctions

#### [a]—When Sanctions May Be Issued

Once a request for documents has been made in a civil discovery or investigatory process, parties must be prepared to turn over all non-privileged, relevant materials. Failure to do so may, and often will, result in significant civil penalties or even a separate civil cause of action, particularly where those documents were lost or destroyed.

Courts have the inherent power to sanction parties failing to produce evidence in a civil action.[227] Courts can impose sanctions to enforce discovery orders that

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[224] *See* Jonas v. City of Atlanta, 647 F.2d 580, 587 (5th Cir. 1981).

[225] Fed. R. Civ. P. 26(a)(1). That initial disclosure must include: names and addresses of individuals likely to have discoverable information that would support claims or defenses; copies of or locations and descriptions of discoverable documents or evidence relevant to claims and defenses in the case; and information or computations of any category of damages claimed by the opponents. *Id.*

[226] Fed. R. Civ. P. 26(a)(5).

[227] Link v. Wabash R. Co., 370 U.S. 626, 632, 8 L. Ed. 2d 734, 82 S. Ct. 1386 (1962)

direct production of documents,[228] and further impose sanctions for the spoliation — destruction, loss, or significant alteration — of evidence deemed material to pending or reasonably foreseeable litigation. The issuance of sanctions, monetary or otherwise, is designed to deter parties' destruction or loss of evidence, restore the prejudiced party to the same position he or she would have been in had the evidence been preserved, and to place the burden of unreliability in the judicial process upon the spoliator.[229] Fundamentally, courts impose sanctions based upon the idea that spoliators must not benefit from wrongdoing.[230]

Courts have employed numerous devices in sanctioning parties for failure to retain relevant evidence. Monetary sanctions can be ordered, in the form of a punitive dollar figure, or as compensation for the opposing party's time, effort and attorneys' fees in attempting to compel production or obtain the evidence from other sources. Courts can also give jury instructions permitting jurors to infer that the missing evidence would have been harmful to the spoliator. Finally, courts can dismiss all or part of a claim or defense. Courts are given broad discretion to

(recognizing the court's inherent power to dismiss a case for abusive litigation practices).

[228] Roadway Exp., Inc. v. Piper, 447 U.S. 752, 763–64, 65 L. Ed. 2d 488, 100 S. Ct. 2455 (1980). There the Court states:

> [The] Federal Rule of Civil Procedure 37(b) authorizes sanctions for failure to comply with discovery orders. The District Court may bar the disobedient party from introducing certain evidence, or it may direct that certain facts will be "taken to be established for the purposes of the action. . . ." The Rule also permits the trial court to strike claims from the pleadings, and even to "dismiss the action . . . or render a judgment by default against the disobedient party." Both parties and counsel may be held personally liable for expenses, "including attorney's fees," caused by the failure to comply with discovery orders. Rule 37 sanctions must be applied diligently both "to penalize those whose conduct may be deemed to warrant such a sanction, [and] to deter those who might be tempted to such conduct in the absence of such a deterrent."

(Citations and footnote omitted.)

[229] West v. Goodyear Tire and Rubber Co., 167 F.3d 776, 779 (2d Cir. 1999) ("The sanction should be designed to: (1) deter parties from engaging in spoliation; (2) place the risk of an erroneous judgment on the party who wrongfully created the risk; and (3) restore the 'prejudiced party to the same position he would have been in absent the wrongful destruction of evidence by the opposing party.'"). S*ee also* Nation-Wide Check Corp. v. Forest Hills Distribs., 692 F.2d 214, 218 (1st Cir. 1982) ("The other rationale for the inference has to do with its prophylactic and punitive effects. Allowing the trier of fact to draw the inference presumably deters parties from destroying relevant evidence before it can be introduced at trial. The inference also serves as a penalty, placing the risk of an erroneous judgment on the party that wrongfully created the risk. In McCormick's words, 'the real underpinning of the rule of admissibility [may be] a desire to impose swift punishment, with a certain poetic justice, rather than concern over niceties of proof.'" (citation omitted).

[230] *West*, 167 F.3d at 779 ("It has long been the rule that spoliators should not benefit from their wrongdoing, as illustrated by 'that favourite maxim of the law, omnia presumuntur contra spoliatorem.'").

impose these penalties and will be overturned only for egregious errors.[231] This section will examine each of the available civil sanctions and the showing that prejudiced parties must make to have those sanctions imposed.

**[b]—What a Party Requesting Sanctions Must Establish**

A party requesting sanctions for the spoliation of evidence typically must satisfy a three-pronged test. First, the offended party must show that the opponent, having control over the requested evidence, knew or should have known that the evidence would be relevant to current or existing litigation.[232] The litigation need not be ongoing; anticipation of litigation is sufficient. In *Silvestri v. General Motors Corporation*,[233] for example, spoliation sanctions were imposed even when the loss of evidence occurred well before the commencement of litigation.

Second, the offending party must have a culpable state of mind in the destruction or loss of the documents.[234] Some courts have suggested that the spoliator must have destroyed documents intentionally, with gross negligence, or in bad faith.[235] However, some courts *have* imposed sanctions even where the documents were negligently lost or were simply disposed pursuant to a document retention policy.[236] This issue will be more fully discussed below, in the context

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[231] *See, e.g.*, Med. Lab. Mgmt. Consultants v. Am. Broad. Cos., 306 F.3d 806, 824 (9th Cir. 2002) ("[A federal trial court has the discretionary power to sanction for spoliation and] [a]s a discretionary power, the district court's exercise of that power is reviewed by this court only for abuse of discretion."); Fujitsu Ltd. v. Fed. Express Corp., 247 F.3d 423, 436 (2d Cir. 2001) ("The determination of an appropriate sanction for spoliation, if any, is confined to the trial judge and is assessed on a case-by-case basis. We have recently observed that '[our] case by case approach to the failure to produce relevant evidence seems to be working.'" (citations omitted).

[232] Fujitsu Ltd. v. Fed. Express Corp., 247 F.3d 423, 436 (2d Cir. 2001) ("The obligation to preserve evidence arises when the party has notice that the evidence is relevant to litigation or when a party should have known that the evidence may be relevant to future litigation.").

[233] 271 F.3d 583 (4th Cir. 2001).

[234] Residential Funding Corp. v. DeGeorge Fin. Corp., 306 F.3d 99, 107 (2d Cir. 2002). S*ee also* Silvestri v. General Motors Corp., 271 F.3d 583, 590 (4th Cir. 2001) ("In addition, a court must find some degree of fault to impose sanctions.").

[235] Cole v. Keller Indus., Inc., 132 F.3d 1044, 1047 (4th Cir. 1998) ("Nevertheless, the vast weight of authority, including the Virginia Supreme Court, holds that absent bad-faith conduct applying a rule of law that results in dismissal on the grounds of spoilation of evidence is not authorized.") S*ee also* Stevenson v. Union Pacific R.R., 354 F.3d 739, 746 (8th Cir. 2004) ("[T]he standard is the same under either state or federal law — there must be a finding of intentional destruction indicating a desire to suppress the truth.").

[236] Byrnie v. Town of Cromwell, 243 F.3d 93, 108 (2d Cir. 2001) ("[A]t times we have required a party to have intentionally destroyed evidence; at other times we have required action in bad faith; and at still other times we have allowed an adverse inference based on gross negligence."). S*ee also Silvestri*, 271 F.3d at 593; Zubulake v. UBS Warburg LLC, No. 02-CIV-1243, 229 F.R.D. 422, 2004 U.S. Dist. LEXIS 13574 (S.D.N.Y. July 20, 2004) (holding that spoliators and counsel are not

of the decision in *Zubulake v. UBS Warburg LLC*.[237]

Third, parties demanding sanctions must demonstrate that the loss of evidence resulted in prejudice, or that the evidence was highly relevant to the cause of action or defense at issue.[238] The moving party must show not only that the missing evidence was relevant in the evidentiary sense, but also that the evidence would have been harmful to the spoliator.[239] Courts tend to relax the prejudice and/or relevance requirement where the potential spoliator acted willfully or in bad faith by destroying documents.[240] These courts reason that the willful destruction of documents provides reliable proof that the documents were relevant to the cause of action and harmful to the spoliator.[241] As such, additional proof or relevance or prejudice is not as important.

### [c]—Courts May Apply a Variety of Sanctions

#### [i]—Adverse Jury Instructions

A common sanction used to remedy spoliation is an adverse inference instruction read to the jury. Such instructions permit jurors to infer that missing evidence, had it been produced, would have been harmful to the spoliator. Adverse inference instructions often direct juries to presume that spoliators failed to prove a portion of their case. For example in *West v. Goodyear Tire*

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immune to spoliation sanctions merely because documents were destroyed pursuant to a document retention policy); Reilly v. Natwest Mkts. Group, Inc., 181 F.3d 253, 268 (2d Cir. 1999) ("Thus we hold that a finding of bad faith or intentional misconduct is not a sine qua non to sanctioning a spoliator with an adverse inference instruction.").

[237] No. 02 Civ. 1243, 229 F.R.D. 422, 2004 U.S. Dist. LEXIS 13574 (S.D.N.Y. July 20, 2004), discussed in § 6B.13[1][d] *infra*.

[238] *Stevenson*, 354 F.3d at 748 ("There must be a finding of prejudice to the opposing party before imposing a sanction for destruction of evidence.").

[239] *DeGeorge*, 306 F.3d at 108–09 ("Although we have stated that, to obtain an adverse inference instruction, a party must establish that the unavailable evidence is relevant to its claims or defenses, our cases make clear that 'relevant' in this context means something more than sufficiently probative to satisfy Rule 401 . . . . Rather, the party seeking an adverse inference must adduce sufficient evidence from which a reasonable trier of fact could infer that the destroyed or unavailable evidence would have been of the nature alleged by the party affected by its destruction.").

[240] *Zubulake*, 2004 U.S. Dist. LEXIS 13574 at *29 ("[I]n the case of *willful* spoliation . . . the degree of culpability give[s] rise to a presumption of the relevance of the documents destroyed."). Similarly in *Stevenson*, the Eighth Circuit determined that the nature of the documents that had been destroyed, *i.e.* their centrality to the litigation, in addition to the fact that no other evidence had been destroyed, was sufficient to find prejudice. 354 F.3d at 748.

[241] *DeGeorge*, 306 F.3d at 109 ("The same evidence of an opponent's state of mind will frequently also be sufficient to permit a jury to conclude that the missing evidence is favorable to the party.").

*Company,*[242] a tire explosion case, the court suggested that destruction of evidence regarding tire servicing issues could be remedied by instructing the jury to presume that the tires were overinflated and that the tire mounting machine malfunctioned, and further precluding the introduction of rebuttal evidence on these issues.[243] More lenient instructions also have been issued: "[the judge] instructed the jury that *if* [plaintiff] could prove that (1) [defendant] failed to deliver [documents] in a timely fashion or delivered them incomplete and (2) that such 'non-delivery' prejudiced [plaintiff] because the files were important to him, 'then you can infer these matters in his favor and against the defendant.'"[244] In both cases, the instruction to the jury brings the missing documents to the jurors' attention and would logically lead them to ask why a spoliator would withhold, destroy or lose documents.

Adverse instructions generally require findings of a duty to produce documents, a culpable state of mind connected with the loss, alteration or destruction of evidence, and materiality of the potential evidence. Some courts, however, have allowed an adverse instruction only where there is evidence of intentional destruction of evidence, indicating a "fraud and desire to suppress the truth," *i.e.*, bad faith.[245] These cases can be contrasted with jurisdictions, particularly the Second Circuit and Ninth Circuits, in which a finding of bad faith is not necessary to impose sanctions: "[A] finding of bad faith or intentional misconduct is not a *sine qua non* to sanctioning a spoliator with an adverse inference instruction."[246] Most importantly, the power to impose appropriate sanctions in the face of alleged spoliation is in the broad discretion of the court, and parties who are unable to produce relevant, requested documents — even absent bad faith — may well face a damaging jury instruction.

### [ii]—Striking Pleadings and Defenses, Entry of Judgment

In the most severe cases of wrongdoing, spoliators can be sanctioned through adverse findings of law: summary judgment, partial summary judgment, or dismissal. Dismissal and other findings of law will be upheld only under the most extreme circumstances. Bad faith or willfulness by the spoliator must be

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[242] 167 F.3d 776 (2d Cir. 1999).

[243] *West*, 167 F.3d at 780 (suggesting that these severe jury instructions would have been more appropriate than a full dismissal of the plaintiffs case).

[244] *Reilly*, 181 F.3d at 267 (emphasis added).

[245] Stevenson v. Union Pac. R.R., 354 F.3d 739, 746 (8th Cir. 2004).

[246] *Reilly*, 181 F.3d 253, 268 (2d Cir. 1999). S*ee also* Glover v. BIC Corp., 6 F.3d 1318, 1329 (9th Cir. 1993) ("[A] finding of 'bad faith' is not a prerequisite to this corrective procedure . . . . Surely a finding of bad faith will suffice, but so will simple notice of 'potential relevance to the litigation.'").

shown,[247] and courts must ensure that other penalties — including significant adverse jury instructions — would not suffice to deter spoliation and restore the prejudiced party.[248] Such penalties are likely to be imposed when a party willfully opposes a court order to produce documents (even if the documents have not been lost or destroyed) or where parties act dishonestly in attempting to avoid a judicial order to compel document production.

For example, the Tenth Circuit upheld the dismissal of a suit where the family of a teenager suing a residential treatment facility refused to produce documents relating to the mental health of the teenager. In that case, the trial court gave numerous extensions and warnings that the failure to produce the documents would result in dismissal. The trial court even imposed lesser sanctions before dismissing the case entirely.[249] Similarly, the Fifth Circuit upheld a district court judgment finding that willful document destruction and alteration after the commencement of litigation, along with other obstructionist tactics, was sufficient misconduct by the defendant to warrant striking all defenses and entering judgment for the plaintiff.[250] The Ninth Circuit likewise upheld dismissal of a

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[247] Jones v. Niagara Frontier Transp. Auth. (NFTA), 836 F.2d 731, 734 (2d Cir. 1987) ("Dismissal under Rule 37 is an extreme sanction, to be imposed only in extreme circumstances. 'The sanction of dismissal should not be imposed under Rule 37 unless the failure to comply with a pretrial production order is due to "willfulness, bad faith, or any fault" of the deponent.'"). S*ee also West*, 167 F.3d at 779.

[248] John B. Hull, Inc. v. Waterbury Petroleum Prod., Inc., 845 F.2d 1172, 1176 (2d Cir. 1988) ("Dismissal under Fed.R.Civ.P. 37 is a drastic remedy that should be imposed only in extreme circumstances, usually after consideration of alternative, less drastic sanctions." (citations and internal quotation marks omitted)); *Silvestri*, 271 F.3d at 590 (4th Cir. 2001) ("But dismissal should be avoided if a lesser sanction will perform the necessary function."). The Tenth Circuit has created a formal five-prong test for determining whether dismissal is an appropriate sanction for discovery abuses:

> Before imposing dismissal as a sanction, a district court should ordinarily evaluate the following factors on the record: "(1) the degree of actual prejudice to the [other party]; (2) the amount of interference with the judicial process; . . . (3) the culpability of the litigant; (4) whether the court warned the party in advance that dismissal of the action would be a likely sanction for noncompliance; and (5) the efficacy of lesser sanctions."

Gripe v. City of Enid, 312 F.3d 1184, 1188 (10th Cir. 2002).

[249] Lafleur v. Teen Help, 342 F.3d 1145, 1151–52 (10th Cir. 2003). S*ee also* Fair Housing of Marin v. Combs, 285 F.3d 899, 906 (9th Cir. 2002) (similar situation; default judgment was entered against the defendant for disobedience during discovery, even when the defendant was able to produce the documents after sanctions had been imposed).

[250] Frame v. S-H, Inc., 967 F.2d 194, 203 (5th Cir. 1992) ("As the receiver became increasingly involved in the dealings of Mrs. Frame, he became convinced near the end of 1989 that there had been willful document destruction and alteration after the beginning of the lawsuit and that Mrs. Frame had engaged in further obstructionist tactics during the receiver's tenure in control of the Frame entities. Based on those revelations, and on the numerous filed motions, the district court finally decided to strike the pleadings." (footnote omitted)).

suit, *without considering other sanctions*, where the plaintiff altered a videotape produced during discovery to support a fraudulent disability claim.[251]

While dismissal or entry of judgment[252] typically must be supported by a showing of egregious conduct, at least one court has recognized that extreme prejudice to the party seeking sanctions could offset the need for bad faith conduct on the part of the spoliator. In *Silvestri v. General Motors Corporation*,[253] the Fourth Circuit determined that an automobile manufacturer defendant was severely prejudiced by the fact that the plaintiff did not preserve the faulty airbag which allegedly caused injury, and consequently the defendant was not able to make an inspection of the alleged defects.[254] As a result of that severe prejudice to the defendant, even absent wanton action by the plaintiff, dismissal of the case was not an abuse of discretion.[255]

### [iii]—Monetary Sanctions

Courts are empowered to impose sanctions and civil contempt awards in discovery disputes to compensate requesting parties for the attorneys' fees necessary to obtain improperly withheld documents.[256] Monetary sanctions alone may be appropriate where non-essential documents are missing, or relevant materials can be obtained from other sources. For example, in 2004 the Ninth Circuit allowed a monetary sanction, even in the face of dishonest conduct during

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[251] Magarian v. Monarch Life Ins. Co., 25 Fed. Appx. 618, 619–620 (9th Cir. 2002) (unpublished opinion) ("Nor did the district court abuse its discretion in dismissing the case without considering other alternatives. '[W]e have never held that explicit discussion of alternatives is necessary for an order of dismissal to be upheld.' In fact, 'there are circumstances where such a discussion would be superfluous or unnecessary'. One such circumstance is when, as here, the party against whom sanctions are imposed has engaged in egregious conduct." (citation omitted).

[252] Courts may effectively provide the same remedy without a direct ruling, simply by excluding one party's evidence on a particular topic. For example, the Ninth Circuit upheld the exclusion of evidence of the design defects in a hand cart where testing of the cart by the plaintiffs destroyed the cart and did not allow for independent tests by the defendants. As a remedy, the results of the plaintiff's tests were excluded from evidence, such that summary judgment for the defendant was appropriate. Weidler v. Spring Swings Inc., 55 Fed. Appx. 419, 420 (9th Cir. 2003) (unpublished opinion) ("The destruction and then the disappearance of the frayed piece of cable and commingling of the clamps render a reliable determination of the cause of the accident impossible. A defect in the design or manufacturing of goods obtained from the defendants or from the hardware store, an installation defect, plaintiff's modification [of] the product, and a lack of clarity of the instructions all remain plausible factors. Thus, . . . the destruction of evidence 'rendered unreliable' what a trier of fact might consider, and plaintiff 'lacked the ability to put forward a prima facie case.'").

[253] 271 F.3d 583 (4th Cir. 2001).

[254] *Silvestri*, 271 F.3d at 593–94.

[255] *Silvestri*, 271 F.3d at 593–94.

[256] *See, e.g.*, Jankins v. TDC Mgmt. Corp., 305 U.S. App. D.C. 342, 21 F.3d 436, 444–45 (D.C. Cir. 1994).

discovery and destruction of evidence.[257] The sanctions were designed to compensate the plaintiff for the attorneys' fees expended as a result of the document destruction. The sanctions amounted to $300,000, a large figure when compared with the $600,000 total damages award.[258]

In instances of spoliation, however, contempt awards and monetary sanctions are rarely satisfactory, because ultimately there are no documents to turn over in discovery and the merits will not be affected by a monetary award. Accordingly, monetary sanctions can serve as an intermediary punishment, before the court concludes that the evidence simply will not, or cannot, be produced and dismissal or adverse jury instructions then become appropriate.[259]

**[d]—Impact of Document Retention Programs**

Formalized document retention programs, particularly for electronic documents, may help to protect against spoliation sanctions because some courts have declined to impose sanctions where documents were lost in the course of a regular document retention policy. The Ninth Circuit, for example, has upheld a trial court's refusal to impose spoliation sanctions where defendant doctors were accused of submitting false claims to the government.[260] The false claims in question had been destroyed in the course of a document retention program and in accordance with state regulations. As a result, the court found that the defendant was not culpable in the loss of documents and imposed no sanctions.[261]

However, document retention programs are coming under greater scrutiny, as recently demonstrated by a related series of cases in the Southern District of New York, *Zubulake v. UBS Warburg LLC.*[262] *Zubulake* has been widely recognized as notable because Judge Scheindlin, a leading jurist in the area of electronic discovery, undertook a detailed analysis that provided particular guidance regarding the duties of counsel to preserve electronically stored information.

Plaintiff Laura Zubulake sued her former employer, UBS Warburg (UBS), for gender discrimination, failure to promote and retaliation. During the course of the

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[257] Creative Computing v. Getloaded.com LLC, 386 F.3d 930, 936–37 (9th Cir. 2004).

[258] *Id.*

[259] *See, e.g.,* Maynard v. Nygren, 372 F.3d 890, 893 ("Three factors apparently played into the district court's determination that a lesser sanction would not be appropriate: (1) Maynard's continued untruthfulness; (2) *Maynard's failure to pay any portion of the monetary sanctions imposed against him . . .*; and (3) the evidentiary weakness of Maynard's case[.]" (emphasis added)).

[260] United States v. Kitsap Physicians Serv., 314 F.3d 995, 1001 (9th Cir. 2002).

[261] *Id.*

[262] *See* No. 02 Civ. 1243, 229 F.R.D. 422, 2004 U.S. Dist. LEXIS 13574 (S.D.N.Y. July 20, 2004) *("Zubulake V")* (Hon. Shira A. Scheindlin).

litigation, UBS lost a significant number of e-mails relevant to the case. Numerous back-up tapes that might have saved the necessary data likewise were lost or destroyed, all as part of an articulated document retention policy. Nevertheless, the court was unwilling to ignore the loss of relevant documents:

> As noted, the central question implicated by this motion is whether UBS *and its counsel* took all necessary steps to guarantee that relevant data was both preserved and produced. If the answer is "no," then the next question is whether UBS acted wilfully when it deleted or failed to timely produce relevant information — resulting in either a complete loss or the production of responsive information close to two years after it was initially sought. If UBS acted wilfully, this satisfies the mental culpability prong of the adverse inference test and also demonstrates that the deleted material was relevant. If UBS acted negligently or even recklessly, then Zubulake must show that the missing or late-produced information was relevant.[263]

The court thus imposed the same standards on parties with document retention policies as it did on entities without such programs, namely, that documents may not be negligently or willfully disposed if the materials are foreseeably relevant in pending or reasonably anticipated litigation. The *Zubulake* court further held that counsel and their clients must cooperate to institute a "litigation hold" on the destruction of documents that may be relevant to litigation once litigation is reasonably anticipated. The court provided further guidance regarding whether the "hold notice" is appropriate and sufficient. In particular, the court held that:

> [C]ounsel [must] make certain that all sources of potentially relevant information are identified and placed "on hold[.]" To do this, counsel must become fully familiar with her client's document retention policies, as well as the client's data retention architecture. This will invariably involve speaking with information technology personnel, who can explain system-wide backup procedures and the actual (as opposed to theoretical) implementation of the firm's recycling policy. It will also involve communicating with the "key players" in the litigation, in order to understand how they stored information. . . . .
>
> To the extent that it may not be feasible for counsel to speak with every key player, given the size of a company or the scope of the lawsuit, counsel must be more creative. It may be possible to run a system-wide keyword search; counsel could then preserve a copy of each "hit." . . . .
>
> In short, it is *not* sufficient to notify all employees of a litigation hold and expect that the party will then retain and produce all relevant information. Counsel must take affirmative steps to monitor compliance so that all sources of discoverable information are identified and searched. [C]ounsel and client must take *some reasonable*

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[263] *Zubulake V*, 2004 U.S. Dist. LEXIS 13574 at *30 (footnotes and citations omitted; emphasis added).

*steps* to see that sources of relevant information are located.[264]

Under the rule articulated in *Zubulake*, counsel thus are required to oversee document retention as litigation progresses (including reissue of litigation hold instructions to new employees), must themselves understand at least some of the details of electronic storage mechanisms, and must take reasonable steps to ensure that the litigation hold instructions are understood and followed.[265] Particularly after *Zubulake*, it is apparent that while document retention policies are important, the programs must be carefully implemented and will not serve as impregnable shields in defending a spoliation charge.

**[e]—Spoliation Cause of Action**

Where spoliation sanctions are not available — for instance where the destruction of evidence is not discovered until after the completion of the underlying action — a wronged party may be able to proceed with a separate action for the destruction of evidence and the resulting interference with a potential cause of action.

Many jurisdictions permit an intentional spoliation cause of action,[266] typically requiring that adverse parties in the underlying litigation agreed to preserve the evidence that subsequently was destroyed or lost.[267] Furthermore, the destruction of the documents must be intentional and must be the proximate cause of the damages, *i.e.*, the failure of the underlying suit.[268] The proximate cause requirement ensures that a plaintiff cannot bring a spoliation action where the plaintiff could or did obtain the "missing" evidence from another source. A few

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[264] *Zubulake V*, 2004 U.S. Dist. LEXIS 13574 at *33–35 (emphasis in original; footnotes omitted).

[265] *Zubulake V*, 2004 U.S. Dist. LEXIS 13574 at *39.

[266] Ohio, Indiana, and Louisiana are some of the jurisdictions that allow for an intentional spoliation cause of action.

[267] *See* Spano v. McAvoy, 589 F. Supp. 423, 427 n.2 (N.D.N.Y. 1984) ("The court there recognized a new tort — intentional spoliation of evidence — entitling a party who needed certain evidence for a prospective civil action to recover damages. The wrongdoers in that case had destroyed, lost, or transferred certain physical evidence he had previously agreed to keep pending further investigation. . . . [T]he circumstances of the California case are immediately distinguishable from the case at bar. There the wrongdoer had previously agreed to keep certain evidence.").

[268] Fox v. Cohen, 84 Ill. App. 3d 744, 751, 40 Ill. Dec. 477, 406 N.E.2d 178 (1980) ("Another necessary element is that an injury proximately occurred from a breach of that duty [to preserve evidence]. . . . Counts II and III allege that the hospital's breach of its duty caused plaintiff to lose her malpractice action against the defendant doctor as alleged in Count I of the complaint. However, plaintiff has not yet sustained any injury. The medical malpractice claim under Count I is still pending."). Some jurisdictions have further required that no other remedies be available for the destruction of evidence. In most cases that, too, requires that the underlying action be complete, since during the action more traditional spoliation sanctions would be available.

jurisdictions further permit an action for *negligent* spoliation, in which a plaintiff must demonstrate that evidence was destroyed, that the defendant had a duty to the plaintiff to preserve that evidence, that damages were sustained, and that the loss of documents was the proximate cause of those damages.[269] While spoliation actions are rare, a separate cause of action for spoliation may result in a steep verdict that rivals the award in the underlying cause of action, or even vitiates an earlier judgment.[270]

### [2]—Criminal Penalties Including Those Imposed by the Sarbanes-Oxley Act

Particularly egregious conduct in the destruction or alteration of documents can result in criminal sanctions. In the wake of the Enron and Arthur Andersen scandals, the Sarbanes-Oxley Act[271] was enacted in 2002 "to clarify and close loopholes in the existing criminal laws relating to the destruction or fabrication of evidence and the preservation of financial and audit records."[272] For EHS practitioners, somewhat routine documents — such as certification of compliance with CAA permits or signoffs on CWA monitoring reports — may now be subject to increased scrutiny and concomitant risk of penalties under Sarbanes-Oxley if the documents are not available or are found to be incorrect.[273]

If criminal sanctions are sought for destruction or alteration of documents, a

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[269] Benjamin J. Vernia, *Negligent Spoliation of Evidence, Interfering with Prospective Civil Action as Actionable*, 101 ALR 5th 61 Pt. III (2004). S*ee also* Silhan v. Allstate Ins. Co., 236 F. Supp. 2d 1303, 1309 (N.D. Fla. 2002) (applying Florida law) ("In 1990, the District Court of Appeal for the Third District of Florida defined the elements of negligent spoliation of evidence, which are as follows: (1) existence of a potential civil action, (2) a legal or contractual duty to preserve evidence which is relevant to the potential civil action, (3) destruction of that evidence, (4) significant impairment in the ability to prove the lawsuit, (5) a causal relationship between the evidence destruction and the inability to prove the lawsuit, and (6) damages.").

[270] Comment, James F. Thompson, *Spoliation of Evidence a Troubling New Tort*, 37 U. Kan. L. Rev. 563, 582 (1989) ("In any event, damages for the value of the lost opportunity to litigate presumably would consist of the amount of the judgment that would have been awarded (or avoided, in the case of a defendant injured by spoliation) if crucial evidence had not been destroyed." (footnote omitted)).

[271] Pub. L. No. 107-204, 116 Stat. 745 (2002) ("SOX").

[272] 148 Cong. Rec. S7419 (daily ed. July 26, 2002) (statement of Sen. Leahy).

[273] While criminal penalties for false statements in these documents existed before Sarbanes-Oxley was enacted, the statute has increased applicable penalties and makes a "reasonableness" inquiry harder to defend. Increased penalties for mail and wire fraud may further affect companies submitting voluminous permitting or reporting records electronically and by mail. SOX § 903, 18 U.S.C. §§ 1341, 1343. Sarbanes-Oxley further contains enhanced whistleblower protections that must be considered if, for example, an internal dispute regarding the scope of a environmental reporting requirement arises. SOX § 1107, 18 U.S.C. § 1513(e); SOX § 1102, 18 U.S.C. § 1512(c); SOX § 806, 18 U.S.C. § 1514A.

corporation and/or an individual can be charged with obstruction of justice, a felony. Sarbanes-Oxley increased the maximum jail sentences for obstruction of justice.[274]

Four federal obstruction of justice statutes regularly are used to prosecute document destruction or alteration. Two older and more narrow provisions require that a judicial or an administrative proceeding be ongoing when the destruction or alteration occurs. The third, a somewhat broader statute, is the provision under which Arthur Andersen was prosecuted; the fourth was added entirely by the Sarbanes-Oxley Act to address document destruction.

First, obstruction of justice statutes have long addressed judicial proceedings: "whoever corruptly . . . influences, obstructs or impedes, or endeavors to influence, obstruct or impede, the due administration of justice, shall be fined. . . or imprisoned. . . or both."[275] The Supreme Court has interpreted this statute narrowly, finding that a defendant must have intended to influence only judicial or grand jury proceedings, and not other types of proceedings.[276] The elements of the crime are: (1) judicial or grand jury proceedings were pending; (2) the defendant knew of the pending proceedings; and (3) the defendant intended to obstruct those proceedings.[277] However, the government need not prove that the altered or destroyed document was relevant to the proceeding, or that the defendant's efforts were, in fact, successful.[278]

Second, similar language covers federal agencies and Congress: "whoever corruptly. . . influences, obstructs or impedes or endeavors to influence, obstruct, or impede the due and proper administration of the law under which any pending proceeding is being had before any department or agency of the United States, or the due and proper exercise of the power of inquiry. . . by either House, or any committee of either House or any joint committee of the Congress — shall be fined. . . or imprisoned. . . or both."[279] Courts have construed the term "proceedings" broadly, to include not only formal hearings before a legislative

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[274] Increases in maximum penalties, while politically popular, may have somewhat limited impact, because criminal sentences under Sarbanes-Oxley remain governed by the Federal Sentencing Guidelines. *See* John J. Falvey, Jr. & Matthew A. Wolfman, *The Criminal Provisions of Sarbanes-Oxley: A Tale of Sound and Fury?*, 12 No. 4 Andrew's Prod. Liab. Litig. Rep. 18 (2002).

[275] 18 U.S.C. § 1503(a).

[276] United States v. Aguilar, 515 U.S. 593, 600, 132 L. Ed. 2d 520, 115 S. Ct. 2357 (1995).

[277] United States v. Neal, 951 F.2d 630, 632 (5th Cir. 1992).

[278] United States v. Ruggiero, 934 F.2d 440, 446 (2d. Cir. 1991); United States v. Barfield, 999 F.2d 1520, 1523 (11th Cir. 1993); United States v. Thomas, 916 F.2d 647, 651 (11th Cir. 1990). *See generally* Gary G. Grindler & Jason A. Jones, *Please Step Away from the Shredder and the 'Delete' Key: §§ 802 and 1102 of the Sarbanes-Oxley Act*, 41 Am. Crim. L. Rev. 67, 72 (2004).

[279] 18 U.S.C. § 1505.

committee or an agency, but also investigations within the authority of a committee or an agency.[280]

Third, prior to Sarbanes-Oxley, a commonly used statute to prosecute document destruction or alteration stated that: "whoever knowingly . . . corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person, with the intent to . . . cause or induce any person to . . . alter, destroy, mutilate, or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding . . . shall be fined . . . or imprisoned . . . or both."[281] A violation thus required that a defendant: (1) knowingly; (2) coerced or attempted to coerce another person, or misled that other person; (3) to withhold a document from an official proceeding, or alter or destroy the document, in order to make it unavailable for use in the proceeding; (4) while specifically intending that result.[282]

Although the government obtained convictions under this statute against Arthur Andersen and other defendants, the language of the statute permitted only the instigator of the document destruction or alteration to be punished, while people who then carried out the acts could not be reached. Sarbanes-Oxley corrected this difficulty by adding language that: "whoever corruptly alters, destroys, mutilates or conceals a record, document, or other object, or attempts to do so, with the intent to impair the object's integrity or availability for use in an official proceeding, shall be fined under this title or imprisoned . . . or both."[283] This language, of course, plugs the loophole in the earlier version of this statute, and allows prosecution of the person who actually destroys or alters the documents.

Finally, Sarbanes-Oxley added an obstruction of justice statute specifically directed at document destruction. That statute provides: "whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies or makes a false entry in any record, document or tangible object with the intent to impede, obstruct or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States or any case filed under Title 11, or in relation to or contemplation of any such matter or case, shall

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[280] United States v. Mitchell, 877 F.2d 294 (4th Cir. 1989) (Congressional investigation); United States v. Fruchtman, 421 F.2d 1019 (6th Cir. 1970) (FTC investigation).

[281] 18 U.S.C. § 1512(b)(2)(B).

[282] *See* Christopher R. Chase, *To Shred or Not to Shred: Document Retention Policies and Federal Obstruction of Justice Statutes*, 8 Fordham J. Corp. & Fin. L. 721, 739 (2003). An official proceeding need not be pending at the time of the alleged conduct. United States v. Gonzalez, 922 F.2d 1044, 1055 (2d Cir. 1991); United States v. Frankhauser, 80 F.3d 641, 652 (1st Cir. 1996); *see generally* Chase, *supra,* at 740.

[283] SOX § 1102, 18 U.S.C. § 1512.

be fined . . . or imprisoned . . . or both."[284]

No cases have yet interpreted this statute, but the drafter of the legislation, Senator Leahy, has said that "the intent of the provision is simple; people should not be destroying, altering or falsifying documents to obstruct any government function."[285] That is, "the timing of the act in relation to the beginning of the matter or investigation [by the government] is not a bar to prosecution."[286] Equally important, all government proceedings should now be covered: "[The new language] is also meant to do away with the distinctions, which some courts have read into obstruction statutes, between court proceedings, investigations, regulatory or administrative proceedings (whether formal or not), and less formal government inquiries, regardless of their title."[287]

Courts will have to interpret the language in the context of individual cases. The scope for such interpretation may be broad, and place a great deal of emphasis on the state of mind of a defendant. On one hand, the language could be construed narrowly, to mean that it is not criminal to destroy documents if a defendant believed future government involvement was unlikely; on the other, it could be construed to mean that documents must be retained if the defendant believed a government investigation was possible, even if unlikely.[288] As one commentator put it: "Where is the line drawn with respect to a potential future investigation that has not yet been commenced or even been considered? And how are ordinary citizens expected to be able to anticipate the full range of federal interests that could potentially be evinced with respect to any given e-mail or spreadsheet?"[289] This interpretative challenge will arise with no less force in the EHS context as any other, and the range of potentially relevant documents — permitting information, environmental assessments, Phase I and Phase II investigations[290] — that could be subject to future government investigation is virtually limitless. Judicial guidance is needed to inform these issues.

## § 6B.14 Conclusion: Specific Circumstances Must Be Assessed in Guiding Clients Through Document Retention Issues

Document retention issues are difficult for all those involved. Corporate officers

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[284] SOX § 802, 18 U.S.C. § 1519.

[285] 148 Cong. Rec. S7419 (daily ed. July 26, 2002) (statement of Sen. Leahy).

[286] 148 Cong. Rec. S7419 (daily ed. July 26, 2002) (statement of Sen. Leahy).

[287] 148 Cong. Rec. S7419 (daily ed. July 26, 2002) (statement of Sen. Leahy).

[288] Gary G. Grindler & Jason A. Jones, *Please Step Away from the Shredder and the 'Delete' key: §§ 802 and 1102 of the Sarbanes-Oxley Act*, 41 Am. Crim. L. Rev. 67, 80 (2004).

[289] Stanley S. Arkin & Charles S. Sullivan, *Document Destruction Under Sarbanes-Oxley*, N.Y.L.J., Sept. 15, 2003.

[290] Such environmental assessments and investigations are discussed in Chs. 5A and 6 *supra*.

are more sensitive than ever to ensuring that document retention issues are properly managed. However, the complexity of statutory, regulatory, and judicial mandates, coupled with the potentially severe penalties for noncompliance, render document retention issues resistant to a "cookie-cutter" management approach. The Sarbanes-Oxley Act has raised the stakes even further, and the EHS practitioner must carefully consider specific circumstances when guiding a client through these issues.

# PART C: REFERENCE GUIDE

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