Urban Law Annual ; Journal of Urban and Contemporary Law

Volume 42 *Symposium on the Role of International Law in Global Environmental Protection | Interuniversity Poverty Law Consortium*

January 1992

Environmental Audits: Protective Shields or Smoking Guns? How to Encourage the Private Sector to Perform Environmental Audits and Still Maintain Effective Enforcement

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ENVIRONMENTAL AUDITS: PROTECTIVE SHIELDS OR SMOKING GUNS? HOW TO ENCOURAGE THE PRIVATE SECTOR TO PERFORM ENVIRONMENTAL AUDITS AND STILL MAINTAIN EFFECTIVE ENFORCEMENT.

INTRODUCTION

In the rapidly increasing effort to clean up the environment and halt those who pollute it, environmental statutes are by no means new weapons in the arsenal of the agencies whose task it is to protect the environment.[1] However, the federal government's use of criminal prosecutions to enforce the environmental statutes and punish their transgressors has dramatically increased in the past few years.[2] Along

1. In 1963, Congress enacted the Clean Air Act, 42 U.S.C.A. §§ 7401-7671(q) (West 1983 & Supp. 1991). Since then, Congress has enacted several additional environmental statutes. *See, e.g.*, Toxic Substances Control Act, 26 U.S.C. §§ 2601-2671 (1988) (enacted in 1986); Clean Water Act, 33 U.S.C.A. §§ 1251-1387 (West 1983 & Supp. 1991) (enacted in 1972); National Environmental Policy Act of 1969, 42 U.S.C.A. §§ 4321-4370c (West 1983 & Supp. 1991); Resource Conservation Recovery Act of 1976, 42 U.S.C. §§ 6901-6992 (1988); Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9601-9675 (1988).

2. James M. Strock, *EPA's Environmental Enforcement in the 1990's*, 20 ENVTL. L. REP. (Envtl. L. Inst.) 10,327 (Aug. 1990) (discussing the EPA's past, present, and future enforcement programs); Paul M. Barrett, *Official Mulls Ways to Bar Prosecution of Polluters that Clean Up Their Acts*, WALL ST. J., Dec. 26, 1990, at A12 (reporting that the environmental chief of the Justice Department is considering safe harbors for polluters who are taking remedial actions); Marianne Lavelle, *Enforcement and the EPA*,

with a general increase in enforcement actions,[3] the Environmental Protection Agency (EPA), the Department of Justice, and the United States Attorney's Offices have reinvigorated the environmental statutes with the threat and use of criminal prosecutions for environmental crimes.[4] These efforts are certain to continue due to congressional legislation that will augment EPA's criminal investigation staff,[5] significantly increase the potential fines that may be levied upon environmental criminals,[6] and possibly lead to substantial jail terms for

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NAT'L L.J., Sept. 24, 1990, at 1, 50 (discussing pressure on the EPA to implement harsher enforcement measures).

3. The EPA collected almost $37 million in civil penalties for fiscal 1988, and in fiscal 1989 reported collecting penalties in excess of $35 million. In addition, the Agency initiated more than 4,100 administrative actions against violators, 34% more than in 1988. *See* Strock, *supra* note 2, at 10,327 (reporting the number of administrative actions and civil referrals to the Department of Justice from 1972 to 1989); Lavelle, *supra* note 2, at 48 (reporting that 75 percent of all EPA's penalties were imposed between 1985 and 1989).

4. Former Attorney General Richard Thornburgh has said that prosecuting environmental crimes is among the Justice Department's highest priorities. Kevin A. Gaynor, *A System Spinning Out of Control*, ENVTL. F., May/June 1990, at 28. The Department of Justice reported a "record-breaking year of criminal-law enforcement" of environmental violations in 1990, with 134 felony indictments returned by federal grand juries. This represented a 33% increase over the previous year. Barrett, *supra* note 2, at 12. In 1989, the EPA's Criminal Enforcement Program produced 76 convictions for environmental crimes. Strock, *supra* note 2, at 10,327. *See, e.g.*, United States v. Hoflin, 880 F.2d 1033 (9th Cir. 1989) (affirming defendant's felony conviction for aiding and abetting hazardous waste disposal), *cert. denied*, 493 U.S. 1083 (1990); United States v. Hayes Int'l Corp., 786 F.2d 1499 (11th Cir. 1986) (finding defendant guilty of unlawfully transmitting hazardous waste); United States v. Frezzo Bros., Inc., 546 F. Supp. 713 (E.D. Pa. 1982) (affirming defendants' convictions for discharging pollutants without a permit into navigable waters), *aff'd*, 703 F.2d 62 (3d Cir.), *cert. denied*, 464 U.S. 829 (1983). *See also supra* note 2 for a discussion of recent and future EPA enforcement actions.

5. In 1981, the EPA did not employ any criminal investigators. By 1990, the Agency employed 54 investigators. With the passage of the Pollution Prosecution Act of 1990, 42 U.S.C.A. § 4321 (West 1983 & Supp. 1991), commentators expect the number of criminal investigators at EPA to increase to 200 by 1995. FRANK B. FRIEDMAN, PRACTICAL GUIDE TO ENVIRONMENTAL MANAGEMENT 12-13 (1991). *See also* James R. Moore et al., Why Perform Environmental Audits If They Enhance the Risk of Criminal Enforcement? 10 n.6 (Sept. 5, 1991) (unpublished manuscript, on file with the *Washington University Journal of Urban and Contemporary Law*) (arguing that the EPA and Department of Justice should eliminate the reasons why industry questions auditing); Lavelle, *supra* note 2, at 50.

6. The Fine Enhancement Statute, 18 U.S.C. §§ 3571-72 (Supp. 1991) will allow courts to impose fines of up to $500,000 for one felony charge. Moore et al., *supra* note 5, at 11 n.8.

violators.[7]

Through this emphasis on criminal enforcement of the environmental statutes, the federal government has indicated that it plans to enforce environmental compliance through penalties. An alternate method would be to entice the regulated community to police itself through programs that can better achieve effective compliance. Additionally, such an approach would be less burdensome upon the government's regulatory agencies. A voluntary environmental audit, corrective action, and self-disclosure program would provide the regulated community with the enticement and prompting it needs. The switch from criminal enforcement to an environmental audit policy deserves attention because it represents a philosophical change in the United States' environmental enforcement policy from punishment, reactive, to compliance, proactive.[8]

Part I of this Recent Development examines an illustrative case of the government's present enforcement policy at work. Part II briefly describes and discusses environmental audits. Part III analyzes recently issued Department of Justice guidelines as well as the EPA's existing policy statements concerning criminal prosecutions and environmental audits. Part IV surveys the audit policies of other government agencies. Part V discusses the concerns of both government and private industry. Finally, Part VI looks at what can be done to promote environmental auditing and compliance instead of after-the-fact enforcement and prosecution.

I. THE WEYERHAEUSER COMPANY: A CASE STUDY

Weyerhaeuser operates a sawmill in Aberdeen, Washington on the Shannon Slough, a tributary of the Chehalis River.[9] After lumber is cut and finished, it is stenciled with the company's logo and the ends are painted to prevent cracking.[10] On five separate occasions, Weyer-

7. New sentencing guidelines require jail terms for even corporate executive first-offenders who are convicted of environmental crimes. Moore et al., *supra* note 5, at 11.

8. *See* William N. Farran III & Thomas L. Adams, Jr., *Environmental Regulatory Objective: Auditing and Compliance or Crime and Punishment*, 21 ENVTL. L. REP. (Envt. L. Inst.) 10,239, 10,239 (May 1991) (arguing that the EPA should encourage auditing programs by legally protecting companies that participate in environmental self-audits and undertake corrective action voluntarily).

9. Peter Lewis, *Weyerhaeuser Fined for Polluting Slough*, SEATTLE TIMES, Nov. 16, 1990, at D8.

10. Steve Miletich, *Weyerhaeuser Pleads Guilty to Pollution at Aberdeen Mill*, SEATTLE POST-INTELLIGENCER, Nov. 17, 1990, at A1.

haeuser discharged the red paint waste and wash water from their sealing and stenciling operation into the slough[11] in violation of the Clean Water Act (CWA).[12] Acting upon a tip, the EPA began investigating the mill's compliance efforts.[13] After a search warrant was served upon the Aberdeen mill, the EPA learned of Weyerhaeuser's discharges into the Shannon Slough.[14] The United States Attorney in Seattle brought criminal charges against Weyerhaeuser, which eventually pleaded guilty to five misdemeanor violations of the CWA.[15]

The United States could have charged Weyerhaeuser with felony violations of the CWA[16] or proceeded civilly instead.[17] Curiously, the United States Attorney decided to forego felony charges and seek only misdemeanor counts because of Weyerhaeuser's internal environmental compliance audit program.[18] They might have pursued Weyer-

11. *Id.* Weyerhaeuser admitted that on each occasion it used about 20 gallons of water to clean paint spraying equipment and then discharged the water into the slough. When released into the slough, the waste water contained approximately 5% paint residue. *Id.* at A8. EPA investigators discovered paint residue 12 inches into the bed of the slough. Lewis, *supra* note 9, at D8.

12. 33 U.S.C. § 1311 (1988) (proscribing the discharge of pollutants unless it complies with specified provisions). *See* United States v. Weyerhaeuser Co., No. CR90-298S (W.D. Wash. Nov. 21, 1990) (Judgment and Order of Restitution); *see also* 33 U.S.C.A. § 1319(c)(1)(A) (West 1983 & Supp. 1991) (providing the penalties which apply to illegal pollutant discharge constituting misdemeanor violations).

13. Miletich, *supra* note 10, at A8.

14. *Id.*

15. *Id.*, at A1. *See also* Lewis, *supra* note 9, at D8. Weyerhaeuser Co. agreed to pay the maximum fine under the Clean Water Act of $25,000 per violation for a total of $125,000. The lumber company deposited an additional $375,000 into a trust fund to study and clean the Shannon Slough. Lewis, *supra* note 9, at D8. *See also* Miletich, *supra* note 10, at A8. Finally, the court placed Weyerhaeuser on probation until it paid all fines and trust payments and signed the Trust Agreement. United States v. Weyerhaeuser Co., No. CR90-298S (W.D. Wash. Nov. 21, 1990) (Judgment and Order of Restitution).

16. *See* Lewis, *supra* note 9, at D8 (discussing the United States Attorney's decision to charge the company with a misdemeanor rather than a felony). *See also* Clean Water Act, 33 U.S.C.A. §§ 1311, 1319(c)(2)(A) (West 1983 & Supp. 1991) (proscribing pollutants discharge without a permit, and providing the penalties associated with felony violations).

17. *See* Clean Water Act, 33 U.S.C.A. § 1311 (West 1983 & Supp. 1991); 33 U.S.C.A. § 1319(b) (1988) (authorizing civil actions against any defendant who discharges without a permit).

18. Lewis, *supra* note 9, at D8; Miletich, *supra* note 10, at A8. Weyerhaeuser conducted voluntary environmental audits in 1987 and 1988. These audits discovered that similar paint waste discharges had been going on for nine years. These audits led Weyerhaeuser to undertake corrective steps before EPA's investigation; however, the gov-

haeuser with only civil sanctions had the lumber company addressed the illegal discharges more aggressively.[19] Weyerhaeuser's internal audits showed that the company was aware of the problem before EPA uncovered it, but that Weyerhaeuser dragged its feet in remedying the violations.[20] The United States Attorney praised Weyerhaeuser's efforts at an internal environmental audit program, but chastised the company for not adequately following up the deficiencies that those reports disclosed.[21] In essence, the lumber company's undertaking of a voluntary environmental audit was a step in the right direction, but it was not a big enough step.

The Weyerhaeuser Company violated the provisions of the CWA[22] in Washington State and learned first hand about the government's preference for criminal environmental prosecutions. This situation exemplifies the competing interests that conducting internal environmental audits brings to bear upon a corporation and prosecutor. Initially, the United States Attorney had to consider whether Weyerhaeuser's environmental compliance audit was satisfactory or qualifying. The United States Attorney also had to decide how much credit to give the corporation for voluntarily conducting an environmental audit. Further, he had to determine how to adjust that credit when the audit results were not promptly acted upon. As for the corporation, Weyerhaeuser must determine whether it is justified in continuing its environmental audit program in light of the fact that their audit results were used against them in the criminal charges for the violations. Additionally, the government has put Weyerhaeuser, and others like it, on notice that they must react quickly and thoroughly to environmental audit results. Thus, environmental audits serve as both a sword and shield for the corporation.

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ernment felt that the actions taken were "too slow and inadequate." Notwithstanding, the United States Attorney praised the company for conducting environmental audits, identifying problems, and taking some steps to address them. Lewis, *supra* note 9, at D8. *See also* Miletich, *supra* note 10, at A1 (reporting Weyerhaeuser's guilty plea).

19. *See supra* notes 17-18 (addressing civil liability for discharging pollutants without a permit, and possible reasons that the United States Attorney brought criminal charges rather than a civil action).

20. *See supra* note 18 for a discussion of Weyerhaeuser's past internal audits, and its delay in responding to the audits' results.

21. Lewis, *supra* note 9, at D8; Miletich, *supra* note 10, at A1.

22. Clean Water Act, 33 U.S.C.A. §§ 1251-1387 (West 1983 & Supp. 1991) (formerly known as the Federal Water Pollution Control Act of 1972).

II. ENVIRONMENTAL AUDITS: WHAT ARE THEY?[23]

Regulated entities use many types of environmental audits.[24] The type of audit a company uses depends on the size and nature of that company. That is, each company will and should adopt an audit structure and scope that fits its particular needs.[25] A large corporation with many sites may want to establish an environmental auditing team that visits each site periodically. In contrast, a smaller company with a single operation may want to contract with an independent auditing group. While many auditing options exist from which companies may choose, many elements of the audits should be identical.[26]

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23. This section is intended to acquaint the reader with the basics of an environmental audit. The specific details and requirements of environmental audits, however, are not within the scope of this Recent Development. For further information regarding environmental audits, see EPA Environmental Auditing Policy Statement, 51 Fed. Reg. 25,004 (1986) [hereinafter Environmental Auditing Policy Statement]. *See also* FRIEDMAN, *supra* note 5, at 81-111 (describing the environmental audit process).

24. The EPA defines an environmental audit as "a systematic, documented, periodic and objective review by regulated entities of facility operations and practices related to meeting environmental requirements." Environmental Auditing Policy Statement, *supra* note 23, at 25,006. Others have defined it as "an independent appraisal of a corporation's environmental control systems and its environmental assets and liabilities to enable management to make rational decisions relating to environmental matters." Phillip D. Reed, *Environmental Audits and Confidentiality: Can What You Know Hurt You as Much as What You Don't Know?*, 13 ENVTL. L. REP. (Envtl. L. Inst.) 10,303 (Oct. 1983) (suggesting that a policy of ignoring environmental audit reports in administrative enforcement actions could encourage auditing, yet not weaken enforcement efforts).

25. *See* Environmental Auditing Policy Statement, *supra* note 23, at 25,006 (discussing purposes which environmental audits might serve). This might account for the different terms companies use to refer to environmental audits. These terms include: environmental assessment, environmental survey, environmental surveillance, environmental review, environmental appraisal, environmental self-audit, environmental self-assessment, and environmental compliance audit. *See also* FRIEDMAN, *supra* note 5, at 89-90 (discussing how to structure a successful assessment program).

26. The EPA has identified several elements that "an effective environmental auditing system" should include:

a. Explicit top management support for such auditing and the commitment to follow up auditing findings;
b. An environmental auditing function independent of audited activities;
c. Adequate team staffing and auditor training;
d. Explicit audit program objectives, scope, resources and frequency;
e. A process which collects, analyzes, interprets and documents information sufficient to achieve audit objectives;
f. A process which includes specific procedures to promptly prepare candid, clear and appropriate written reports on audit findings, corrective actions, and schedules for implementation; and

Environmental audits break down into two general types: compliance audits and management audits.[27] The first, a compliance audit, is an independent assessment[28] of the company's compliance with environmental statutes and regulatory requirements.[29] The second, a management audit, is broader in scope and examines the company's management systems and procedures for ensuring compliance with environmental regulations and statutes.[30] These different audits are not mutually exclusive, and may actually complement one another in certain situations.[31]

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g. A process which includes quality assurance procedures to assure the accuracy and thoroughness of such audits.

J. Michael Abbott, *Environmental Audits: Pandora's Box or Aladdin's Lamp*, 31 A.F. L. REV. 225, 225 (1989) (citing Environmental Auditing Policy Statement, *supra* note 23, at 25,009). *See also* FRIEDMAN, *supra* note 5, at 88-89 (delineating certain standard characteristics of environmental assessment programs that can apply to all companies).

27. Memorandum from Thomas L. Adams, Jr., Assistant Administrator for Enforcement and Compliance Monitoring, Final EPA Policy on the Inclusion of Environmental Auditing Provisions in Enforcement Settlements 3 (Nov. 14, 1986) (available from EPA's Legal Enforcement Policy Branch) (describing the two types of audits and outlining the circumstances in which each type of audit is most appropriate); George Van Cleve, The Changing Intersection of Environmental Auditing, Environmental Law and Enforcement Policy, Address Before the Benjamin N. Cardozo School of Law Conference on Corporate Governance: Beyond the Transactional Audit 5 (Sept. 17, 1990) (transcript on file with *Washington University Journal of Urban and Contemporary Law*) (comparing the two types of environmental audits with two types of financial audits required under federal securities laws).

28. This independent assessment is distinct from the independent inspection programs of the environmental regulatory agencies or the periodic compliance and reporting activities required of regulated and permitted entities under certain environmental programs. Allen J. Danzig et al., *Environmental Auditing: Reaching the Bottom Line in Compliance*, NAT'L ENVTL. ENFORCEMENT J., Jan. 1987, at 3. *See also* Environmental Auditing Policy Statement, *supra* note 23, at 25,006 (stating that environmental audits do not replace regulatory agency inspections; rather, they improve compliance by complementing federal, state, and local oversight). *See* The Environmental Law Institute, Environmental Audit Issue Paper: Duties to Report or Disclose Information on the Environmental Aspects of Business Activities, (Sept. 1985) for an analysis of environmental laws' reporting requirements.

29. *See* Adams, *supra* note 27, at 3 (describing the scope of the audit requirement); Van Cleve, *supra* note 27, at 5 (comparing financial and environmental audits).

30. *See* Adams, *supra* note 27, at 3; Van Cleve, *supra* note 27, at 5.

31. *See* Adams, *supra* note 27, at 3 (explaining that in some circumstances both compliance and management audits are appropriate).

III. PRESENT FEDERAL GOVERNMENT POLICY ON ENVIRONMENTAL AUDITS

Both the Department of Justice and the Environmental Protection Agency encourage the environmentally regulated community to voluntarily perform compliance or management audits. The federal government hopes that these audits will induce regulated companies to comply without extensive agency oversight. Most significantly, voluntary environmental audits proactively address compliance, rather than a reactive governmental response via administrative, civil, or criminal sanctions. The following two sections examine the presently established guidelines and standards.[32]

A. *The Department of Justice Guidelines*

On July 1, 1991, the Department of Justice issued comprehensive guidelines[33] designed to encourage corporations to examine, address, and disclose their environmental non-compliance while avoiding potential exposure to criminal liability.[34] The guidelines delineate several factors that the Department will consider in deciding how to prosecute violations.[35] The Department identified three significant corporate actions that it will take into account when deciding whether to prosecute.[36] First, the Department will determine whether the person[37] made a voluntary disclosure of the noncompliance and when.[38] For a company to receive the maximum benefit from its disclosure, the dis-

32. For a brief discussion of state initiatives in the environmental audit field, *see* FRIEDMAN, *supra* note 5, at 109-11.

33. United States Department of Justice, Factors in Decisions on Criminal Prosecutions for Environmental Violations in the Context of Significant Voluntary Compliance or Disclosure Efforts by the Violator (July 1, 1991) [hereinafter United States Department of Justice] (on file with *Washington University Journal of Urban and Contemporary Law*).

34. Jonathan Moses & Wade Lambert, *Environmental-Wrongdoing Guide Issued*, WALL ST. J., September 25, 1991, at B4.

35. United States Department of Justice, *supra* note 33, at 2-6. In addition, the Department of Justice document applies the guidelines to hypothetical examples. *Id.* at 6-14.

36. *Id.* at 2-5 (describing factors that Justice Department attorneys should consider in determining whether to prosecute). The guidelines emphasize that this list of factors is not exhaustive or exclusive. Rather, "[t]hey merely illustrate some of the types of information which is relevant to [the] exercise of prosecutorial discretion." *Id.* at 2.

37. In the Department of Justice guidelines, the term "person" includes business and non-profit entities in addition to individuals. *Id.* at 3 n.1.

38. *Id.* at 3.

closure must be prompt and timely.[39] Particularly important is whether the disclosure substantially aided the agency's investigative activities.[40] Disclosure of information already required to be reported to the government does not qualify as a voluntary disclosure.[41]

Second, the Department will evaluate whether the corporation cooperated with the government's investigation.[42] Similar to disclosures, cooperation should be timely and complete to receive full credit.[43] The Department of Justice may give consideration to a company's cooperation even if it made no voluntary disclosure. Cooperation is thus an independent factor that may allow leniency for the person.[44] Also, as with disclosures, the quantity and quality of the party's assistance should be considered.[45] Thus, a corporation that provides the government with all of its internal or external compliance data will have cooperated more extensively than one that attempts to protect or conceal such information.[46]

The third significant factor the Department of Justice guidelines identified is whether the corporation already has in place an environmental compliance program with preventative measures.[47] The government will look to the scope and existence of a regular, intensive, and comprehensive environmental compliance program.[48] In addressing this factor, it is very important whether the program was adopted with sufficient means to address noncompliance and in a timely and good faith manner.[49] A corporation's compliance program will not be adequate without timely and consistent follow-up or remediation.[50] As

39. United States Department of Justice, *supra* note 33, at 3. The guidelines indicate that a disclosure would not be prompt and timely if a law enforcement or regulatory authority became aware of the violation before disclosure. *Id.*

40. *Id.* Consideration is also given to the quantity and quality of the information provided in the disclosure. *Id.*

41. *Id.* at 3.

42. *Id.*

43. *Id.* United States Department of Justice, *supra* note 33, at 3-4.

44. *Id.* at 3.

45. *Id.* at 4.

46. *Id.* at 3-4.

47. United States Department of Justice, *supra* note 33, at 4.

48. *Id.* This program may include either a compliance or management environmental audit. *Id.*

49. *Id.*

50. *Id.* at 4-5.

the Weyerhaeuser case illustrated,[51] a corporation cannot embrace an environmental compliance program half-heartedly and hope to escape criminal punishment. A corporation must act upon the results of these programs and audits to receive any leniency.[52]

The Department of Justice guidelines also list the following additional factors that it will incorporate into its calculus when deciding whether or not to prosecute: (1) the pervasiveness of the violations in terms of frequency or inadequate management controls;[53] (2) whether the corporation sufficiently disciplines employees who violate their environmental compliance program;[54] and (3) the corporation's past and present efforts to remedy violations.[55] The weight of any one of the factors cannot be isolated. Rather, the prosecutorial decision is a comprehensive one by taking into account all of these factors. The key to these guidelines is that they reward the regulated community's good faith efforts with the appropriate leniency in prosecution, while zealously prosecuting corporations who make no efforts or bad faith efforts.[56]

B. *The Environmental Protection Agency's Policy*

Unlike specific Department of Justice guidelines, the EPA's position on environmental auditing is more general and policy oriented.[57] The EPA does not address or cite specific factors. Instead, it states a desire that the regulated community improve compliance and environmental

51. *See supra* notes 9-22 and accompanying text for a discussion of the United States' prosecution against Weyerhaeuser Company for discharging pollutants without a permit.

52. United States Department of Justice, *supra* note 33, at 4-5 (discussing standards for evaluating compliance programs).

53. *Id.* at 5. For example, an ongoing violation of which numerous employees are aware, but to which neither employees nor management have responded may indicate that the company lacks a meaningful compliance program. *Id.* Also, the "obviousness, seriousness, duration, history, and frequency of noncompliance" may indicate the pervasiveness of any noncompliance. *Id.*

54. *Id.* Crucial to this factor is whether or not the corporation has created an atmosphere that indicates to all employees that the company will neither condone nor permit. *Id.*

55. *Id.* In determining whether to prosecute, the Department of Justice attorney will consider the company's timely and good faith efforts to comply with state or federal authorities. *Id.* at 5-6.

56. United States Department of Justice, *supra* note 33, at 14.

57. Environmental Auditing Policy Statement, *supra* note 23.

management practices.[58] The policy then outlines EPA's position on several environmental audit issues.[59] The EPA treats environmental audits as completely voluntary programs for corporations,[60] specifically rejecting any mandatory audit requirement.[61] The EPA also endeavors to entice corporations to adopt environmental audits by promoting and praising their benefits.[62]

In its policy statement, the EPA clearly attempts to rally support for the environmental audit from within the regulated community, using the carrot and stick method. The agency first proffers environmental audits as management's solution to meeting their compliance responsibilities (the carrot),[63] then it reminds regulated entities of these responsibilities under the environmental statutes (the stick).[64] Using a very deferential approach, the EPA declares that environmental auditing will remain a voluntary activity because it does not want to interfere with business decisions.[65] Apparently, the EPA believes its present level of enforcement and prosecution is sufficient to spur the regulated community into action.

The EPA emphasizes environmental audits' benefits to companies as a way of enticing companies to implement environmental audit programs.[66] The EPA argues that environmental audits have emerged because of sound business reasons,[67] such as improved environmental performance and awareness of regulatory requirements,[68] the development of solutions to common environmental problems,[69] and better environmental management.[70] Perhaps most importantly, the EPA contends that such audits will make corporate policy environmentally proactive, instead of reactive to crises or agency investigations.[71] Thus,

58. *Id.* at 25,006.
59. *Id.* at 25,007-08.
60. *Id.* at 25,007.
61. Environmental Auditing Policy Statement, *supra* note 23, at 25,007.
62. *Id.* at 25,006-08.
63. *Id.*
64. *Id.* at 25,006-07.
65. Environmental Auditing Policy Statement, *supra* note 23, at 25,007.
66. *Id.* at 25,006.
67. *Id.*
68. *Id.*
69. Environmental Auditing Policy Statement, *supra* note 23, at 25,006.
70. *Id.*
71. *Id.*

corporations will avoid violations and their resultant fines and penalties because, instead of remedying transgressions, the corporations will have prevented them from ever occurring.

Aside from the above advantages of voluntary corporate environmental compliance programs, the EPA refused to provide any other incentives. Specifically, it declined to agree to forego inspections or other enforcement actions.[72] The EPA would only concede that facilities with good compliance records may receive fewer inspections[73] or that the EPA "may" consider the entity's compliance program and subsequent responses in exercising its discretion.[74] Meanwhile, the agency refused to grant internally generated environmental compliance reports absolute confidentiality.[75] On the one hand, the EPA recognizes the inhibiting and detrimental effect that their access to these reports will have upon corporate auditing. Therefore, it is their policy not to request these audit reports unless the circumstances warrant.[76] However, the EPA goes on to reserve all rights to request these reports.[77] As a result, corporations receive mixed signals.

The EPA has also used environmental audits in other contexts, such as settlements and consent decrees.[78] While they have advocated the

72. *Id.* at 25,007.

73. Environmental Auditing Policy Statement, *supra* note 23, at 25,007.

74. *Id.*

75. *Id.*

76. *Id.* EPA states, "[t]herefore, as a matter of policy, EPA will *not* routinely request environmental audit reports." *Id.*

77. Environmental Auditing Policy Statement, *supra* note 23, at 25,007-08. *See* Danzig et al., *supra* note 28, at 7-11 (discussing when the EPA can obtain audit reports); Adams, *supra* note 27, at 5 (advising EPA negotiators to "expressly reserve EPA's right to review audit-related documents"); Memorandum from James M. Strock, EPA Assistant Administrator, to Regional Administrators et al., Policy on the Use of Supplemental Enforcement Projects in EPA Settlements (Feb. 12, 1991) (on file with *Washington University Journal of Urban and Contemporary Law*) (addressing, in part, the EPA's ability to request audit reports as part of the EPA's settlements).

78. *See* Danzig et al., *supra* note 28, at 7-8 (discussing EPA's use of compliance and management auditing provisions in settlement negotiations); Strock, *supra* note 2, at 10,330 (recognizing EPA's use of environmental auditing provisions in enforcement settlement since 1986 as a means of enhancing compliance); *see, e.g.*, United States v. Unichem Int'l, Inc., No. CR90-0057-J, 1990 WL 264544 (D. Wyo. Nov. 5, 1990) (ordering the corporation to conduct an environmental audit); United States v. Eagle-Picher Indus., Civ. No. 87-5100-CV-SW-8, 1990 U.S. Dist. LEXIS 13206 (W.D. Mo. Sept. 29, 1990) (approving a consent decree requiring an environmental audit); United States v. Browning-Ferris Indus. Chem. Servs., 704 F. Supp. 1355, 1360, 1374-79 (M.D. La. 1988) (approving a consent decree requiring an environmental audit).

voluntariness of adopting environmental audits, the EPA has not hesitated to incorporate them into settlements.[79] Following the issuance of their Environmental Auditing Policy Statement, the EPA adopted a policy on including environmental audit provisions in enforcement settlements.[80] In the settlement context, the EPA possesses a broad range of options[81] with one drawback: Requiring an environmental audit in a settlement is a reactive policy that does not stop the initial violation. This audit should prevent most violations after the settlement, but it does little to aid EPA's enforcement goal of proactive management or encouraging corporate compliance efforts before violations occur.

IV. OTHER AUDITING PROGRAMS OF FEDERAL AGENCIES

The essential goal of voluntary internal environmental audits is to motivate the regulated community into policing itself and disclosing all violations. Many other federal agencies' regulatory schemes revolve around similar goals. This section will examine a few of these policies to determine if they would be helpful in the environmental compliance arena.

A. *Federal Aviation Administration (FAA)*

Recently, the FAA administrator, James B. Busey, announced that his agency was implementing a solution-based audit and disclosure program.[82] To qualify, carriers that discover inadvertent violations must correct and report them to the FAA immediately and put in place FAA acceptable procedures to ensure that violations do not reoccur.[83]

79. *See* Adams, *supra* note 27 (providing guidelines for EPA negotiators regarding the use of auditing provisions in enforcement settlements).

80. *See id.*

81. *See* Danzig et al., *supra* note 28, at 7-8 (describing the types of audit provisions that EPA has negotiated); Environmental Auditing Policy Statement, *supra* note 23, at 25,007-08 (identifying situations in which settlement agreements are likely to include environmental audit provisions).

82. Federal Aviation Administration, United States Department of Transportation Compliance/Enforcement Bulletin No. 90-6 (March 29, 1990) [hereinafter Federal Aviation Administration] (on file with *Washington University Journal of Urban and Contemporary Law*). *See* Frank Friedman, *Is This Job Worth It?*, ENVTL. F. May/June 1991, 20, at 23 (arguing that the risk of criminal and civil liability and the recordkeeping requirement may make conscientious environmental managers wary of remaining in their positions).

83. Federal Aviation Administration, *supra* note 82, at 24. The policy states that the FAA will not seek civil penalties if: 1) the certificate holder voluntarily discloses a failure to comply with FAA regulations before the Agency learns of the violation; 2) the

If these conditions are met, the FAA will not seek any penalties against the carrier.[84]

Busey defends the policy because it aggressively promotes safety by taking advantage of three circumstances. First, it shifts the focus of carriers' resources from battling the FAA in compliance matters to enhancing safety in their operations.[85] Second, the airlines are in the best position to ensure aviation industry safety.[86] Third, this efficient and effective use of airline resources allows the FAA to maximize its limited staff and resources to further promote the public's safety.[87]

B. *Department of Defense*[88]

In response to several publicized instances of procurement fraud, the Department of Defense and Department of Justice implemented a voluntary disclosure program in 1986.[89] Under this program, a volunteering contractor or employee contacts the Pentagon's Office of the Inspector General.[90] If the alleged violation is not already under investigation, the party is preliminarily accepted into the program.[91] The contractor then has an independent investigation conducted by counsel that will be covered by the attorney-client privilege.[92] From this privileged document, a written report is drafted and submitted to the Office of the Inspector General and Department of Justice.[93] This report should describe the infraction, the restitution the contractor is to make,

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failure is neither deliberate nor intentional; 3) the violation does not indicate the certificate holder's lack of basic qualification; 4) the certificate holder has immediately undertaken corrective action; and 5) the certificate holder agrees to implement measures to prevent the violation from recurring. *Id.* *See also* Farran & Adams, *supra* note 8, at 10,241 n.15 (discussing government agencies' voluntary disclosure programs).

84. Farran & Adams, *supra* note 8, at 10,241 n.15. *See also* Friedman, *supra* note 82, at 23 (quoting FAA Administrator James B. Busey).

85. Friedman, *supra* note 82, at 23.

86. *Id.*

87. *Id.*

88. *See* Benjamin B. Klubes, *The Department of Defense Voluntary Disclosure Program*, 19 PUB. CONT. L.J. 504 (1990) for a comprehensive examination of the Department of Defense's voluntary disclosure program.

89. Benjamin Klubes, *EPA Should Borrow Pentagon's Artillery*, LEGAL TIMES, Aug. 20, 1990, at 18 (arguing that the EPA should adopt the Department of Defense's voluntary disclosure program).

90. *Id.*

91. *Id.*

92. *Id.*

93. Klubes, *supra* note 89, at 18.

any disciplinary actions taken or to be taken by the contractor, and what policies and procedures have been implemented to insure these violations do not occur again.[94] Typically, the government will undertake its own investigation of the misconduct at this stage to verify the contractor's disclosure.[95] The only assurances made to these contractors is that their voluntary disclosure and cooperation will be considered in the prosecutorial decision.[96]

The Department of Defense program has been very successful in achieving the objectives of civil and criminal prosecutions and administrative debarment.[97] In 1989 the program accepted 156 disclosures and recovered over eighty-two million dollars.[98] Fiscal 1990 saw over $117 million recovered from contractor fraud.[99] Despite potential criminal and civil liability, the defense industry itself initiated the Defense Department's voluntary disclosure program primarily because of the benefits for both industry and government.[100]

C. *The Environmental Protection Agency's Toxic Substances Control Act*[101] *Disclosure Program*

The EPA has already implemented a voluntary disclosure program under the Toxic Substances Control Act (TSCA) that encourages companies to conduct internal audits, correct violations, and disclose the findings.[102] Under the TSCA program, civil penalties are automatically reduced by twenty-five percent if the company discloses the violation before the EPA learns of it.[103] An additional twenty-five percent may be deducted if the violation is disclosed within thirty days of the company's discovery of a possible violation.[104] Besides disclosure, the

94. *Id.*

95. *Id.*

96. *Id.*

97. Klubes, *supra* note 89, at 18. The program has also been relatively inexpensive to administer. *Id.*

98. *Id.*

99. *DOD Debars Record 511 Contractors in Second Half of FY 1990, IG Reports*, Fed. Cont. Rep. (BNA) (Dec. 24, 1990).

100. Klubes, *supra* note 89, at 19 (noting that the Defense Department's program evolved from a defense industry reform report signed by 24 major defense contractors).

101. 26 U.S.C. §§ 2601-2671 (1988).

102. Farran & Adams, *supra* note 8, at 10,241.

103. *Id.*

104. *Id.*

program encourages appropriate remediation of the violation by allowing EPA the discretion to reduce the penalty another fifteen percent if the company reasonably and satisfactorily addresses the violation.[105]

Additionally, the EPA has initiated a program under TSCA Section 8(e) to encourage companies to audit their environmental compliance and disclose any violations.[106] Several regulated companies signed an administrative consent agreement with the EPA in which they agree to conduct a compliance audit and disclose the results within 180 days.[107] To attract companies to the program, the EPA agreed to stipulated penalties for the uncovered violations including a one million dollar cap on the company's liability.[108]

V. DANGERS AND BENEFITS OF ENVIRONMENTAL AUDITING

A. *Perceived Drawbacks to Environmental Auditing Programs*

The confidentiality of environmental audits or reports is the most controversial component of any environmental compliance program.[109] A reasonable environmental audit program will most assur-

105. *Id.*

106. *See* Registration and Agreement for TSCA Section 8(e) Compliance Audit Program, 56 Fed. Reg. 4128 (Feb. 1, 1991) (announcing the opportunity for companies to register for this program and the program's provisions).

107. *Id.* at 4129.

108. *Id.* at 4130.

109. A complete examination of the options for keeping environmental audit reports confidential is beyond the scope of this Recent Development. Numerous articles and recent judicial decisions, however, have addressed this issue in depth. The following discussion identifies the different positions regarding this issue and provides resources for those interested in more information.

Among the traditional defenses raised in response to government requests for companies' environmental audit reports are the attorney-client and work product privilege. Sustaining these privileges requires extensive attorney supervision of the audit and some foreseeable litigation. Authorities diverge as to the feasibility of either approach, but the majority advise that neither defense is likely to succeed. *See* Environmental Auditing Policy Statement, *supra* note 23, at 25,007 (recognizing EPA's authority to request environmental audit reports); United States v. Chevron U.S.A., Inc., No. 88-6681, 1989 U.S. Dist. LEXIS 12267 (E.D. Pa. Oct. 16, 1989) (holding that the attorney-client privilege does not extend to reports unless the communication is between client and attorney — in his capacity as an attorney — and the communication's purpose is to provide legal assistance). *See, e.g.*, United States v. Dexter Corp., 132 F.R.D. 8 (D. Conn. 1990) (rejecting corporations' claim that environmental evaluation reports were privileged); FRIEDMAN, *supra* note 5, at 104-06; Frank B. Friedman & David A. Giannotti, *Environmental Self-Assessment*, *in* A PRACTICAL GUIDE TO ENVIRONMENTAL LAW 345, 377-78 (David Sive & Frank Friedman eds., 1987); Danzig et al., *supra* note 28, at 5-6 (discussing EPA's authority to obtain information in audit reports); Abbott, *supra* note

edly produce a written record that charts a company's environmental compliance.[110] Once a record exists, one of two things may occur: The company may voluntarily disclose any violations and their plan to remedy them; or they may conceal the results of their audit and address the violations privately. Both paths are fraught with danger. In the first situation, once the violations are made public the company has opened itself to citizen suits in which plaintiffs might seek to discover

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26, at 234 (examining whether factual material in environmental audit drafts is privileged); Farran & Adams, *supra* note 88, at 10,242 (suggesting procedures companies can undertake to increase the likelihood that the results of environmental audits remain confidential); Friedman, *supra* note 82, at 23-24 (recognizing that the attorney-client privilege does not protect most internal documents); Klubes, *supra* note 89, at 19 (discussing civil plaintiff's ability to access environmental audit reports submitted to EPA); Moore et al., *supra* note 5, at 12-13 (questioning why attorneys do not always advise their clients to conduct environmental audits); Reed, *supra* note 24, at 10,304-07 (discussing governmental and private entities' ability to access environmental audit reports).

Some commentators in regulated industries advocate a self-critical analysis or self-evaluative privilege. This privilege has received limited recognition in the health care industry and in Title VII actions. In support of this privilege, commentators argue that self-evaluation furthers the public interest. If the reports are available publicly, companies will neither correct nor report problems freely. *See, e.g.*, Danzig et al., *supra* note 28, at 5-6 (arguing that it may not be practical to bring the entire environmental audit process within the self-evaluation privilege); Farran & Adams, *supra* note 88, at 10,240 (suggesting a limited safe harbor to companies that implement environmental audit programs); *see also* FTC v. TRW, Inc., 628 F.2d 207, 210-12 (D.C. Cir. 1980) (holding that the self-evaluative privilege did not protect reports compiled to comply with National Consumer Relations Audit); Emerson Elec. Co. v. Schlesinger, 609 F.2d 898, 906-07 (8th Cir. 1979) (holding that implementing a memorandum to share information between two government agencies did not violate a self-evaluative privilege); United States v. Noall, 587 F.2d 123, 126 (2d Cir. 1978) (enforcing IRS summons for internal audit and reports), *cert. denied*, 441 U.S. 923 (1979); Reynolds Metals Co. v. Rumsfeld, 564 F.2d 663, 667 (4th Cir. 1977) (holding that the EEOC's request for affirmative action program and related information did not violate a privilege for self-evaluative documents), *cert. denied sub nom.* Reynolds Metals Co. v. Brown, 435 U.S. 995 (1978); O'Connor v. Chrysler Corp., 86 F.R.D. 211, 218 (D. Mass. 1980) (holding that self-evaluation privilege did not protect employer from disclosing data in the self-evaluation portion of its affirmative action plan); Note, *The Privilege of Self-Critical Analysis*, 96 HARV. L. REV. 1083, 1091-1100 (1983) (criticizing courts' approaches to applying the self-critical privilege); Reed, *supra* note 24, at 10,306-07 (recognizing that *at most* the self-evaluation privilege is available in private actions); Moore, et. al., *supra* note 5, at 13-14 (arguing that a self-evaluation privilege would encourage audits and increase their effectiveness).

110. *See supra* notes 23-26 and accompanying text for a discussion of the mechanics of conducting an environmental audit. *See also* Moore et al., *supra* note 5, at 8 (arguing that environmental audits are risky because, in the absence of a privilege, the government or a civil litigant may use the resulting written record against the company).

the environmental audit.[111] The company also puts itself at the risk of being criminally prosecuted by the government, having itself given the prosecutors the evidence of its knowledge.[112] The second path is also dangerous if the government decides to investigate the company and obtains a copy of the audit. Any chance of prosecutorial leniency is especially slim in this circumstance.

With no guarantees of amnesty or leniency,[113] this predicament led many regulated entities to avoid conducting environmental audits, rather than creating a record that could convict them.[114] As the use of criminal penalties increased, this policy of ignorance began to look more reasonable,[115] especially as courts increasingly upheld individual criminal liability for these violations.[116] The EPA's stated policy of not regularly requesting audit reports[117] did not comfort the environmentally regulated community. Although not regularly requesting audit reports may have been sufficient in 1986, recent legislation[118] brings this policy's viability into serious doubt. In further support of the confidential treatment that environmental audit reports should receive, companies contend that these reports will reveal trade secrets to com-

111. *See* Danzig et al., *supra* note 28, at 4 (recognizing potential exposure to liability); Reed, *supra* note 24, at 10,304 (noting that liberal discovery rules would give any litigant access to audit reports).

112. Van Cleve, *supra* note 27, at 23; Reed, *supra* note 24, at 10,304.

113. *See* Environmental Auditing Policy Statement, *supra* note 23, at 25,004; United States Department of Justice, *supra* note 33, at 14-15 (providing that conducting an environmental audit does not give the company a right or benefit enforceable against the Department of Justice's decision to prosecute); *see also* Van Cleve, *supra* note 27, at 18 (discussing EPA's decision not to offer incentives for companies to conduct environmental audits); Moore et al., *supra* note 5, at 3 (noting that EPA's auditing policy does not assure companies that the government will not use the information they gather against them).

114. *See supra* note 109 discussing the risks that environmental audits pose to companies and that those risks act as a disincentive for companies to conduct environmental audits.

115. *See* Moore et al., *supra* note 5, at 12-13 (recognizing that some attorneys recommend that companies do not conduct environmental audits because of the risks of later prosecution); Van Cleve, *supra* note 27, at 22-23 (stating that corporate attorneys often advise companies not to conduct audits at all, particularly if the company does not intend to respond to an audit's result).

116. *See supra* notes 2-4 and accompanying text for examples of the increase in individual criminal prosecutions.

117. Environmental Auditing Policy Statement, *supra* note 23, at 25,007.

118. *See supra* notes 5-7 and accompanying text for a discussion of recent legislation which will increase EPA's criminal investigation staff, increase fines for criminal violations, and possibly create substantial jail sentences for violators.

petitors.[119] The regulated community contends that environmental audits will remain in disfavor unless some protection is afforded these companies or individuals from criminal prosecution, or the audit reports are treated confidentially or as privileged information.[120]

The results of internal environmental compliance audits may give rise to other obligations for the company. Recent decisions and pronouncements of the Securities and Exchange Commission (SEC) have made a company's environmental compliance record subject to potential disclosure.[121] Failure to disclose relevant environmental information could lead to SEC sanctions for knowingly making inaccurate filings.[122]

Lastly, some companies may find it economically disadvantageous to audit and thus comply with environmental statutes due to compliance costs.[123] The United States Department of Commerce has estimated that environmental compliance costs industry approximately seventy billion dollars a year.[124] Meanwhile, EPA amassed a total of thirty-five million dollars in fines in 1989.[125] Thus, one could contend that an atmosphere is created in which cheating costs less than compliance.[126]

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119. *See* Danzig et al., *supra* note 28, at 4; Farran & Adams, *supra* note 8, at 10,242; Reed, *supra* note 24, at 10,304.

120. *See supra* notes 109-19 and accompanying text discussing risks which arise from environmental audits.

121. *See In re* Occidental Petroleum Corp., Exchange Act Release No. 34-16950, [1980 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 82,622 (July 2, 1980) (accepting a settlement offer regarding company's failure to disclose environmental matters complaints); *In re* United States Steel Corp., Exchange Act Release No. 16223, [1979-1980 Transfer Binder], Fed. Sec. L. Rep. (CCH) ¶ 82,319 (Sept. 27, 1979) (accepting the USSC's settlement offer regarding its failure to adequately disclose environmental matters). *See also* Friedman, *supra* note 82, at 23-24; Van Cleve, *supra* note 27, at 36-40. *See generally* FRIEDMAN, *supra* note 5, at 100-02 (identifying accurate SEC disclosure as a benefit of an environmental assessment program); Environmental Law Institute, Environmental Audit Issue Paper: Duties to Report or Disclose Information on the Environmental Aspects of Business Activities 42-43 (Sept. 1985) (outlining the SEC reporting requirements).

122. Friedman, *supra* note 82, at 23-24.

123. *See supra* notes 23-26 and accompanying text for a discussion of the mechanics of undertaking an environmental audit.

124. Lavelle, *supra* note 2, at 48.

125. *Id.*

126. *Id.*

B. *Benefits of Environmental Auditing Programs*

Properly conducted environmental audits provide numerous benefits to the regulated company, regulatory agency, and the general public. For the company, an effective environmental auditing program can potentially shield corporate management from some criminal liability by documenting the preventative measures undertaken to cease any criminal conduct that had been occurring.[127] Corporations that are government contractors can also avoid another recent enforcement tool of prosecutors — suspension and debarment.[128] Likewise, an audit may protect a corporation from future negligence claims.[129] Notably, these advantages will only be viable if the corporation is willing to act swiftly upon the results of the environmental audit.[130]

Compared to the different enforcement approaches available to the government (administrative, civil, or criminal), environmental compliance and auditing provides corporations with a unified and coherent approach that can resolve all aspects of the government's enforcement action.[131] These audits and resulting enforcement agreements with the government may preclude the private citizen suit. Most provisions which allow citizen suits actually prohibit them when the government is diligently prosecuting the violation.[132] Thus, corporations could argue that the disclosure and any resulting agreements with the regulatory agency precludes the prosecution of any citizen suit.[133]

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127. *See* FRIEDMAN, *supra* note 5, at 99-100 (identifying the possibility of avoiding civil and criminal liability as a benefit of an environmental assessment program); Friedman, *supra* note 82, at 23 (discussing the danger of criminal liability which may result from a company's failure to conduct an environmental audit); Klubes, *supra* note 89, at 18; Van Cleve, *supra* note 27, at 22.

128. Klubes, *supra* note 89, at 18.

129. *See* Friedman, *supra* note 82, at 23 (addressing the role of environmental audits in avoiding negligence liability).

130. Friedman, *supra* note 82, at 23; Van Cleve, *supra* note 27, at 22-23.

131. *See* Klubes, *supra* note 89, at 18 (discussing how companies who conduct environmental audits limit the possibility of criminal prosecution and civil actions).

132. Klubes, *supra* note 89, at 18. *See, e.g.*, Clean Water Act, 33 U.S.C. § 1365(b)(1)(B) (1988) (prohibiting citizen suits if an administrator or state is prosecuting a civil or criminal suit seeking compliance).

133. Klubes, *supra* note 89, at 18. *See* Atlantic States Legal Found., Inc. v. Eastman Kodak Co., 933 F.2d 124, 127 (2d Cir. 1991) (holding that a settlement between the government and a violator will bar citizen suits if the settlement causes the violation to cease and the probability of recurrence is low); Public Interest Research Group v. Powell Duffryn Terminals, Inc., 913 F.2d 64, 80-81 (3d Cir. 1990) (recognizing that where a violator has made a good faith attempt to comply with a permit, and failed because of technical or economic problems, and the EPA has excused noncompliance,

A comprehensive environmental audit program provides a corporation with a number of internal benefits. In general, audits can greatly aid a corporation in its environmental compliance planning and prioritization, reduction of health and safety risks, personnel training, and budgeting and resource allocation.[134] Environmental audit programs also reinforce the corporation's commitment to environmental compliance at all management levels and project a positive corporate approach toward the environment.[135] All of these advantages to audits can lead to a better relationship between the public and regulatory community.

The advantages to the public are both obvious and subtle. Clearly, increased corporate auditing and follow-up will reduce pollution, but it will also decrease the cost of environmental enforcement or allow it to be better utilized. The government benefits in many of the same ways as the general public. Increased corporate auditing and compliance frees regulatory enforcement resources to address the persistent transgressors.

VI. ENVIRONMENTAL AUDITING AND DISCLOSURE POLICY PROPOSAL

Crucial to any comprehensive environmental auditing program is cooperation amongst the regulatory community; all agencies must generally agree to and play by similar, if not identical, rules. However, the EPA and Department of Justice must also maintain a great deal of flexibility and full prosecutorial discretion. This discretion is necessary to maintain an active and effective enforcement effort. This aspect of a comprehensive auditing program remains important because not everyone will implement internal audit programs or even attempt to comply with environmental statutes.

The Department of Justice and EPA should propose a policy of voluntary environmental auditing, self-disclosure, and corrective action.[136] The stated goal of such a policy should be complete compliance with all applicable environmental statutes and regulations. The

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the court may reduce the penalty in related citizen suits), *cert. denied*, 111 S. Ct. 1018 (1991).

134. FRIEDMAN, *supra* note 5, at 103-05.

135. Environmental Auditing Policy Statement, *supra* note 23, at 25,006. *See* FRIEDMAN, *supra* note 5, at 104 (discussing how environmental audit programs can improve public relations).

136. In general, this proposal is consistent with statements made by members of

keys to this policy would be a corporation's adoption of a bona fide environmental audit program, prompt and complete disclosure, and good faith efforts at remedying uncovered violations.

This policy should create a safe harbor for those companies that undertake audits, disclose violations, and begin corrective actions. This safe harbor would protect qualifying companies from criminal prosecution for up to six months[137] following their discovery of the violation. For a corporation to qualify, their violation may not have been intentional, it must have been reported in a timely manner to the EPA, and it may not have resulted in actual harm to human health or the environment.[138] If the corporation has not corrected the violation after six months, the agencies may proceed with criminal sanctions. The government will be free to pursue any other administrative or civil remedy. However, the government should focus on either encouraging compliance or recovering the corporation's economic benefit from the viola-

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both Houses of Congress while discussing the new Clean Air Act and its criminal enforcement provisions. The Statement of Senate Managers stated:

> Voluntarily initiated environmental audits should be encouraged and, in the course of exercising prosecutorial discretion under the criminal provisions of subsection 113(c), the Administrator and the Attorney General of the United States should, as a general matter, refrain from using information obtained by a person in the course of a voluntarily initiated environmental audit against such person to prove the knowledge element of a violation of this Act if-(1) such person immediately transmitted or caused the transmission of such information to the Administrator or the State air pollution control authorities, as appropriate; (2) such person corrected or caused the correction of such violation as quickly as possible; and (3) in the case of a violation that presented an imminent and substantial endangerment to public health or welfare or the environment, such person immediately eliminated or caused the elimination of such endangerment to assure prompt protection of public health or welfare or the environment.

CHAFEE-BAUCUS STATEMENT OF SENATE MANAGERS, 101ST CONG., 2D SESS., 136 CONG. REC. S16,933, S16,951 (daily ed. Oct. 27, 1990).

The House Managers expressed similar sentiments:

> Nothing in subsection 113(c) is intended to discourage owners or operators of sources subject to this Act from conducting self-evaluations or self-audits and acting to correct any problems identified. . . . Knowledge gained by an individual solely in conducting an audit or while attempting to correct any deficiencies identified in the audit or the audit report itself should not ordinarily form the basis of the intent which results in criminal penalties.

JOINT EXPLANATORY STATEMENT OF THE COMMITTEE OF CONFERENCE, 101ST CONG., 2D SESS., 136 CONG. REC. H13,197, H13,201 (daily ed. Oct. 26, 1990).

137. *See* Danzig et al., *supra* note 28, at 10 (discussing instances in which the EPA allowed companies a six-month grace period after completing an environmental audit to correct violations that the audit discovered).

138. *See* Farran & Adams, *supra* note 8, at 10,240 (suggesting conditions under which EPA should provide companies a safe harbor).

tion. Furthermore, the policy should promote substantial credits for corporations that disclose environmental violations.[139]

This safe harbor approach should remove many of the concerns about a defendant's environmental audit report providing the knowledge element in a criminal prosecution. Any party that fails to remedy the violation after the allotted six months, without some intervening circumstances, will independently provide the knowledge element without the prosecution needing the audit report. The government's access to audit reports is an important element of its enforcement process that should not be weakened; however, the government should exercise restraint in requesting these reports.[140] Although the government's use of internal audit reports should not be precluded, corporations and individuals should have an affirmative defense in criminal cases.[141]

In addition, the EPA and Department of Justice must respond to industry's concern over the use of internal audit reports in private citizen suits. The Department of Justice and EPA should urge the courts to adopt a "limited waiver" theory.[142] Under this theory, the government could waive any claim of attorney-client or work product privilege.[143] The limited waiver is a necessary middle ground to encourage further voluntary disclosure. Citizen suits, originally intended as an additional enforcement mechanism,[144] become unnecessary if the corporation discloses the audit report results to the government and corrects the violation. Confidential business information and trade secrets should be adequately protected by provisions in the Freedom of Information Act[145] or may be sealed in civil actions through a Rule 26(c)

139. Moore et al., *supra* note 5, at 23-24. This credit program would be substantially similar to the percentage reductions in the TSCA program. *See supra* notes 103-105 and accompanying text explaining the TSCA § 5 program.

140. *See supra* notes 109-12 and accompanying text discussing corporate fears about the EPA's use of environmental audits.

141. Farran & Adams, *supra* note 8, at 10,240 (recognizing that an affirmative defense may allow companies to reduce or eliminate their civil or criminal liability).

142. Klubes, *supra* note 89, at 19 (noting that without a limited waiver privilege, voluntary disclosures will be discouraged because all documents from an internal investigation would be available for anybody to see).

143. *Id.* This waiver would only apply to the government; not to any third party. *Id.*

144. *See, e.g.*, Clean Water Act, 33 U.S.C. § 1365 (1988) (providing for citizen suits).

145. Freedom of Information Act, 5 U.S.C. § 552 (1988).

protective order.[146]

CONCLUSION

Promoting environmental compliance to the largest extent possible by the regulated community should be the goal of EPA. Environmental audits provide a mechanism by which the regulated community can increase their compliance and police itself. The Department of Justice and EPA agree that they should encourage environmental audits.[147] Unfortunately, they have only paid lip service to this mechanism by leaving significant disincentives to auditing programs in place.[148] The EPA and Department of Justice have had a positive experience with corporate environmental audits.[149] Likewise, other governmental agencies' experience with self-auditing and voluntary disclosure has been very successful.[150] If these programs from other agencies were adapted to the environmental context, there is every reason to believe that they will be just as successful.

*Patrick J. Ennis**

146. *See* FED. R. CIV. P. 26(C) (allowing parties to move to restrict discovery).

147. *See supra* notes 33-81 and accompanying text discussing the federal agencies' respective approaches to environmental audits.

148. Moore et al., *supra* note 5, at 2 (noting that EPA and Justice Department initiatives create a disincentive to auditing because "[a]udits are being used to trigger enforcement or to escalate enforcement from a civil penalty to a criminal sanction").

149. *See supra* notes 101-108 and accompanying text describing the EPA's TSCA §§ 5 & 8(e) programs. *See also* Farran & Adams, *supra* note 8, at 10,242 (recognizing the success of the TSCA § 8(e) program and advocating that other EPA programs adopt a similar provision); Strock, *supra* note 2, at 10,330 (stating that EPA's use of environmental auditing provisions in enforcement settlements has successfully identified and helped to correct violations).

150. *See supra* notes 82-100 and accompanying text describing the FAA's and Defense Department's voluntary disclosure and self-policing policies.

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