

## [A conversation with James \(Jim\) Smith about EHS audits](#)

**Q:** *Do Environmental, Health, and Safety (EHS) audits play a significant role in the firm's EHS practice?*

**JS:** Very significant. Generally, this firm is supporting ten or more active audits at any time. Some are for large petrochemical manufacturing facilities and some are for very small operations. Almost all are for Texas facilities, although we support audits in other states from time to time. Most are with the Texas Commission on Environmental Quality (TCEQ) but we also help clients subject to the Railroad Commission of Texas (RCT) with EHS audits.

**Q:** *What are some examples of small operations that can benefit from EHS audits?*

**JS:** We have helped small operations that use an on-site well for showers and safety water. With even a relatively small number of employees and even if bottled water is provided for drinking, the company can be a public water system (PWS) under TCEQ's rules and need a PWS permit. When a company hears it may be subject to PWS permit requirements and contacts us, we generally recommend the investigation to determine if a PWS permit is needed be done through an EHS audit.

Another example is a small company that generates some amount of hazardous waste but has never determined its annual volume for registration purposes. Again, we would usually recommend the company investigate its historical waste generation through an EHS audit.

**Q:** *Who performs the actual audit? Do the firm's lawyers need to go to the client's facility as part of the audit?*

**JS:** The best approach is to associate a competent environmental consultant, working in conjunction with the client's management and our firm. The consultant conducts the audit at the facility, and we review the proposed findings from the consultant. In many cases, we are asked to advise if a situation presents a violation, and if so, the regulatory citation being violated. We often assist in identifying appropriate corrective action.

The client has the final decision as to the consulting firm that will do the audit, but we can make recommendations when asked. In Texas, certain documents and communications made during the audit are privileged. We facilitate arrangements with the consultant and the client to maintain privilege.

**Q:** *What potentially large enforcement problems have you seen avoided by an EHS audit?*

**JS:** Those familiar with TCEQ's air quality regulations will not be surprised to hear that new source review issues can create potentially large enforcement problems that EHS audits can avoid. Issuance of the required air quality permit must occur before start of construction or modification of a facility. Some EHS audits find facilities operating for years without proper permitting. Maximum administrative and civil penalties are generally thousands of dollars per day of violation, so an improperly permitted facility operated for years could lead to a very large theoretical civil or administrative penalty. If TCEQ discovers such a circumstance through its own inspection, consequences can be severe.

If an operator has any concern a facility was constructed or modified without proper air permitting, it should initiate an audit, immediately.

**Q:** *How do EHS audits enhance transactions?*

**JS:** When companies acquire facilities subject to EHS regulations, they obviously want the facilities to be in 100% compliance and will investigate the facilities to determine their compliance status. Some EHS non-compliance conditions require several months to correct. In Texas, the acquiring company can initiate an audit prior to closing the transaction and receive immunity for items properly disclosed and corrected, even if the correction is not completed until after closing the transaction. The acquiring company need not inform TCEQ of the audit until after the transaction closes. Also, the privilege components of the Texas audit program often provide comfort for the owner of the target facility to be very cooperative with an investigation done as an EHS audit.

**About the Author:**



*James (Jim) Smith principally focuses on environmental matters including counseling, supporting transactions, and trying cases. He also has experience in intellectual property matters and is registered before the U.S. Patent and Trademark Office as a patent attorney. His degree in chemical engineering combined with his legal experience enable him to bring a unique perspective as he represents refining, petrochemical and other resource related industry clients.*

**James E. Smith | 713.752.8620 | [jsmith@craincaton.com](mailto:jsmith@craincaton.com)**

**CRAIN  
CATON  
— & —  
JAMES**

**1401 McKinney St., Suite 1700  
Houston, TX 77010 | 713.658.2323**  
(M-F 8:00 am to 5:30 pm)

**1095 Evergreen Circle, Suite 200  
The Woodlands, Texas 77380 | 713.752.8686**  
(By Appointment Only)