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The Environmental Audit Privilege: Where Does Louisiana Stand in the Federal v. State Showdown?

Anna Kathryne Campbell

COMMENT

The Environmental Audit Privilege: Where Does Louisiana Stand in the Federal v. State Showdown?*

The past two decades could be referred to as the era of environmental regulations. Particularly in corporate America, acronyms like CAA, CWA, CERCLA, RCRA, HSWA, and SARA have become all too standard shop-talk. Corporations that once marched to the beat of their own drummers are now marching under a pervasive and complex regulatory scheme that carries with it severe penalties for non-compliance. Faced with the daunting volume of environmental regulations, increased scrutiny by government agencies, and potential liability for noncompliance, many corporations have voluntarily instituted rigorous internal auditing programs.

The Environmental Protection Agency (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."[1] Many companies have found such a systematic and comprehensive evaluation of corporate operations to be an indispensable management tool. While primarily used to evaluate a company's compliance with environmental laws and regulations, audits serve a host of other functions.

An audit is often the best mechanism for companies to assess their internal control systems, management practices, training programs, and wasteful activities. An audit of workplace conditions may also help a corporation to assure labor organizations and public interest groups concerned with worker safety that the company has complied with the Occupational Safety and Health Act (OSHA)[2] and state labor standards.[3] Furthermore, audits may be needed for corporate dealings with outside parties. For example, many lenders, concerned with their own liability under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA),[4] now require detailed information regarding a company's compliance record so as to identify possible claims that may be asserted against the company.[5] Whatever the incentive to conduct these self-evaluations, internal environmental audits are now commonplace in corporate America.

Considering the value of audits and the frequency with which they are conducted, one can hardly imagine that environmental audits have engendered

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1. EPA Final Policy Statement on Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations, 60 Fed. Reg. 66,706 (1995).

2. 29 U.S.C.A. Ch. 15 (1994).

3. Stephen L. Kass and Jean M. McCarroll, *Corporate Compliance Audits*, 213 N.Y. L.J. 1 (1995).

4. Codified at 42 U.S.C. § 9601 (1994).

5. Kass and McCarroll, *supra* note 3.

a veritable war between some states and the federal government. The raging controversy stems from two camps with diametrically opposed viewpoints. The main issues are whether audit documents should be privileged, and whether a company who self-reports environmental violations discovered through an audit should be immune from civil and even criminal liability. On one side, many public interest groups, regulatory and law enforcement agencies, and environmentalists want access to what they consider vital public information. This side vehemently opposes audit privilege and immunity legislation. On the other side of the battlefield are regulated entities that not only want a guarantee that the results of their environmental audits will be confidential, but also want a promise of immunity for any violations uncovered.

Responding to the battle cry of the regulated community, nineteen states have already enacted audit privilege legislation.[6] Other states will soon follow suit. The federal government, on the other hand, has joined forces with those opposed to audit privilege and immunity laws. A joint policy statement issued by the Environmental Protection Agency (EPA) and the Department of Justice (DOJ) is

6. The following chart is a list of those states that had enacted audit legislation as of December 23, 1996:

STATE	LAW/BILL	EFFECTIVE DATE	QUALIFIED PRIVILEGE	QUALIFIED CIVIL AND/OR CRIMINAL IMMUNITY
Arkansas	Act 350	7/28/95	Yes	No
Colorado	Act 94-139	6/1/94	Yes	Yes
Idaho	SB 1142	7/1/95	Yes	Yes
Illinois	Pub. Act 88-0690	1/24/95	Yes	No
Indiana	P.L. 16-1994, § 8	7/1/95	Yes	No
Kansas	SB 76	7/1/95	Yes	Yes
Kentucky	HB 681	7/15/95	Yes	No
Michigan	SB 728	3/18/96	Yes	Yes
Minnesota	Statute § 115B.03	6/1/95	No	Yes
Mississippi	Law § 49-2-51	7/1/95	Yes	Yes
New Hampshire	HB 275	7/1/96	Yes	Yes
Ohio	SB 138	3/13/97	Yes	Yes
Oregon	SB 912	11/4/93	Yes	No
South Carolina	H 3624	6/4/96	Yes	Yes
South Dakota	SB 24	7/1/96	No	Yes
Texas	HB 2473	5/23/95	Yes	Yes
Utah	§ 19-7-101	3/20/95	Yes	No
Virginia	HB 1845	7/1/95	Yes	Yes
Wyoming	Act 26	7/1/95	Yes	Yes

Information in chart compiled by the law firm of Hale and Dorr, LLP in Washington, D.C.

the federal solution to the audit quagmire.[7] That policy consists of a series of primarily economic incentives designed to encourage companies to perform voluntary internal audits.

The current federal/state split creates a dilemma for states that want to encourage voluntary environmental auditing but have not yet adopted their own audit laws or regulations. Such states must eventually choose sides and join forces. For Louisiana, the choice will likely be made in the 1997 regular legislative session. At the close of the 1995 session, Louisiana was on the road toward adoption of a statutory audit privilege. Now the legislature may decide to change its course in the light of recent EPA threats directed at states with audit privilege and immunity laws. In the opinion of this author, audit privileges and immunity legislation is imminent; however, before adopting any measures, the Louisiana Legislature should re-examine both sides of the debate.

I. THE DUAL NATURE OF AN ENVIRONMENTAL AUDIT: THE SWORD AND THE SHIELD

In February of 1996, head of EPA, Carol Browner, told a United States House of Representatives Democratic environmental task force that recent spending cuts had caused EPA inspections to go down forty percent since October 1995: "The environmental cop is absolutely not on the beat. . . . We cannot ensure American people their air is clean, their drinking water is safe, [or] the health of their children is protected."[8] The ideal solution to EPA's enforcement dilemma would be self-policing by industry; however, many businesses, particularly small and medium-sized ones, have balked at such an idea claiming they are faced with a Catch-22 situation. Without systematic and periodic environmental audits, companies recognize that an undetected, minor environmental violation can easily bloom into major liability for a facility. On the other hand, undertaking a voluntary self-evaluation may be equally risky.

A. The Genesis of the Audit Privilege Movement

Coors Brewing and Weyerhaeuser Company know the risks associated with internal voluntary audits. In fact, both companies have lived corporate America's worst auditing nightmares. In 1992, Coors informed the Colorado Department of Health that a routine "process-audit" had revealed its brewing process was liberating more than 650 tons of volatile organic compounds [VOCs] into the atmosphere annually.[9] Subsequent to its voluntary disclosure, Coors was hit with

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7. 60 Fed. Reg. 66,706 (1995).

8. Scott Sonner, *Demos Knock EPA Budget Cuts*, The Advocate, Baton Rouge, La., Feb. 27, 1996, at 13A.

9. David Rubenstein, *Organizations Fight for Confidentiality of Self-Audits*, Corporate Legal Times, March 1995, at 1.

a multi-count enforcement action by the Colorado Department of Health.[10] The company was assessed over one million dollars in fines, plus an additional penalty for the "economic" benefit Coors received through its noncompliance.[11]

Weyerhaeuser Company's auditing story arose from incidents at its paper mill in Aberdeen, Washington. In 1989, an anonymous whistleblower tipped off EPA criminal investigators that an illegal midnight dumping had occurred at the mill.[12] While this whistleblower had in fact witnessed a legitimate midnight deposit arranged by Weyerhaeuser Company and the local wastewater management plant, EPA officials began an investigation of the activities at the Aberdeen mill.[13] That investigation eventually led EPA officials to obtain a search warrent for the mill.[14] Three internal audit reports were seized and used against Weyerhaeuser Company in a subsequent criminal prosecution.[15] The company pleaded guilty to five misdemeanors and paid fines totalling more than half a million dollars.[16]

Opponents of audit privilege legislation offer different versions of these two stories and claim that both cases reveal the true propulsion behind audit laws. In his recently published article, "Dirty Secrets: The Corporation's Campaign to Create an Environmental Audit Privilege," Christopher Bedford explains that many companies like Coors and Weyerhaeuser Company want to protect the findings of their internal audits because they have some "dirty secrets" to hide.[17] Colorado Department of Health inspectors notified Coors over a three-year period that it was emitting substantial VOC emissions for which the company did not have permits.[18] Coors failed to meet compliance deadlines ". . . until 1991 when, as part of an agreement with the state on permits for another facility, Coors was *forced* to do an audit of its emissions as the first step in getting permits and controlling releases."[19] According to Bedford's article, Weyerhaeuser Company had some "secrets" of its own. From 1980 to 1989, the company's saw mill discharged red paint washes, including oil and latex-based solvents, into a nearby river.[20] During that time, three internal audits identified the waste water discharge as a potential hazardous waste and a water quality violation, yet no move was made to correct the problem until Weyerhaeuser Company was "caught."[21]

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10. *Id.*
11. *Id.*
12. *Id.* at 3.
13. *Id.* at 1.
14. Christopher Bedford, National Organizer for Communities Concerned about Corporations, *Dirty Secrets: The Corporation's Campaign to Create an Environmental Audit Privilege* 10 (publication information on file with the *Louisiana Law Review*).
15. *Id.* at 10.
16. *Id.*
17. Bedford, *supra* note 14.
18. *Id.* at 9.
19. Taken from a letter to Colorado State Senator Claire Traylor from Patricia A. Nolan, MD, Executive Director, Colorado Department of Health dated 9/23/93, *cited in* Bedford, *supra* note 14.
20. Bedford, *supra* note 14, at 10.
21. *Id.*

Whether Coors and Weyerhaeuser Company were punished too harshly for undertaking a voluntary self-evaluation, or whether both companies were hiding "dirty secrets," one can easily see why regulated entities fear that their audit reports will find themselves in the hands of their opponents. Internal audits are hot items in environmental lawsuits. To a plaintiffs' attorney, prosecutor, or regulatory official filing suit against a regulated entity, an audit report can often be as good or better than a smoking gun. Besides pinpointing violations of environmental laws and regulations, audit documents often contain detailed commentary and subjective analysis relative to what mistakes may have led to the violation, who is responsible, and how the company should remedy the problem. Although existing evidentiary privileges and doctrines might provide some protection, these privileges have proven largely ineffective where audit documents are concerned.

B. Traditional Protections

Over the years, three specific legal doctrines have been employed to shield audit reports from disclosure: the attorney-client privilege, the work product doctrine, and the self-critical analysis privilege.

1. The Attorney-Client Privilege

The attorney-client privilege is codified in article 506 of Louisiana's Rules of Evidence,[22] and is well-entrenched in the federal common law. In order to encourage full disclosure from clients to their lawyers, the attorney-client privilege allows a client to prevent his attorney from disclosing any confidential communications made to the attorney for the purpose of obtaining legal advice.[23] While a small number of companies have successfully invoked this privilege to protect information ascertained through an environmental audit, more often than not the privilege is far too limited to protect audit reports.

The primary obstacle in using the attorney client privilege to shield audit documents is the fact that the communication at issue (the audit report) must be made for the purpose of obtaining legal advice. Where a company can prove that the primary purpose of an audit report is to secure an opinion of law from inside or outside counsel, courts have held that the attorney-client privilege protects the report from disclosure to third parties or governmental agencies.[24] Most of time, however, a lawyer merely aids in the preparation of the audit report itself. In such a case, the attorney client privilege will not apply.

In *United States v. Chevron*,[25] for example, EPA officials demanded disclosure of Chevron's environmental review status reports. Those reports had

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22. La. Code Evid. art. 506.

23. *See* United States v. United Shoe Machinery Corp., 87 F. Supp. 357 (D. Mass. 1950).

24. *See* Olen Properties v. Sheldahl, Inc., No. CV91-6446-WDK, 1994 WL 212135 (C.D. Calif. April 12, 1994).

25. Civ. A. No. 88-6681, 1989 WL 121616 (E.D. Pa. Oct. 16, 1989).

been prepared by three people, one of whom was the corporation's environmental attorney. Chevron invoked the attorney-client privilege; however, the court held that the privilege did not apply since the mere presence of an attorney does not make a communication privileged. Rather, the court said, a communication must be made between a client and an attorney in his capacity as attorney, not merely as a business advisor. In addition, the court noted that the lawyer must be engaged in a legal inquiry as opposed to routine fact-finding, and the communication's main purpose must be to provide legal aid. As *Chevron* reveals, the attorney-client privilege simply will not protect the vast majority of voluntary environmental audits.

2. The Work Product Doctrine

The work product doctrine overlaps to some degree with the attorney-client privilege. Like the attorney-client privilege, the work product doctrine does not go far enough to protect most environmental reports from disclosure. Codified in rule 26(b)(3) of the Federal Rules of Civil Procedure and article 1424 of Louisiana's Code of Civil Procedure, the doctrine provides absolute protection for an attorney's mental impressions, conclusions, opinions, or theories prepared in anticipation of litigation.[26] The doctrine also protects any other writing prepared in anticipation of litigation, unless the opposing attorney proves that unfair prejudice will result if he is denied access to those materials.[27]

While litigation need not be imminent for the work product doctrine to apply, documents must be prepared with at least "an eye toward litigation."[28] While some audits are conducted as a result of pending litigation, most companies perform audits as a part of their normal business operations.[29] Most routine audits, therefore, will not be covered by this evidentiary privilege.[30]

3. The Self-Critical Analysis Privilege

The self-critical analysis privilege, also known as the self-evaluative privilege, is a qualified privilege that protects from discovery certain self-appraisals. which could. be used. against a company. in future. litigation.[31] First used in the medical and securities fields to encourage internal investigations, courts have been reluctant to expand this privilege to environmental

26. Fed. R. Civ. P. 26(b)(3); La. Code Civ. P. art. 1424.

27. Fed. R. Civ. P. 26(b)(3).

28. In re Sealed Case, 29 F.3d 715, 718 (D.C. Cir. 1994).

29. Lynn L. Bergeson and Courtney B. Sandifer, *EPA Ponders Its Environmental Policy While States and the Judiciary Move Ahead*, 9 Toxics L. Rep. 769 (1994).

30. *Id.*

31. Joseph E. Murphy and Ilise L. Feitshans, *Protecting the Compliance Audit*, 943 PLI/Corp 667, 674 (1996).

audits.[32] A recent federal court decision, however, may offer regulated entities some hope for protecting their audit documents.

In *Reichhold Chemicals, Inc. v. Textron, Inc.*,[33] a federal district court in Florida held that certain documents in an environmental audit were protected from discovery by the self-critical analysis privilege. The court determined that the privilege, which is analogous to Federal Rule of Evidence 407 (dealing with subsequent remedial measures), means that "an entity's retrospective self-assessment of its compliance with environmental regulations should be privileged in appropriate cases."[34] One important qualification of this privilege, the court noted, is that the privilege may be overcome if an adverse party "can demonstrate extraordinary circumstances or special need."[35]

Other courts have indicated a willingness to recognize the self-evaluative privilege but have suggested that it only applies to private litigation.[36] In *Federal Trade Commission v. TRW, Inc.*,[37] for example, a federal district court held: "Whatever may be the status of the 'self-evaluative' privilege in the context of private litigation, courts with apparent uniformity have refused its application, where, as here, the documents in question have been sought by a governmental agency."[38]

C. An Audit Privilege: Unnecessary Protection or Needed Incentive?

Against this backdrop of unreliable evidentiary protection, industry groups began a movement on the federal and state levels to create a statutory privilege for audit reports.[39] In 1993, Oregon became the first state to pass an audit privilege law.[40] Colorado soon followed suit with a similar law, though adding a safe harbor provision that offers companies limited immunity from civil and criminal liability.[41] Since that time, nineteen other states have enacted privilege legislation based on one of those two models, and many more are considering similar measures.[42]

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32. Paula C. Murray, *The Environmental Self-Audit Privilege: Growing Movement in the States Nixed by EPA*, 24 Real Est. L.J. 169 (1995).

33. 157 F.R.D. 522 (N.D. Fla. 1994).

34. *Id.* at 526.

35. *Id.* at 528.

36. *See, e.g.*, Reich v. Hercules, 857 F. Supp. 367-71 (D. N.J. 1994); In re Grand Jury Proceedings, 861 F. Supp. 386, 387-89 (D. Md. 1994). This idea is discussed at greater length in Mia Anna Mazza, *The New Evidentiary Privilege for Environmental Audit Reports: Making the Worst of a Bad Situation*, 23 Ecology L.Q. 79 (1996).

37. 628 F.2d 207, 210 (D.C. Cir. 1980).

38. *Id.* at 211.

39. These groups include the Compliance Management and Policy Group (CMPG), the Coalition for Improved Environmental Audits (CIEA), and the Corporate Environmental Enforcement Counsel (CEEC).

40. Or. Rev. Stat. § 36-468.963 (1995).

41. Colo. Rev. Stat. Ann. § 13-25-1-114.5 (1994).

42. For a chart of states with audit privilege laws, see *supra* note 6.

The basic concept behind an audit privilege is to make a company's voluntary audit reports confidential, thereby protecting such information from disclosure to enforcement officials and discovery in court actions. Without such protection, some companies flatly refuse to conduct internal audits facing a fate similar to Coors and Weyerhaeuser Company. Those companies that do conduct compliance audits often couch their audit reports in "overly cautious lawyer-speak" so that lawyers and prosecutors will not be able to use them as a road map in court.[43] A statutory audit privilege, say supporters, removes the disincentive for companies to self-police and promotes frank and candid discussion among those protected.[44]

Many opponents of the privilege movement maintain, however, that a statutory audit privilege will do little to improve the quality of audits or to increase the frequency with which they are conducted. One very vocal opponent, Bennet L. Heart, points to a recent Price Waterhouse survey[45] on voluntary audits as proof that most of the country's large companies are already conducting audits, even without the protection of an audit privilege; moreover, fear of disclosure is rarely the pivotal factor when a company decides not to audit.[46]

In its survey, Price Waterhouse sent questionnaires to 1,800 manufacturing companies in fourteen industrial sectors.[47] Each company had over $10 million in annual sales and over one hundred employees. Three hundred and sixty-nine companies responded. Of those participating in the survey, seventy-five percent currently perform some form of environmental auditing. Of the non-auditing companies, only twenty percent (eighteen of ninety-one) identified "concern that audit information could somehow be used against the company" as a factor influencing their decision not to audit.[48] The most frequently chosen reason for not conducting audits was that companies "do not believe the need exists."[49] Though smaller companies were not included in the survey, Heart attributes any failure to audit on their part to limited resources and lack of information about the benefits of environmental auditing, as opposed to fear of disclosure and enforcement actions.[50] Heart fails to mention, however, that among the self-auditing companies in the survey, two-thirds said they would expand their auditing programs if penalties were eliminated.[51]

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43. Rubenstein, *supra* note 9, at 2.

44. Donald F. Berschback, *Environmental Audit Privilege Laws: An Idea Whose Time Has Come*, 10 Toxics L. Rep. 976 (1996).

45. Price Waterhouse Voluntary Environmental Audit Survey of U.S. Businesses (March 1995).

46. Bennet L. Heart, *The Environmental Audit Privilege: A Step in the Wrong Direction*, 10 Toxics L. Rep. 306 (1995).

47. *Id.*, Price Waterhouse Voluntary Environmental Survey of U.S. Businesses.

48. *Id.*

49. *Id.*

50. *Id.*

51. Price Waterhouse Voluntary Environmental Audit Survey of U.S. Businesses (March 1995).

II. REACTION ON THE FEDERAL LEVEL: EPA'S POSITION

Like Bennet L. Heart, EPA has taken the position that auditing practices are expanding "without the stimulus of a privilege."[52] EPA's internal review of the Weyerhaeuser case provides some insight into its position on environmental audits, as well as its traditional hostility to audit privileges. Commenting on Weyerhaeuser, an EPA official said:

> Environmental programs are self-reporting programs which assume that all companies will act in good faith to comply. Such programs are effective only if there is effective enforcement. . . . The audit is not a means unto itself. It is one means of ensuring compliance and therefore prosecution. The issue is really whether a company is willing to commit immediately to addressing any problems raised in an audit.[53]

Many EPA officials fear an audit privilege would "sanitize a wide range of past violations under circumstances in which enforcement officials will find it difficult to prove a corporation's improper intent."[54] Others say that an environmental audit deserves no more special status than a corporation's financial records.[55] In Ohio, a deputy regional counsel for EPA even went so far as to call Ohio's proposed environmental audit bill the "Polluters Protection Act."[56] He said "the U.S. EPA does not support an audit privilege because the proposed environmental audit privilege promotes secrecy by allowing companies to withhold important evidence from law enforcement agencies and the local public."[57]

Prompted by industry pressure and the growing movement in the states to enact audit privilege legislation, the EPA issued an interim policy statement on March 31, 1995 specifically rejecting an across-the-board privilege for audit findings.[58] The EPA stated that such a privilege would serve to benefit lawbreakers, thwart open participation in environmental policy and decision making, and clog courtrooms with litigation over the specific parameters of the privilege. To promote voluntary audits and reward companies that undertake them, EPA proposed instead to reduce civil penalties or violations discovered through a self-audit, disclosed to the appropriate agencies, and promptly corrected.[59] Other provisions of the policy provided for possible elimination of punitive damages and limitation of referrals to

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52. 60 Fed. Reg. 66,709 (1995) (Explanation of Policy F. 2).

53. U.S. Environmental Protection Agency internal review of Weyerhaeuser case, *cited in* Bedford, *supra* note 14, at 10.

54. Kass and McCarroll, *supra* note 3, at col. 1.

55. *Id.* at col. 1.

56. *Reported in* Corporate Communications at Browning Ferris Industries, Feb. 9, 1996 (on file with the *Louisiana Law Review*).

57. *Id.*

58. 60 Fed. Reg. 16,875 (1995).

59. *Id.*

the Department of Justice (DOJ); however, such blessings were reserved only for those entities that could meet each of a long list of provisos.[60]

Most notable in the interim policy was a threat directed at the states considering audit privilege legislation and those states that had already adopted such statutes.[61] EPA stated in no uncertain terms that it would step up enforcement in states with audit privilege laws. Additionally, EPA administrator Carol Browner told the National Association of Attorneys General in late March of 1995 that some state audit legislation would override federal environmental regulations and standards, causing environmental programs delegated to the states to revert to national control.[62]

Through the end of May 1995, EPA took comments on the interim policy from the Department of Justice, state attorneys general, local prosecutors, state environmental agencies, the regulated community, and public interest organizations. After much debate and discussion, the interim policy was re-worked and fine-tuned, and on December 22, 1995, EPA issued its final policy statement on the voluntary discovery, disclosure, and remediation of environmental violations.[63] Reaffirming its absolute opposition to statutory evidentiary privileges for audit reports, EPA used the results of the 1995 Price Waterhouse survey on environmental auditing to identify non-statutory incentives that would encourage companies to expand their auditing programs.[64] A statutory privilege, says EPA, would not reflect "the high value the public places on fair access to the facts" and would invite secrecy.[65] EPA's greatest fear is that a privilege would prompt defendants to claim as audit material "almost any evidence the government needed to establish a violation or determine who was responsible."[66]

A. Major Incentives Offered By EPA's Final Policy Statement

In its final policy statement, EPA recognized the need to reward companies that conduct voluntary audits. It identified three specific incentives to encourage self-policing, self-disclosure and self-correction: (1) reduction of penalties; (2) limitation of criminal referrals; and (3) the need for independent grounds for instituting an enforcement inspection.

1. Reduction of Penalties

The main incentive, and the core of the new audit policy, provides for elimination or substantial reduction of gravity-based penalties for violations

60. *Id.*
61. *Id.*
62. 10 Toxics L. Rep. 1176 (1995).
63. 60 Fed. Reg. 66,706 (1995).
64. 60 Fed. Reg. 66,710 (1995) (Explanation of Policy F. 5).
65. 60 Fed. Reg. 66,709 (1995) (Explanation of Policy F. 1).
66. 60 Fed. Reg. 66,709 (1995) (Explanation of Policy F. 3).

promptly disclosed and corrected.[67] The gravity-based portion of a penalty, which reflects the seriousness of a violator's behavior, represents that portion of the penalty that is over and above any economic gain resulting from noncompliance.[68] For complete waiver of gravity-based penalties, a violation must be discovered through an environmental audit or a compliance management system that meets EPA's requirement of due diligence; however, even if a company did not conduct an audit and cannot document due diligence, EPA will still reduce gravity-based penalties by seventy-five percent for a violation that is "voluntarily discovered, promptly disclosed and expeditiously corrected."[69]

2. Limitation of Criminal Referrals

EPA's policy also states that the agency will not recommend criminal prosecution for a regulated entity that discovers violations through an audit or due diligence, provided the company promptly discloses and corrects the violations.[70] Only good actors can benefit from this incentive. Noteworthy is EPA's express stipulation that it "reserves the right to recommend prosecution for the criminal acts of individual managers or employees under existing policies guiding the exercise of enforcement discretion."[71]

3. Need for Independent Grounds for Instituting an Enforcement Inspection

Finally, the policy reaffirms EPA's practice, effective since 1986, of not requesting audits to trigger an enforcement proceeding.[72] Only when the Agency has some independent reason to believe a violation has occurred will it seek information relative to the infraction.[73]

B. Conditions a Regulated Entity Must Meet

Before EPA will completely waive gravity-based penalties, a regulated entity must meet nine specific conditions.[74] For a seventy-five percent reduction of gravity-based penalties, the entity must meet the last eight of these nine.[75] The conditions are:

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67. 60 Fed. Reg. 66,706, 66,711 (1995).
68. *EPA Environmental Self-Policing Policy*, Client Alert (Latham & Watkins Environmental Law Group) Jan. 19, 1996, at 2 (on file with *Louisiana Law Review*).
69. 60 Fed. Reg. 66,706, 66,707 (1995).
70. 60 Fed. Reg. 66,706, 66,711 (1995).
71. *Id.*
72. *Id.*
73. 60 Fed. Reg. 66,706, 66,708 (1995).
74. 60 Fed. Reg. 66,706, 66,711-66,712 (1995).
75. 60 Fed. Reg. 66,706, 66,711 (1995).

(1) The violation is found through a systematic, objective and periodic audit, or a documented, systematic compliance management program that reflects the entity's due diligence in preventing, detecting and correcting violations.
(2) The violation is voluntarily discovered, meaning it was not identified through some procedure required by a statute, regulation, or order.
(3) The regulated entity discloses the specific violation within ten days after discovery, or such shorter time as provided by law.
(4) The violation is identified and disclosed prior to commencement of a governmental inspection or information request, notice of a citizen suit or third party complaint, a reporting by a whistleblower employee, or imminent discovery of the violation by a regulatory agency.
(5) The regulated entity corrects the violation within sixty days and takes appropriate measures to remedy any environmental or human harm.
(6) The entity agrees in writing to take preventive measures to prevent reoccurrence.
(7) The same or similar violation has not occurred at the facility within the previous three years and is not a part of a pattern of violations over the past five years.
(8) The violation cannot be one that results in serious actual harm, presents imminent and substantial endangerment to the environment or human health, or violates the specific terms of any judicial or administrative order or consent agreement.
(9) The entity must agree to cooperate with EPA and provide information necessary to determine the applicability of this policy.[76]

In addition to these nine conditions, a regulated entity must satisfy two additional conditions before EPA will avoid recommending that criminal charges be brought against an entity. Specifically, the violation that is discovered must not involve:

(1) any management practice or philosophy that concealed or condoned the environmental violation; or
(2) any high level official's conscious participation or willful blindness to the violation.[77]

C. Does EPA's Final Policy Go Far Enough?

While some in corporate America may view EPA's final policy as a step in the right direction, a regulated entity can hardly feel more secure conducting an internal environmental audit today than it did prior to the time the final policy

76. 60 Fed. Reg. 66,706, 66,711-66,712 (1995).
77. 60 Fed. Reg. 66,706, 66,711 (1995).

became effective. One need only examine the overwhelming amount of discretion EPA has reserved to itself in its final policy to realize that companies cannot safeguard the confidentiality of their audit reports, nor can they be assured of significant immunity from criminal and civil liability. At frequent intervals in the final policy, certain chilling reservations cut through EPA's encouraging message to entities. What EPA giveth, it seems EPA also taketh away.

Unquestionably, those companies that self-report environmental violations to EPA can expect either complete waiver or a sizable reduction of gravity-based penalties; however, EPA pointedly adds in Section (E) of the policy: "EPA will retain its full discretion to recover any economic benefit gained as a result of noncompliance to preserve a 'level playing field' in which violators do not gain a competitive advantage over regulated entities that do comply."[78] Considering that no one knows exactly how EPA will calculate the economic benefits of noncompliance,[79] one can imagine many scenarios where "leveling the playing field" through economic penalties could be far more costly than pure gravity-based penalties. For a policy intended to be grounded in financial incentives, many companies simply will not think EPA's policy goes far enough.

Also antithetical to EPA's desire to give meaningful incentives to regulated entities is EPA's firm statement that: "Whether or not EPA refers the regulated entity for criminal prosecution . . ., the Agency reserves the right to recommend prosecution for the criminal acts of individual managers or employees. . . ."[80] This provision alone has the potential to significantly retard the number of self-reported environmental violations. A company must self-police and self-report to be eligible for any of EPA's incentives; however, it goes without saying that individuals, and not the company itself, will perform these functions. As one commentator has noted, "it is doubtful someone would report a violation that might protect the company but spell potential criminal prosecution for the person making the report."[81]

Another quite significant reservation of authority is EPA's ability to obtain audit reports at its whim. While the Agency states that it will not routinely request the results of a voluntary audit, the very next sentence of the policy adds: "If the Agency has independent reason to believe that a violation has occurred, however, EPA may seek any information relevant to identifying violations or determining liability or extent of harm."[82] One champion of audit privilege legislation recently commented that this provision really means "[o]nce we [EPA] get ahold of damaging information from a disgruntled employee, environmentalist, etc., we'll use that audit for prosecution faster than you can say 'plea

78. 60 Fed. Reg. 66,706, 66,712 (1995).
79. Berschback, *supra* note 44, at 979-80.
80. 60 Fed. Reg. 66,706, 66,711 (1995).
81. Berschback, *supra* note 44, at 979.
82. 60 Fed. Reg. 66,706, 66,711 (1995).

bargain.'"[83] In its explanation to this section, EPA notes that the agency has not instituted a single criminal prosecution for violations discovered as a result of a self-disclosed audit;[84] however, EPA does not say that such a criminal prosecution is out of the question. Additionally, even though the Department of Justice worked in close conjunction with EPA in developing the final policy, the Justice Department still retains complete independent authority to prosecute any environmental crimes.[85]

EPA's most far-reaching reservation of authority is found in Section (F) of the final policy. That section states in part, "[t]he Agency [EPA] reserves its right to take necessary actions to protect public health or the environment by enforcing against any violations of federal law."[86] How can a regulated entity be encouraged to voluntarily discover, disclose and correct an environmental violation after a provision such as this? With one stroke of the brush, EPA has potentially reduced every incentive in its policy to a string of promises full of sound and fury, and perhaps, signifying nothing.

Beyond express reservations, certain broadly-worded provisions of the final policy leave EPA with even further discretion to decide who will and who will not receive EPA's protections. The Agency states, for example, that a violation must be discovered through a procedure exhibiting to EPA that the entity used "due diligence";[87] however, the definition of due diligence is neither simple nor clear. Reading the extensive laundry list of what constitutes due diligence,[88]

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83. Berschback, *supra* note 44, at 979.

84. 60 Fed. Reg. 66,706, 66,708 (1995).

85. Berschback, *supra* note 44, at 979.

86. 60 Fed. Reg. 66,706, 66,712 (1995).

87. 60 Fed. Reg. 66,706, 66,711 (1995).

88. "Due Diligence" encompasses the regulated entity's systematic efforts, appropriate to the size and nature of its business, to prevent, detect and correct violations through all of the following:

(a) Compliance policies, standards and procedures that identify how employees and agents are to meet the requirements of laws, regulations, permits and other sources of authority for environmental requirements;

(b) Assignment of overall responsibility for overseeing compliance with policies, standards, and procedures, and assignment of specific responsibility for assuring compliance at each facility or operation;

(c) Mechanisms for systematically assuring that compliance policies, standards and procedures are being carried out, including monitoring and auditing systems reasonably designed to detect and correct violations, periodic evaluation of the overall performance of the compliance management system, and a means for employees or agents to report violations of environmental requirements without fear of retaliation;

(d) Efforts to communicate effectively the regulated entity's standards and procedures to all employees and other agents;

(e) Appropriate incentives to managers and employees to perform in accordance with the compliance policies, standards and procedures, including consistent enforcement through appropriate disciplinary mechanisms; and

(f) Procedures for the prompt and appropriate correction of any violations, and any necessary modifications to the regulated entity's program to prevent future violations.

60 Fed. Reg. 66, 706, 66, 710(B) (1995).

one realizes that companies may easily fall outside the parameters of EPA's policy despite having a comprehensive and systematic auditing program in place.

EPA states that the criteria for due diligence is flexible and will accommodate companies of various types and sizes; however, EPA provides no guidance on how the criteria will be applied in particular circumstances.[89] Additionally, many companies that can document due diligence may still lose the protections of the policy because the policy only applies to violations "identified voluntarily."[90] Because "identified voluntarily" does not include any monitoring that is already "prescribed by statute, regulation, permit, judicial or administrative order, or consent agreement,"[91] industry will undoubtedly complain that this is a case where the exceptions swallow the rule.

Finally, companies will note that EPA's final policy is nonbinding. Section (G) on the applicability of the policy states: "This policy sets forth factors for consideration that will *guide* the Agency in the exercise of its prosecutorial discretion. . . . The policy is *not* final agency action, and is intended as *guidance*. It does not create any rights, duties, obligations, or defenses, implied or otherwise, in any third parties."[92] In light of this express provision, EPA's comment in the summary to the policy that the final policy "will be applied uniformly by the Agency's enforcement programs"[93] seems to have little force.

III. LOUISIANA'S RESPONSE TO THE AUDIT PRIVILEGE

Louisiana did not see audit privilege legislation until the 1995 legislative session. At that time, Representative John Siracusa introduced House Bill No. 2085 (H.B. 2085) for the purpose of creating an environmental self-audit privilege and corresponding immunity from civil penalties. Mid-Continent Oil and Gas Association, a powerful Louisiana lobby, drafted the original bill.[94] Later, in committee, the original bill was merged with a similar audit bill the Louisiana Chemical Association had drafted.

The final version of H.B. 2085, as presented to the Louisiana legislature in 1995, was essentially a combination of Colorado's and Illinois' audit laws, as well as a model bill put out by the Corporate Environmental Enforcement Council [CEEC] and the Coalition for Improved Environmental Audits [CIEA].[95] The bill provided for civil immunity, privileges, release of information, exceptions, and protection against disclosure. The stated purpose of H.B.

89. *See* Client Alert, *supra* note 68.
90. 60 Fed. Reg. 66,706, 66,711 (1995).
91. *Id.*
92. 60 Fed. Reg. 66,706, 66,712 (1995) (emphasis added).
93. 60 Fed. Reg. 66,706 (1995).
94. Bedford, *supra* note 14, at 6.
95. *Id.*

2085 was to encourage voluntary compliance and improve environmental quality while preserving the regulatory authority of governmental agencies.[96]

On May 17, 1995, the Louisiana House of Representatives passed the amended bill by a vote of eighty-six to sixteen, with two members absent. When Senator Mike Foster (now Governor Foster) subsequently introduced the bill in the Senate Judiciary Committee, environmentalists sounded the alarm. Furiously claiming that the bill had been routed through improper channels to avoid public attention and to achieve speedy passage, Louisiana environmental advocates and trial lawyers called an emergency press conference June 14, 1995.[97] Through the efforts of these groups, the Louisiana Senate tabled H.B. 2085, where it remained at the close of the 1995 session.[98]

Considering the overwhelming industry support for H.B. 2085 and the large margin by which it passed out of the House of Representatives, that bill, or some version of it, will likely resurface in the next regular legislative session in April of 1997. If it does reemerge, the Louisiana legislature must decide whether H.B. 2085 should be modified to comply with EPA's final policy guidelines, or whether the bill, which offers both privilege and immunity features expressly disapproved by EPA, should be pushed for passage in essentially the same form as in 1995. An examination of the provisions of H.B. 2085 and a comparison with EPA's final policy will be helpful in predicting the future of a statutory audit privilege in this state.

A. Privilege For Voluntary Self-Evaluations

H.B. 2085 provided for a privilege for environmental audit reports prepared pursuant to a plan pre-approved by management.[99] In any noncriminal legal action or administrative proceeding where the person or entity claiming the privilege is a defendant, respondent, or applicant, the privilege would make the audit report, or portions thereof, inadmissible.[100] Additionally, the contents of the audit would not be subject to discovery,[101] and anyone involved in the preparation of the audit could not be compelled to testify regarding any privileged portions of the report.[102]

B. The Exceptions to the Privilege

As with almost every audit law or bill across the country, the seemingly broad audit privilege in H.B. 2085 was purposefully riddled with exceptions to

96. H.B. No. 2085, 1995 Session, § 2511.
97. Bedford, *supra* note 14, at 6.
98. *Id.* at 7.
99. H.B. No. 2085, 1995 Session, § 2512(7).
100. H.B. No. 2085, 1995 Session, § 2513(A).
101. H.B. No. 2085, 1995 Session, § 2513(A).
102. H.B. No. 2085, 1995 Session, § 2516(A).

ensure that the privilege would not be abused. Specifically, Section 2514 of H.B. 2085 stated that the self-evaluation privilege would not apply to any of the following:

> (1) Information or documents required to be developed, maintained, or reported pursuant to a permit or order;
> (2) Information or documents required to be available or furnished to a regulatory agency pursuant to an environmental rule or law;
> (3) Information obtained by a regulatory agency through observation, sampling or monitoring;
> (4) Information obtained through an independent source, even though the subject of such information is in the audit report;
> (5) Any records existing before the commencement of and/or independent of the voluntary self-evaluation;
> (6) Documents prepared subsequent to the completion of and independent of the voluntary self-evaluation;
> (7) Facts in an audit report disclosed in testimony by a person who conducts or participates in the preparation of the report and who has actually observed or has knowledge of physical events;
> (8) The existence of an environmental audit report, the date of the report, the period of time covered, the subject matter, and the names of the consultants or personnel who conducted the report.[103]

In addition to excluding the above information from the reach of the privilege, Section 2513 of the bill states that the privilege will not apply where:

> (1) The privilege has been waived by concurrence of the owner or operator of the audited facility or activity;
> (2) A court or administrative law judge [ALJ] determines the audit report shows noncompliance and appropriate efforts to achieve compliance were not initiated within thirty days;
> (3) A court or ALJ determines the privilege is being asserted for fraudulent purpose;
> (4) A court or ALJ determines the report was prepared to avoid disclosure of information in a pending or imminent investigative, administrative, or judicial proceeding, or to avoid disclosure in a civil proceeding for property damage or personal injury; or
> (5) A court or ALJ determines that the information contained in the report demonstrates a significant danger to public health or the environment.[104]

Section 2513 further provided that a party having independent knowledge leading him to believe that an exception exists or that the privilege does not apply may

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103. H.B. No. 2085, 1995 Session, § 2514.
104. H.B. No. 2085, 1995 Session, § 2513.

be granted access to all or part of the audit for the purposes of an in camera review.[105]

While these exceptions to H.B. 2085 undeniably reined in the scope of the audit privilege, companies would still be more inclined to self-police and self-report under H.B. 2085 than under EPA's final policy where a privilege is not even an option.

C. *Civil Penalty Immunity*

Besides creating an evidentiary privilege for audit reports, H.B. 2085 offered another incentive to regulated entities in Louisiana. Section 2517 of the bill provided for a rebuttable presumption that any person or entity who voluntarily disclosed a violation of state environmental law or regulation would be immune from any administrative or civil penalties.[106] Like the evidentiary privilege, this immunity was limited by express exceptions in the bill.

First, unless the facility conducting the audit notified the appropriate state regulatory agency prior to conducting the audit, a person or entity who later voluntarily disclosed would not receive immunity.[107] Second, if disclosure related to the person or entity's failure to satisfy a reporting requirement under a specific permit condition or order, immunity would be lost.[108] Third, penalties could be imposed if: (a) the disclosure was not voluntary; (b) the violation was committed intentionally or willfully by the person disclosing; (c) the violation was not promptly corrected; (d) the violation caused a significant danger to public health or the environment; or (e) the department knew of the violation before the person disclosed it.[109] Further, immunity would not apply if a court or ALJ found the person or entity had committed "serious violations that constitute a pattern of continuous or repeated violations of environmental laws," and "were due to separate and distinct events giving rise to the violations" within the three years before disclosure.[110]

While the privilege created by H.B. 2085 would be a radical departure from EPA's final policy incentives, the exceptions to H.B. 2085's immunity provisions would actually be in keeping with EPA's own limited penalty immunity. An entity who self-reported an environmental violation under H.B. 2085 would by no means be wrapped in an impenetrable cloak and freed of all liability. Rather, that entity would only be relieved of paying "administrative or civil *penalties*."[111] EPA's final policy providing for the elimination or seventy-five percent reduction of gravity-based penalties is not significantly different. While

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105. *Id.*
106. H.B. No. 2085, 1995 Session, § 2517(A).
107. H.B. No. 2085, 1995 Session, § 2517(I).
108. H.B. No. 2085, 1995 Session, § 2517(D).
109. H.B. No. 2085, 1995 Session, § 2517(F).
110. H.B. No. 2085, 1995 Session, § 2517(G).
111. H.B. No. 2085, 1995 Session, § 2517 (emphasis added).

EPA's criteria for reduction of penalties is undoubtedly more stringent than the criteria under H.B. 2085, both measures intend to achieve higher levels of self-policing, self-disclosure and self-correction through very similar financial incentives. Most importantly, both measures confine these incentives to civil and administrative proceedings.

D. Broad Terms In H.B. 2085 Give Entities More Flexibility

An examination of terms used in H.B. 2085 and similar terms used in EPA's final policy reveals some of the underlying tension between the two measures. For example, Section (D)(1) of EPA's final policy states that a company is not eligible for penalty elimination or reduction unless a violation is discovered through either: (a) a "systematic, objective, and periodic" review of facility operations related to environmental compliance, or (b) a documented, systematic procedure reflecting the entity's due diligence in preventing, detecting, and correcting violations.[112] Besides the fact that EPA's due diligence "laundry list" is extensive, EPA makes clear the point that an entity who fails to meet just one of the due diligence criteria will not be a candidate for penalty reductions.[113] Not only would companies have to spend valuable resources to conform to the terms of the policy statement, but the risk of a non-conforming audit is just too great. Accordingly, small and medium size businesses have little incentive to investigate and to voluntarily disclose environmental violations.

In contrast, under H.B. 2085, entities were largely free to structure their own auditing programs according to the size and nature of their businesses without fear of losing the privilege if their plan was not in exact conformity with a standardized due diligence list. Though "due diligence" was mentioned in Section 2517 of the bill, an entity needed only to pursue "*compliance* with due diligence."[114] Due diligence was not required to be a part of the self-evaluation that uncovered the violation in the first instance. Further, even if due diligence was implicitly required for an effective environmental audit, H.B. 2085 contained no definition of "due diligence," thereby leaving the bounds of the phrase potentially open-ended.

Other broadly defined phrases in H.B. 2085, like "environmental audit report,"[115] "voluntary self-evaluation,"[116] and "audit,"[117] would also have aided smaller entities in their auditing efforts and encouraged them to self-report. The bill defined an "audit" as a "voluntary, internal, and comprehensive

112. 60 Fed. Reg. 66,706, 66,708 (1995).

113. 60 Fed. Reg. 66,706, 66,710(B) (1995): "'Due Diligence' encompasses the regulated entity's systematic efforts . . . to prevent, detect and correct violations through all of the following:" *See supra* note 88 for the list that follows.

114. H.B. No. 2085, 1995 Session, § 2517(3) (emphasis added).

115. H.B. No. 2085, 1995 Session, § 2512(3).

116. H.B. No. 2085, 1995 Session, § 2512(7).

117. H.B. No. 2085, 1995 Session, § 2512(8).

evaluation of a facility or an activity at a facility . . . designed to identify and prevent noncompliance and improve compliance . . . ."[118] The only qualification was that an audit could not be conducted by the owner of the facility, an employee of the facility, or an independent contractor.[119]

A "voluntary self evaluation" was defined as "a self-initiated audit, not otherwise expressly required by environmental law, that is performed pursuant to an audit plan approved in advance in writing by plant management . . . to determine whether such person or entity is in compliance with applicable environmental laws."[120] Besides the requirement that the plan be pre-approved, the only other restriction on such evaluations is that they must be completed within a reasonable time.[121]

Finally, the bill defines an "environmental audit report" as "*any* document, including *any* report, finding, communication, or opinion or *any* draft of a report, finding, communication, or opinion, related to and prepared as the result of a voluntary self-evaluation that is done in good faith pursuant to an audit plan approved in advance in writing by plant management."[122]

Of course the problem with extending the privilege to such an undefined range of auditing activities is that the pendulum could swing too far away from EPA's restrictive policy. While H.B. 2085 may have increased the number of self-reported violations by giving entities wider latitude in their self-policing activities, it may also have inhibited regulatory enforcement efforts at critical moments and given safe harbor to "bad actors." A significant omission in H.B. 2085 was the bill's failure to give any regulatory agency, or anyone for that matter, authority to approve or disapprove the manner in which an audit is conducted. Many may wonder, for example, if H.B. 2085 would allow an entity to claim the privilege for any document simply by labelling it an environmental audit report.

E. Enforcement Efforts Not Thwarted by H.B. 2085

Opponents of audit privilege and immunity legislation fear that such laws will shield bad actors from the reach of the law. Of paramount concern is that such measures stifle environmental lawsuits and enforcement of environmental laws. EPA administrator Carol Browner commented last year that EPA is "'extremely concerned' about state environmental audit laws and bills that would shield companies from prosecution if they audit and voluntarily correct and report criminal violations."[123] Government prosecutors have also been very vocal about their opposition to recent audit legislation.

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118. *Id.*
119. H.B. No. 2085, 1995 Session, § 2512(8).
120. H.B. No. 2085, 1995 Session, § 2512(7).
121. *Id.*
122. H.B. No. 2085, 1995 Session, § 2512(3) (emphasis added).
123. *Outside the Courtroom*, Toxics L. Rep., Mar. 29, 1995, at 1176.

In June of 1996, while two audit immunity and privilege bills were pending in Congress, the National District Attorneys Association sent a letter to a group of conservative House Democrats asking them to abandon their efforts to pass the bills.[124] The district attorneys stressed the need for free access to audit materials:

> Because of the highly technical nature of many environmental offenses, and because of the structured management levels found in most corporations, the elements of knowledge and intent become paramount in any decision by a prosecutor to bring criminal charges either against the corporate entity or individuals within the corporation. Records of the corporation would provide the information necessary to make this determination.[125]

Regarding immunity for violations, the prosecutors urged the Congressmen to consider less "potent" protection such as penalty mitigation or the use of corporate records as an affirmative defense.[126]

Many proponents of audit laws, like attorney for the Corporate Environmental Enforcement Council (CEEC) Paul G. Wallach, think that prosecutors have more than enough resources to prosecute environmental violations without having access to audit reports. As Wallach says, "[t]hey [prosecutors] express concern about anything that will limit their discretion. . . . But I found the more experienced ones do not believe it [an audit privilege] is a big issue, because in most cases they have such information-gathering authority, and they do not need to get audit reports."[127]

Regardless of whether access to audit reports is a necessary weapon in the prosecutorial arsenal, a statutory privilege modeled after H.B. 2085 should not substantially inhibit the exercise of authority entrusted to law enforcement officials and regulatory agencies. Even though the bill's definition of an audit report clearly intended to embrace a broad range of activities, the explicit list of unprotected materials and the enumeration of circumstances under which the privilege would be lost highlight the fact that Louisiana's audit privilege would not provide blanket protection to regulated entities.[128]

While entities would have a substantial amount of leeway in fashioning their audits, they would have little freedom in how they would respond to discovered violations. Specifically, if a court or administrative law judge determined that an entity has not initiated "appropriate efforts to achieve compliance" within a

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124. *General Policy: District Attorneys Urge Democrats To Reject Audit Privilege, Immunity*, 27 Envtl. Rep. 465 (1996).

125. *Id.*

126. *Id.*

127. Rubenstein, *supra* note 9.

128. H.B. No. 2085, 1995 Session, § 2514 (Exceptions); H.B. No. 2085, 1995 Session, § 2513 (Application of privilege to environmental audit reports)

reasonable amount of time after discovery of the violation,[129] that an entity has fraudulently asserted the privilege,[130] or that an audit report demonstrates a "significant danger to public health or the environment,"[131] the privilege would not apply. Since phrases like "appropriate effort,"[132] "reasonable amount of time,"[133] and "significant danger"[134] were left undefined, H.B. 2085 afforded the judiciary much discretion in determining the applicability of the audit privilege. Enforcement officials would thus have an opportunity to make their case for access to an audit report.

Most important for enforcement officials to note is Section 2513(B) of the bill. Under that section, if "any party" has independent knowledge that "good cause exists" that the privilege does not apply or that an exception to the privilege is applicable, a court or administrative law judge "shall allow" that party access to all or part of an audit report for purposes of an in camera review.[135] Even if an audit is privileged, H.B. 2085 still permitted officials to obtain much information through external sources. For example, the testimony of a person who participated in the audit and actually observed or had independent knowledge of physical events relative to the violation was specifically excluded from the privilege.[136] In that case, even without an audit report, the enforcement authority would be able to procure competent and credible evidence that a violation had occurred. While an audit report could certainly corroborate a witness's testimony with subjective comments and analysis, some give and take is necessary if Louisiana truly wants to encourage self-policing.

F. Should H.B. 2085 Apply In a Criminal Proceeding?

What may be the most contentious issue on reconsideration of H.B. 2085 is the fact that the privilege and immunity provisions of the bill were not applicable in a criminal setting. Many audit laws, like the one in Texas, provide for limited immunity from administrative, civil, *and criminal* penalties where a voluntary disclosure of an environmental violation is made.[137] On the other hand, the last sentence of H.B. 2085 specifically stated: "None of the privileges and immunities created in this Chapter shall be construed to apply in any criminal investigation or proceeding."[138]

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129. H.B. No. 2085, 1995 Session, § 2513(A)(2)(b).
130. H.B. No. 2085, 1995 Session, § 2513(A)(3).
131. H.B. No. 2085, 1995 Session, § 2513(A)(4).
132. H.B. No. 2085, 1995 Session, § 2513(A)(2)(b).
133. *Id.*
134. H.B. No. 2085, 1995 Session, § 2513(A)(4).
135. H.B. No. 2085, 1995 Session, § 2513(B)(1).
136. H.B. No. 2085, 1995 Session, § 2514(7).
137. Texas Environmental, Health, and Safety Audit Privilige Act, 74th Leg., ch. 219, 1995 Tex. Sess. Law Serv. 1963.
138. H.B. No. 2085, 1995 Session, § 2517(L).

Under the bill as written, the only consolation entities may have had with respect to criminal proceedings was that a criminal proceeding could not be "invoked or threatened as a means to compel the disclosure of an environmental audit report for use in civil legal actions or administrative proceedings."[139] Otherwise, H.B. 2085 provided entities zero assurance of amnesty from criminal prosecution. Even under EPA's final policy, a person or entity demonstrating due diligence has EPA's "assurance" (as non-binding as that may be) that EPA will not hand the person or entity over to DOJ or recommend them for prosecution.

Upon reconsideration, H.B. 2085 should be modified in a way that makes regulated entities feel more at ease about the risk of criminal liability, while at the same time preserving prosecutorial authority. Specifically, Louisiana should consider adopting Oregon's approach and provide that the state could only gain access to an audit in a criminal setting *if*: (1) there is a compelling need for the evidence; (2) the evidence is otherwise unavailable; and (3) the substantial equivalent is unavailable without incurring unreasonable cost and delay.[140] Though such language does leave a court substantial leeway in determining whether an audit report should be handed over, inclusion of such a provision may at least prompt more disclosures than the bill as previously written. Of course, the problem with such a provision would be the possibility of undue burden on enforcement authorities. Interestingly, however, both the Oregon Department of Environmental Quality and the Oregon Department of Justice supported the enactment of Oregon's audit law.[141] Whether or not Louisiana's enforcement officials will be so receptive remains to be seen.

G. Glitches In the Immunity Provisions of H.B. 2085

Overall, H.B. 2085 worked a reasonable balance between encouraging self-reporting and preserving regulatory authority; however, certain details of the immunity provisions of H.B. 2085 should be re-examined before their inclusion in a subsequent bill. One such provision, found in Section 2517(I), states in part:

> In order to receive immunity under this Section, a facility conducting an environmental audit under this Chapter must give notice to the appropriate regulatory agency of the fact it is planning to commence the audit . . . . The notice may provide notification of more than one scheduled environmental audit at a time.[142]

While notification may not appear to place an onerous burden on regulated entities, a notification requirement could hinder self-policing and self-reporting.

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139. H.B. No. 2085, 1995 Session, § 2513(C).
140. Bergeson and Sandifer, *supra* note 29.
141. *Id.*
142. H.B. No. 2085, 1995 Session, § 2517(I).

If an entity perceives a potential environmental problem, the entity may view notification as essentially putting up a "red flag" that it is not in compliance; moreover, once that flag is raised, nothing in the language of the bill would prohibit a regulatory agency from intervening with its own audit. The end result equals loss of immunity for the entity because enforcement officials "got there first." The fear of such an occurrence might lead an entity to believe it is in a better position if it does not say or do anything, and instead, simply remedies the perceived problem without the involvement of regulatory officials.

From an enforcement standpoint, the provision for notification also presents some problems. While H.B. 2085 expressly provided for the contents of a notice,[143] the method of notice was not described. Notably, the bill did not specify how much advance notice was required to be given. Since written notice was not mandated, presumably a regulated entity could call the appropriate agency the day before, or even the day of the audit, and still receive immunity. Also, the bill as written would allow for notification of more than one scheduled audit at a time.[144] How many audits were contemplated? Would one notice be sufficient for all of the audits scheduled in one year? Two years? For the life of the company? One can see how bad actors might abuse this lack of specificity. If H.B. 2085's notice requirement is kept in place, some designated time period should be identified within which all scheduled audits must be conducted. Alternatively, the legislature could provide for an express limit on the number of audits a notification could encompass.

Before inclusion in a future bill, the legislature should likewise reexamine the implications of Section 2517(D) of H.B. 2085 on voluntary disclosures for immunity purposes. That part reads:

> If the disclosure relates to the person or entity's failure to satisfy a reporting requirement under a specific permit condition or order, then such person or entity shall not . . . be immune from any liability associated with such failure to report. *However, any other violation of the environmental law associated with the failure to report, except for criminal violations, shall be subject to the voluntary disclosure provisions set forth in this Section.*[145]

Drafters of Texas' audit law, which contains a similar provision, acknowledge that it seems counterintuitive to protect an entity that voluntarily discloses violations which it is already required by law to report.[146] However, those legislators argue that such a provision is an incentive for companies, required to

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143. "The notice shall specify the facility or portion of the facility to be audited, the anticipated time the audit will begin, and the general scope of the audit." H.B. No. 2085, 1995 Session, § 2517(I).

144. H.B. No. 2085, 1995 Session, § 2517(I).

145. H.B. No. 2085, 1995 Session, § 2517(D) (emphasis added).

146. Senator J.E. "Buster" Brown et al., *Encouraging Compliance: The Texas Environmental, Health, and Safety Act*, 26 St. B. Tex. Envtl. L.J. 79 (1995).

report nearly every violation of a permit or regulation, to conduct an audit, report violations, and bring their facility into compliance.[147]

On the other hand, many enforcement authorities insist that regulated entities should be liable for any failure to comply with existing reporting requirements. As one FBI official commented, the FBI prides itself in seeking jail time and high fines for environmental offenders and "is not in the business of nurturing private companies into compliance."[148] While most enforcement and regulatory officials may hesitate to be quite so blunt, many enforcement agencies are accustomed to a command and control oriented approach to environmental compliance. Since audit privilege legislation cuts directly at the heart of traditional bureaucratic structures, enforcement officials cannot be expected to welcome audit laws with open arms.

IV. CONCLUSION: ROAD TO NOWHERE?

What is Louisiana to do? Though a federal statutory audit privilege would end the entire dilemma, supporters of audit bills in Congress have yet to break down the federal resistance to an evidentiary privilege for audit reports, and the prospects of doing so in the near future look dim. The Clinton administration stands firmly behind the proposition that "[p]rosecution is essential to protecting public health and the environment."[149] Since that is the case, Louisiana could simply back out of the "federal v. state showdown" and wait for further action on the federal level; however, retreat is not the best solution. Louisiana must take affirmative action.

Louisiana could choose to follow the lead of California, for example, by adopting a Department of Environmental Quality (DEQ) audit policy that expands on EPA's final policy statement. Like EPA's policy, California's policy (dubbed Cal/EPA) does not shield results of environmental audits from public disclosure, and California retains full enforcement authority to severely punish companies that intentionally violate environmental laws and regulations.[150] For reduction or elimination of penalties, Cal/EPA requires that companies meet the same nine conditions as EPA's policy; however, Cal/EPA goes further than EPA's policy by providing up to an additional fifteen percent in penalty reductions for investments in pollution prevention programs.[151] Further, Cal/EPA expands "the federal policy's guidance involving the right to refer cases

147. *Id.*

148. *Final EPA Policy May Cover Violations Not Currently Eligible*, 10 Toxics L. Rep. 670 (1995) (comment by Alexis Suggs, headquarters supervisor of the FBI's governmental fraud division).

149. *Environmental Auditing: Clinton Administration Hardens Opposition to Legislation Granting Privilege, Immunity*, 20 Chemical Reg. Rep. 441 (1996).

150. *State Unveils Draft Audit Policy That Expands on U.S. EPA Approach*, 10 Toxics L. Rep. 1091 (1996).

151. *Id.*

for criminal prosecution."[152] Most importantly, since EPA's policy gives little guidance as to what programs qualify for penalty reductions, Cal/EPA attempts to provide industry with greater certainty by offering a certification program. Businesses that follow the procedures specified in that program receive assurance that they will benefit from the provisions of the policy.[153] For any state that believes EPA's policy stops short of meaningful incentives, but is firmly opposed to a statutory audit privilege, Cal/EPA may provide a solution to the audit debate. In Louisiana, however, Cal/EPA will still fall short of appeasing Louisiana industry.

Considering the huge margin of passage that H.B. 2085 received in the Louisiana House of Representatives in the 1995 legislative session, audit privilege and immunity legislation will likely be Louisiana's solution to the audit debate. The ultimate question then becomes which statutory model will be most workable for encouraging self-policing and self-disclosure of environmental violations. Unfortunately, at this early date little empirical data has come from those states who have enacted audit privilege legislation, and the data that has been compiled is lacking in detail and substance.

A year after the passage of Oregon's privilege law, one lawyer opined that the law did not appear to encourage more companies to undertake audits, though she admitted the privilege has definitely expanded awareness of audit programs and has influenced how companies construct their audits.[154] Similar findings came out of Colorado one year after its audit privilege and immunity law was passed. In that year, an official from the Colorado State Department of Public Health and Environment reported that only six companies voluntarily notified the state of environmental violations.[155] Such a small number of disclosures, he said, makes it difficult to judge whether the privilege legislation is "spurring environmental self-assessment in Colorado."[156]

Findings in Texas are more promising. In August of 1996, Texas Natural Resources Conservation Commission's (TNRCC) director of litigation, John Riley, reported that 239 notices of intent to audit have been filed with TNRCC since Texas' audit law took effect on May 23, 1995.[157] Entities filing those notices include petroleum and chemical companies, universities, the U.S. Air Force, and even some municipalities.[158] Thirty-five of the entities have made disclosures, including record-keeping violations and exceeding state authorized permits.[159]

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152. *Id.*

153. *Id.*

154. Lynne Perry, *Benefits of New Oregon Audit Privilege Law Still Unclear after First Year, Lawyers Say*, 9 Toxics L. Rep. 796 (1994).

155. *Six Companies Disclose Violations Under State's New Audit Privilege Law*, 10 Toxics L. Rep. 410 (1995).

156. *Id.*

157. *Enforcement: New Federal Audit Policy Leads 76 Companies to Disclose Environmental Violations, EPA Says*, 27 Envtl. Rep. 784 (1996).

158. *Id.*

159. *Id.*

If Louisiana were to adopt an audit bill like H.B. 2085, the costs and benefits of such a law may not be manifest until years after implementation. In the interim, Louisiana will be faced with some significant implementation problems. Federal preemption problems present the biggest obstacle to effective implementation. As noted by drafters and supporters of Texas' audit law, unless and until EPA changes its position with respect to privilege legislation, the effect of a state audit bill will likely turn on the "location and nature of the action."[160] If the suit is one in federal court under federal law, any privilege established by Louisiana would not apply. If the suit is in state court under Louisiana law, Louisiana privilege legislation would control. These two scenarios and the applicable law are fairly obvious. Beyond that, confusion and uncertainty ensue. If suit is brought in state court under federal law such as the Clean Water Act, the privilege may or may not apply. If federal court is the forum, but the action occurs under a delegated program and state law is used, substantive state law should apply; however, the "federal courts' application of substantive state law may differ from district court to district court."[161] Conceivably, then, a privilege law in Louisiana might offer little meaningful protection for regulated entities, which ultimately translates into little incentives for those entities to self-police.

Beyond preemption problems, many states that have enacted audit privilege and immunity legislation are also now wrangling with EPA. While EPA has always been opposed to a statutory audit privilege, the immunity provisions of these state laws have caused EPA's most recent outcry.[162] In an April 5, 1996, memorandum to regional EPA officials, EPA set out a new policy for determining whether audit laws take away state enforcement authority needed for certain delegated programs, specifically Title V of the Clean Air Act.[163] According to EPA officials, EPA is concerned about how state laws and administrative policies are affecting minimum enforcement standards in federal statutes.[164] EPA maintains that it is not "crusading against these [audit privilege and immunity] laws."[165] However, since that memo, EPA has asked several states, including Texas, to change their existing audit laws or risk losing delegated authority to administer Clean Air Act programs.[166] In light of these recent developments, any state considering audit legislation must carefully structure its laws so as to comply with minimum enforcement provisions of federal environmental statutes.

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160. Brown et al., *supra* note 146, at 80.

161. *Id.* at 81.

162. *Environmental Audits: State Immunity, Privilege Laws Examined for Conflicts Affecting Delegated Programs*, Daily Environment Report (BNA) (Sept. 18, 1996).

163. *Id.*

164. *Id.*

165. *Id.*

166. *Enforcement: State Audit-Privilege Laws Must Uphold Minimum Federal Standards, EPA Official Says*, Daily Environment Report (BNA) (Sept. 13, 1996).

The road toward enactment of audit privilege and immunity legislation in Louisiana will not be a smooth one. Amidst pressure from regulated entities, regulatory and law enforcement officials, and EPA itself, legislators in the 1997 regular session will be faced with the unenviable task of drafting an audit bill that can never appease all sides involved. While the comments and recommendations of this author will not resolve the ongoing audit debate, this article may be helpful in reaching an acceptable equilibrium.

Anna Kathryne Campbell