ENVIRONMENTAL AUDITS AND ENFORCEMENT POLICY

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I. INTRODUCTION

The rise in the volume and complexity of environmental laws and regulations[1] has led to dramatic increases in the number and size of environmental enforcement cases. As a result, industrial enterprises subject to these standards are searching for ways to ensure compliance and discover and correct environmental problems without creating additional enforcement liability.[2] In this effort, many corporate managers are using environmental audits to make candid, comprehensive evaluations of their facilities, operations, management procedures, and other internal risk management and liability control functions.[3] While the U.S. Environmen-

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1. *See* LAWRENCE B. CAHILL & RAYMOND W. KANE, ENVIRONMENTAL AUDITS I-1 (6th ed. 1989) (explaining that "[m]anaging compliance in today's regulatory setting has become an almost overwhelming exercise, involving more and more regulations, and affecting more and more organizations").

2. Corporate officers are increasingly concerned, both personally and in their roles as corporate managers, about environmental liability, as evidenced by corporate public comments concerning Environmental Protection Agency's Environmental Auditing Policy Statement, 51 Fed. Reg. 25,004, 25,005 (1986). This Article discusses the need to provide industrial corporate entities clear and direct incentives to conduct honest and thorough internal self-investigation of environmental compliance and potential environmental hazards. While such "environmental auditing" should be encouraged for nonindustrial activities that involve questions of potential environmental hazards or liability, industrial enterprises will face the most frequent and serious decisions regarding the desirability of environmental auditing.

3. The environmental auditing-consulting business has grown significantly and continues to grow in response to the increasing awareness of environmental liabilities associated with commercial transactions. Commenting on audits performed in preparation for real estate transfers, financings, and other commercial change of control transactions, a Chicago attorney testified at a congressional hearing that "lenders he surveyed paid an average of $4,500 for environmental audits. 'Based upon those survey results, we projected that approximately $418 million will be spent on environmental audits for environmentally risky transactions through the 1990's.'" Martha M. Hamilton, *Passing the Buck on Toxic Cleanup*, WASH. POST, July 6, 1990, at C1 (quoting James P. O'Brien). Although comprehensive data

tal Protection Agency ("EPA") and the Department of Justice ("DOJ") generally have supported these efforts,[4] some current law and policies substantially deter companies from increasing their reliance on internal auditing. In fact, on several occasions EPA has used the results of such audits in enforcement proceedings against the corporations that performed them.[5] Unless current law and existing policies are modified to broaden confidentiality privileges, or unless new policies and other protective measures are introduced, powerful disincentives to self-examination will remain.

EPA describes environmental audits as "systematic, documented, periodic and objective review[s] by regulated entities of facility operations and practices related to meeting environmental requirements."[6] Although audits can take many forms, the two most common types are compliance audits and management audits. Compliance audits entail an investigation by internal or outside environmental specialists of a facility's compliance with applicable environmental laws and regulations and the identification of nonregulatory environmental liability risks.[7] Management audits include a review of the managerial risk-control systems and procedures used by the corporation or facility to detect and remedy possible violations and potentially problematic environmental conditions.[8]

apparently have not been compiled, both the quantity and scope of internal corporate-wide and facility-based audits seem to be substantial and increasing. CAHILL & KANE, *supra* note 1, at I-11.

4. *See infra* Part III.D–E.

5. *See infra* note 30.

6. EPA Environmental Auditing Policy Statement, 51 Fed. Reg. 25,004, 25,006 (1986).

7. Compliance audits focus on existing and potential environmental hazards, releases, and discharges for the purposes of (1) complying with environmental laws and regulations, (2) identifying nonregulatory risks, including potential liability associated with toxic tort actions, off-site disposal, or citizen suits, (3) evaluating the need to remediate existing environmental conditions and the methods used to do so, and (4) assessing the corporation's or facility's vulnerability to environmental enforcement proceedings.

8. Management audits evaluate a corporation's or facility's management systems or procedures for (1) identifying environmental noncompliance, (2) assessing environmental risks, (3) informing the corporation's decisionmakers of such risks, (4) designing and implementing measures to prevent environmental violations and mitigate nonregulatory environmental risk, and (5) remediating or otherwise responding to potential or actual environmental hazards. A comprehensive management audit will review the organization, structure, and placement of the environmental oversight functions; will evaluate the adequacy of existing statements of the company's environmental mission, goals, and objectives; and will consider the adequacy of current planning and control mechanisms to ensure that environmental criteria are adequately considered in evaluating both individual and organizational performance. It also entails developing operating procedures, training manuals,

Despite the potential benefits of early discovery of environmental problems, current law and regulatory policies discourage audits. Environmental audit reports may contain documentation—that might not otherwise exist—of a corporation's environmental violations, releases of hazardous substances, improper handling or disposal of hazardous wastes, historical contamination, and failure to comply with permit obligations. If audit reports containing this information can be obtained by prosecutors, civil enforcement authorities, and private litigants, they can be used as evidence in enforcement proceedings and private litigation that may result in substantial fines, penalties, liability for damages, or even imprisonment.[9] Further, audit results may prove actual or at least constructive prior knowledge of noncompliance, heightening the risk and magnitude of criminal liability under many environmental statutes.[10] Thus, corporations currently face the reality that environmental audits undertaken for the purpose of uncovering and correcting environmental, health, and safety problems actually may increase the risk of civil proceedings, private litigation, or criminal prosecution.[11]

These concerns have become particularly acute in light of increasingly frequent and successful enforcement actions and criminal prosecutions brought by EPA, DOJ, and state authorities against corporations and individual corporate officers for environmental offenses.[12] The trend toward stiffer sentencing for criminal offenses seems certain to continue, as the current U.S. Sentencing Commission Guidelines are particularly harsh on environmental

preventive maintenance programs, proactive planning, and total quality management enhancements to convert high-minded policy statements into a pervasive corporate culture of environmental stewardship.

9. *See infra* note 30.

10. *See infra* notes 30–32 and accompanying text.

11. *See Attorneys Debate Benefits of Confidentiality of Environmental Audits*, Daily Rep. for Execs. (BNA) No. 225, at A-10 (Nov. 21, 1991) ("Disclosing the results of an environmental audit during litigation is like handing opponents their case 'on a silver platter' . . . ."); Marianne Lavelle, *Guidelines Get Tepid Reception*, NAT'L L.J., Aug. 26, 1991, at 3 ("many believe these audits leave a paper trail that opens companies up to prosecution"). Public comments on the proposal of EPA's Auditing Policy Statement evidenced concern that the interim guidance did not sufficiently allay corporate fears that "EPA will use audit reports for environmental compliance 'witch hunts.'" EPA Environmental Auditing Policy Statement, 51 Fed. Reg. 25,004, 25,005 (1986).

12. The aggressive application of enforcement sanctions by EPA, DOJ, and the states has resulted in record numbers of enforcement actions, unprecedented civil penalties and criminal fines, and substantial jail terms for corporate officers. *See infra* note 15.

crimes.[13] Fear of this possibility and of other contingencies, such as substantial civil penalties and toxic tort and other private litigation, deter corporations from conducting candid and thorough environmental audits.

This Article focuses on the shortcomings of current privileges and policies affecting the potential disclosure and adverse use of environmental audits, and suggests possible solutions. It argues that administrative agencies and legislatures should adopt policies that realign incentives for corporate self-investigation of potential environmental noncompliance without undermining appropriate civil proceedings, criminal prosecutions, and private litigation. The thesis of this Article is that environmental policies that emphasize remediation and deterrence by encouraging corporate self-policing will provide greater overall social benefits—in terms of compliance and indentification of existing and potential environmental concerns—than will policies that facilitate strict enforcement at the expense of honest and thorough self-evaluation.[14]

13. U.S. SENTENCING COMM'N, GUIDELINES MANUAL, § 2Q1.1 (1990). Under the new U.S. Sentencing Commission Guidelines, environmental violations involving "knowing endangerment" will subject a defendant to imprisonment of 51 to 63 months even before aggravating factors are considered. *Id.*; *see also* W. John Moore, *Collaring Business*, 22 NAT'L J. 960 (1990); Judson W. Starr & Thomas J. Kelly, Jr., *Environmental Crimes and the Sentencing Guidelines: The Time Has Come . . . and It Is Hard Time*, 20 Envtl. L. Rep. (Envtl. L. Inst.) 10,096, 10,097 (Mar. 1990) ("[J]ail time will become the norm rather than the exception under the new rules . . . . In fact, most of those who [previously] have been convicted for environmental offenses, and have received only probation would now most likely spend time behind bars under the new sentencing rules."). The Water Quality Act of 1987, Pub. L. No. 100-4, § 312, 101 Stat. 7, 42, (codified as amended at 33 U.S.C. § 1319 (1988)), and the 1990 Clean Air Act Amendments, Pub. L. 101-549, § 701, 104 Stat. 2399, 2675 (codified as amended at 42 U.S.C.A. § 7413 (West Supp. 1992)), also have boosted criminal penalties sharply. For example, some first offenses involving "knowing endangerment" may subject a convicted officer to as much as 15 years imprisonment. Clean Water Act § 309(c)(3), 33 U.S.C. § 1319(c)(3) (1988); Clean Air Act § 113(c), 42 U.S.C.A. § 7413(c) (West Supp. 1992).

14. In no way is it suggested that audit programs should be used to discover and correct environmental violations and hazards in order to avert government and public knowledge. An audit should not be a mechanism of subterfuge or "cover up." Most corporations probably do not and would not employ audits in such a manner. Rather, the Article argues that performing an audit improves knowledge of environmental problems for all concerned and serves to foster the overall goals of protecting the environment and public health and safety.

A corollary to this assertion is that performing audits never should increase the risk of civil or criminal enforcement or liability for corporations or their officers; nor should auditing increase the level of sanctions to which corporations or their officers may be exposed when such audits are conducted in good faith. Any policy that creates such disincentives deters socially valuable self-evaluation, even when implemented under the guise of tougher environmental enforcement.

Part II of this Article examines the factors giving rise to the growing use and desirability of corporate internal environmental auditing despite current disincentives, as well as the potential costs associated with conducting such audits in the context of existing law and privileges. Part III identifies the weaknesses of existing law and policies as mechanisms for encouraging auditing. It focuses on common law privileges and administrative policies affecting a corporation's perception that a voluntary internal investigation will increase, rather than reduce, the risk of environmental liability. Part IV advocates four policies to correct the tendencies of existing law and policies to deter environmental auditing. First, it recommends that EPA adopt a limited-time program to cap potential penalties for violators who perform a detailed environmental audit, report specific deficiencies identified therein to EPA, and enter into an agreement to achieve full compliance and to undertake reasonable remediation. Second, it suggests that EPA institute a self-policing program for companies that have demonstrated an exemplary record of environmental risk management and compliance. Third, it advocates the adoption of a specific limited self-evaluation privilege for environmental audit reports. Finally, it suggests that EPA rewrite and reissue its Environmental Auditing Policy to provide stronger incentives for internal corporate environmental investigations. The policies this Article recommends are designed to encourage thorough and candid investigation of environmental compliance and of existing and potential environmental, health, and safety hazards. Such investigations may be the most efficacious means of identifying and correcting environmental problems of which the public, government, and industry are currently unaware.

II. THE COSTS AND BENEFITS OF ENVIRONMENTAL AUDITING

The threat of environmental liability, particularly the threat of imprisonment for corporate officers and directors,[15] has prompted

15. In 1990, EPA brought a record 375 civil and 32 criminal enforcement actions. *A Newly Harsh EPA Is Punishing Polluters*, INVESTOR'S DAILY, Aug. 5, 1991, at 1. For those actions in which EPA was successful, aggregate criminal and civil fines and penalties of $61.3 million and aggregate prison time of approximately 62 years were imposed. *Id.* These numbers increased in 1991, during which the EPA referred 393 civil and 81 criminal cases to DOJ. Terrell E. Hunt, *The Increasing Risk and Liability from Environmental Releases:*

both corporate managers and environmental lawyers to give greater consideration to environmental auditing as a prophylactic and liability-management measure.[16] Numerous articles, conferences, and addresses have discussed environmental auditing generally,[17] the best methods of performing such audits from the corporate perspective, and the potential problems associated with audits.[18] In these various contexts and in practice, environmental lawyers have been almost unanimous in encouraging their corporate clients to perform environmental audits.[19] Despite their advocacy of environmental audits as a valuable liability-prevention tool, lawyers recommend extreme discretion and caution in the use of environmental audits. Particularly important are procedures designed to ensure protection of audit reports pursuant to the attorney-client and self-critical analysis privileges and the attorney

What You Need to Know to Protect Yourself and Your Company, *in* INDUSTRIAL SPILLS & RELEASES: PREVENTION & PLANNING I-9 (The Government Institutes, Inc. ed., 1992). In comparison, as recently as 1984 only 277 enforcement actions were undertaken, resulting in just six months' prison time and approximately $7.5 million in fines and penalties. *A Newly Harsh EPA Is Punishing Polluters*, *supra*, at 1.

"Managers can be held criminally liable as individuals for environmental violations even where they did not personally participate in or direct the actions that [gave] rise to criminal liability." *Companies with Environmental Audit Program Must Have Plan to Fix Problems, Lawyer Says*, 21 Env't Rep. (BNA) No. 38, at 1684 (Jan. 18, 1991) [hereinafter *Companies Must Have Plan*]; *see also* United States v. International Minerals Corp., 402 U.S. 558 (1971) (holding corporate officers liable for corporation's acts even when those acts were outside of officer's knowledge).

16. *DOJ Plans to Issue Policy Statement on Use of Corporate Environmental Audits*, 22 Env't Rep. (BNA) 484 (June 21, 1991) [hereinafter *DOJ Plans to Issue*].

17. *See, e.g.*, H. Thomas Wells & Cynthia G. Lamar, *Discovery of Environmental and Other Non-Financial Audits: Is There a Self-Evaluative Privilege?* 10 E. MIN. L. INST. 1-1 (1990); Symposium, *Corporate Governance and the Environment: Beyond the Transactional Audit*, 12 CARDOZO L. REV. 1215 (1990) [hereinafter Symposium, *Corporate Governance*].

18. *See, e.g.*, CAHILL & KANE, *supra* note 1, at III-3 to III-9; Courtney M. Price & Allen J. Danzig, *Environmental Auditing: Developing a "Preventive Medicine" Approach to Environmental Compliance*, 19 LOY. L.A. L. REV. 1189 (1986); Philip 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); Symposium, *Corporate Governance*, *supra* note 17.

19. *See, e.g.*, CAHILL & KANE, *supra* note 1. Attorneys are especially likely to recommend auditing in commercial transactions involving real estate, industrial and, to a lesser extent, commercial properties. *See, e.g.*, OWEN T. SMITH, ENVIRONMENTAL LENDER LIABILITY 73 (1991) (recommending that lenders audit properties to be financed before advancing funds); Douglas A. Donnell, *Environmental Liabilities Arising from Ownership of Oil and Gas Properties*, 11 E. MIN. L. INST. 20-1, 20-15 to 20-16 (1990) (recommending audits of oil-related and gas-related properties); *cf.* James F. Warchall & Maureen M. Crough, *Environmental Risk-Reduction Considerations for Trustees*, TR. & EST., Apr. 1991, at 24, 34, 37 (addressing need for prospective trustees to perform environmental audits before accepting role of trustee).

work product doctrine.[20] Environmental audits benefit not only the corporations performing them,[21] but the general public as well. Audits can help a company comply with federal, state, and local laws and regulations, including disclosure and reporting requirements. They provide industry with an early warning system for existing and potential environmental violations, by enabling corporate managers to identify and remediate incipient problems, thus minimizing the impacts on the environment and reducing the likelihood that the government will initiate civil or criminal enforcement actions.[22] Similarly, they can be the source of valuable information—beyond compliance data—concerning nonregulatory environmental, health, and safety problems that could provide the basis for private civil litigation. Environmental audits also help corporations redesign oversight and management systems to manage environmental risk more effectively and avoid future violations.[23]

Performing audits can provide a means for lower-level and technical employees to communicate environment-related con-

20. *See, e.g.*, Edmund B. Frost & Stephanie Siegel, *Environmental Audits: How to Protect Them from Disclosure*, 5 Toxics L. Rep. (BNA) 1211, 1211 (Feb. 27, 1991); Wells & Lamar, *supra* note 17, at 1-5 to 1-24.

21. EPA commissioned a study that found that companies forced to develop audit programs as a condition of settling enforcement cases had benefited from environmental auditing, in both expected and unexpected ways. Policy, Planning, and Evaluation, Inc., Study of the Efficacy of Environmental Auditing Provisions in Enforcement Settlements (June 11, 1987) (unpublished final report), *discussed in* Cheryl E. Wasserman, *Environmental Auditing Provisions in Consent Decrees and Orders*, ENVTL. L. INST., LAW OF ENVIRONMENTAL PROTECTION § 8.03[4][b][vi], at 8-190, (Sheldon M. Novick et al. eds., 1990). The study found that auditing's environmental benefits include "[d]evelopment of clear environmental policies, . . . [e]nhanced organization and staffing of . . . environmental management operations, . . . [a]ugmented training," improvements in "corporate planning, . . . [and] compliance performance," and fostering a corporate culture of compliance and prudent natural resource stewardship. Wasserman, *supra*, at 8-190. In addition, the study found that environmental auditing provided important commercial benefits to companies that had performed them, including "enhanced access to capital," increased ability to transfer property quickly due to reduced uncertainty about potential environmental liability, "public image" gains, and a lower risk of enforcement or third party lawsuits involving environmental harms. *Id.* at 8-190 to 8-191 (emphasis omitted).

22. When corporations discover, report, and correct their violations promptly, DOJ encourages prosecutors to exercise prosecutorial discretion to minimize the risk of a severe criminal enforcement action. *See* U.S. DEP'T OF JUSTICE, FACTORS IN DECISIONS ON CRIMINAL PROSECUTIONS FOR ENVIRONMENTAL VIOLATIONS IN THE CONTEXT OF SIGNIFICANT VOLUNTARY COMPLIANCE OR DISCLOSURE EFFORTS BY VIOLATOR (June 3, 1991) [hereinafter DOJ GUIDANCE] (on file with the *Harvard Environmental Law Review*); *see infra* Part III.E.

23. CAHILL & KANE, *supra* note 1, at I-15 (indicating that environmental audits can "verify that these environmental management systems do in fact exist and are in use") (emphasis omitted).

cerns to top management, and can legitimate those concerns.[24] Because these employees are usually much more familiar than their managers with the company's day-to-day operations, their input is essential to early detection of environmental problems. Environmental audits also can help assure top executives of the integrity of internal management and control systems, strategic planning mechanisms, monitoring processes, and training programs. Moreover, by demonstrating and communicating an increased level of commitment to environmental protection, active auditing can enhance a corporation's public image and thus improve relations with regulating agencies, the public, and its own employees and customers. Finally, effective auditing may improve a firm's standing in the financial community and on Wall Street.[25]

Despite the aforementioned benefits of auditing, the old adage of "what we don't know won't hurt us" retains a dwindling but real vitality in some industry decisionmaking circles.[26] In light of the possibility of adverse use of such audits, and the potentially significant fines, penalties, civil damages, and criminal sanctions that may result from such use, this phenomenon is not without justification.

A corporation's "know nothing" attitude can be reinforced by the sometimes significant costs of auditing. A thorough investigation of a corporation's facilities involves a substantial expenditure of corporate resources that are limited by competing profit-maximization goals of the corporation, especially when economic ills are placing ever-increasing limitations on corporate resources.[27]

In addition to the basic expense of paying a consultant, the audit process necessarily disrupts a facility's operations, thus reducing revenues and profits.[28] First, audits have the potential to

24. *Id.* at IX-18 (suggesting that interviews with facility staff can help "obtain the best evidence available relative to the compliance status of the facility").

25. Several of these benefits are suggested in James R. Moore & David Dabroski, *EPA Environmental Auditing Policy and Federal Criminal Enforcement*, *in* ALI-ABA COURSE OF STUDY: CRIMINAL ENFORCEMENT OF ENVIRONMENTAL LAWS 207, 212–14 (1991).

26. *See* CAHILL & KANE, *supra* note 1, at I-9 (arguing that "complacency and reduced attention to compliance matters" is very dangerous but that "[i]n practice . . . corporate outlays for environmental management . . . generally have been reduced" since the 1980s due to a more competitive economic climate).

27. CAHILL & KANE, *supra* note 1, at I-16; *see also supra* note 3 (discussing large amount of money being spent on environmental auditing).

28. CAHILL & KANE, *supra* note 1, at I-16 (discussing disadvantage of "[t]emporary disruption of plant operations caused by auditing").

interfere with or delay projects that, for many reasons, a corporation might want to proceed unimpaired. Second, environmental audits can provoke internal "turf wars" between environmental monitors and facility employees who understandably might bristle at being overseen by outsiders.[29] Finally, audits may suggest the need for specific corrective actions that might themselves be disruptive of normal operations. Besides these more tangible costs, auditing can reveal violations or weak management procedures that may embarrass individual managers or the corporation as a whole. These potential costs may discourage corporations that are considering implementing or expanding environmental auditing.

The performance of an audit also may indirectly harm the corporation by reducing its ability to generate revenues and maximize profits for the benefit of its shareholders. For example, an audit can increase the likelihood that competitors, customers, or the general public will become aware of violations and other environmental problems, thus potentially damaging the corporation's reputation. Further, the performance of audits may markedly increase the risk that federal, state, and local authorities will become aware of existing or potential violations or other potential environmental, health, and safety risks, and therefore will tighten regulatory scrutiny of the corporation, resulting in increased monitoring and compliance costs. These costs may be exacerbated if, for whatever reason, the corporation does not take remedial steps immediately.

However, of far greater concern to corporate managers considering whether to audit is the possibility that audits may *increase*, rather than decrease or prevent, the risk of corporate liability for environmental violations or toxic torts. In order to be useful to a company and to indicate appropriate corrective action, audit reports must include comprehensive information concerning the company's existing or potential environmental liabilities. Such a report, however, becomes a tremendous resource for prosecutors, regulators,[30] and toxic tort plaintiffs.

29. *Id.* at IX-19 (explaining that employees may find audit process threatening).

30. Although EPA does not typically use internal audit documents in enforcement proceedings, it employs them often enough to constitute a real threat from the perspective of a corporate manager. Prosecutors and civil enforcement authorities may find audit reports useful as investigative tools to guide them to a facility's potential violations. Audit reports also may be used as corroborative evidence of violations because they describe particular discharges, releases, or areas of contamination. Further, in the criminal context, prosecu-

The results of an audit report might be used to establish a corporation's, or its officers or managers', actual or constructive knowledge of existing violations. Such information may subject the company and its officers to the risk of heightened civil or criminal enforcement sanctions. Despite the fact that civil liability under environmental statutes is generally strict and that environmental crimes may be established without proof of specific intent or actual knowledge,[31] many environmental statutes increase the sanctions with heightened levels of scienter.[32]

The fear of such possibilities creates a huge counterweight to the benefits of audits when a corporate manager is deciding whether to authorize an internal environmental evaluation of a facility or of the corporation as a whole. Thus, especially with respect to environmental crimes, the corporation faces a dilemma: it must either remain consciously ignorant and risk criminal penalties for uncorrected violations, or it must actively attempt to discover and remedy violations to avoid liability and, in the process, risk perhaps even more harsh and more probable criminal sanctions.

Considerations of social utility strongly favor active, rigorous, internal environmental auditing to foster remediation of existing problems, to prevent future environmental problems, and to protect personal health and safety.[33] If the form of punishment discourages compliance-related efforts, the enforcement policy should be re-examined. As noted by Judson W. Starr, former head of DOJ's Environmental Crimes Unit, the ultimate goal of environmental enforcement is compliance, not the imposition of penalties.[34] Thus, maximizing the incentives for, and advantages of, audits should be a fundamental goal of environmental enforcement policy. Analyzing current laws and policies influencing the performance of environmental audits is the first step in determining whether this fundamental goal is being attained.

tors may use audit reports to establish actual or constructive knowledge of violations that are reported therein. DOJ has used audit results as the primary basis for an enforcement action against the environmental violator. *See, e.g.*, United States v. Dexter Corp., 132 F.R.D. 8 (D. Conn. 1990); United States v. Chevron U.S.A. Inc., No. 88-6881, 1989 U.S. Dist. LEXIS 12267 (E.D. Pa. Oct. 16, 1989). In addition, "[t]he experience of many in the regulated community is that audit documents are routinely seized by EPA criminal investigators . . . ." James R. Moore, *Protection Will Increase Compliance*, ENVTL. F., Jan./Feb. 1992, at 39, 40.

31. The Comprehensive Environmental Response, Compensation, and Liability Act § 107, 42 U.S.C. § 9607 (1988), is perhaps the most widely noted strict liability environmental law. Several environmental protection statutes flatly prohibit certain discharges or emissions and, without regard to fault, impose some penalty. *See, e.g.*, Refuse Act §§ 13, 16, 33 U.S.C. §§ 407, 411 (1988).

32. *See, e.g.*, Clean Water Act § 301, 33 U.S.C. § 1311 (1988); Clean Air Act § 113, 42 U.S.C.A. § 7413 (West Supp. 1992).

33. *See supra* notes 21–25 and accompanying text.

III. Current Law and Policies Affecting the Use of Environmental Audits

Current law and the existing policies and practices of legislatures, administrative agencies, and courts affect the incentives for conducting internal corporate environmental audits.[35] To the extent that environmental policies require or permit disclosures of unfavorable audit results to government authorities or private litigants for adverse use, those policies negate the audit's benefits to industry and are a disincentive to environmental auditing. The most significant existing audit-related policies are those affecting the confidentiality and use of audit results, specifically the attorney-client and "critical self-analysis" privileges, the attorney work product doctrine,[36] EPA's policy statement on auditing,[37] and the Department of Justice's guidance to U.S. Attorneys on prosecutorial discretion in the context of an environmental offender's voluntary compliance and disclosure efforts.[38]

This part of the Article discusses these important laws, policies, and practices and their inability to shield companies from the discovery and adverse use of audit documents. It concludes that current law and policies provide some protection for audit documents, but cannot adequately assure industry that self-investigation will not do it more harm than good. Thus, the zeal for en-

34. *Concerning the Creation of a Self-Evaluation Privilege Under the Rules of Evidence: Hearings on H.B. 204 Before the Colorado House State Affairs Committee*, 57th Gen. Assembly, 2d Sess. (Feb. 15, 1990) (statement of Judson W. Starr) [hereinafter *Colorado Hearings*] (on file with the *Harvard Environmental Law Review*); *see also id.* (statement of Ron Smith, Colorado State Director of the National Federation of Independent Business) (on file with the *Harvard Environmental Law Review*).

35. For example, statutes establishing liability for certain environmental violations or conditions and, particularly, the potential for enforcement proceedings or civil litigation associated with them, increase corporations' desire to take prospective actions in order to avoid or minimize such liability.

36. *See* CAHILL & KANE, *supra* note 1, at III-3 to III-9.

37. EPA Environmental Auditing Policy Statement, 51 Fed. Reg. 25,004 (1986).

38. DOJ GUIDANCE, *supra* note 22.

forcement that countervails these privileges is self-defeating. It deters the arguably more effective self-motivated environmental, health, and safety protection that could be achieved through self-policing.

A. Attorney-Client Privilege

The attorney-client privilege protects certain communications between attorneys and their clients from discovery, even though the communications may be relevant to a pending action.[39] In a leading case construing the attorney-client privilege, the Supreme Court observed that "[t]he attorney-client privilege is the oldest of the privileges for confidential communications known to the common law. Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice."[40] These broader public interests are advanced through effective legal representation, which depends upon a client's full communication of relevant facts; the risk of revelation and adverse use would discourage such communications and hamper competent advocacy.[41] Similarly, the privilege protects effective consultation between clients and their attorneys, facilitating compliance with laws and regulations.

1. The Required Elements

The following elements are required in order to establish the attorney-client privilege:

> (1) [T]he asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate, and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.[42]

39. *See* FED. R. CIV. P. 26(b)(3) (permitting discovery of all relevant evidence except that covered by privilege).

40. Upjohn Co. v. United States, 449 U.S. 383, 389 (1981) (citations omitted).

41. *Id.*

Unless these four requirements are satisfied, communications will be vulnerable to discovery.

With respect to internal corporate environmental auditing, the privilege first requires that the audit take place within the purview of an attorney-client relationship, pursuant to which the corporation seeks legal advice as the attorney's client. Thus, a corporation must perform an audit under the direction and control of in-house corporate counsel or outside legal counsel hired by the corporation, in order to satisfy the first element of the privilege.[43]

The second element requires that communications be made to an attorney or an attorney's agent[44] in a context in which the attorney is "*acting as a lawyer.*"[45] To satisfy this second requirement, the information gathered by the attorney or the consultant working for the attorney must be useful for and used for the purpose of providing legal advice.[46] Information-gathering for management, financial, or other business purposes will not be protected under the attorney-client privilege.[47]

As suggested above, the attorney is entitled to seek outside expertise within the scope of a confidential relationship for purposes of providing legal advice. Communications to such experts generally are protected from disclosure under the privilege as well.[48] This expansion of the privilege to include consultants has

42. United States v. United Shoe Mach. Corp., 89 F. Supp. 357, 358–59 (D. Mass. 1950). *United Shoe Machinery* remains the seminal statement of the attorney-client privilege's requirements.

43. Frost & Siegel, *supra* note 20, at 1212 (explaining that satisfaction of attorney-client privilege's first element requires "use of an attorney to provide legal advice").

44. *See infra* note 48 and accompanying text.

45. *See* United States v. Chevron U.S.A., Inc., 1989 U.S. Dist. LEXIS 12267, at *15 (E.D. Pa. Oct. 16, 1989) (emphasis added) (holding mere presence of in-house counsel insufficient to establish attorney-client privilege for environmental audit report when attorney did not act in "capacity of an attorney rather than as, for example, a business adviser").

46. The "communication's primary purpose must be to gain or provide legal assistance." *Id.* at *18; *see also* United States v. Davis, 636 F.2d 1028, 1044 (5th Cir. 1981), *cert. denied*, 454 U.S. 862 (1982); Coleman v. American Broadcasting Cos., 106 F.R.D. 201 (D.D.C. 1985); North Am. Mortgage Investors v. First Wis. Nat'l Bank, 69 F.R.D. 9 (E.D. Wis. 1975).

47. Philadelphia v. Westinghouse Elec. Corp., 210 F. Supp. 483 (E.D. Pa. 1962).

48. CAHILL & KANE, *supra* note 1, at III-5 ("[I]n practice, communications to non-lawyers, who are assisting counsel in providing legal advice may also be protected by the privilege.")

been applied for tax experts[49] and accountants[50] acting as attorneys' agents. This doctrine seemingly includes technical consultants like environmental auditors who have been retained by and report to the attorney in question.[51]

It is important to note that even when the information is provided for the purpose of obtaining legal advice and all other elements of the privilege are met, the attorney-client privilege does not shield the underlying facts of the communication. Indeed, a client "cannot be compelled to answer the question, 'What did you say or write to your attorney?' but may not refuse to disclose any relevant fact within his knowledge merely because he incorporated a statement of such fact into his communication to his attorney."[52]

The third element of the attorney-client privilege requires the communication to be related by the client, outside of the presence of third parties not included in the attorney-client relationship. Essentially, the communication must be made and held in strict confidence.

Until recently, controversy surrounded the question of whose communications would be protected if the client were a corporation.[53] However, under current law, when a corporation's "employees themselves [are] sufficiently aware that they [are] being

49. *See* United States v. (Under Seal), 748 F.2d 871, 874 (4th Cir. 1984).

50. *See* United States v. Cote, 456 F.2d 142, 142 (8th Cir. 1972).

51. *See* CAHILL & KANE, *supra* note 1, at III-5.

52. Upjohn Co. v. United States, 449 U.S. 383, 396 (1981).

53. *Id.* at 386 ("choosing between two 'tests' which have gained adherents in the courts of appeals"). Several courts had held that the privilege was applicable only to communications from members of a high-ranking "control group" within a corporation. *See, e.g.*, General Elec. Co. v. Kirkpatrick, 312 F.2d 742 (3d Cir. 1962), *cert. denied*, 372 U.S. 943 (1963); *Westinghouse Elec. Corp.*, 210 F.Supp. at 485. Under this reasoning, the attorney-client privilege covered only communications by employees who exercised management-level control over the issues in question. As a practical matter, however, such management personnel frequently do not have as full an understanding of the facts that are relevant to evaluating compliance with laws, determining necessary corrective action, or preparing a case, as do other employees excluded by this test. This is especially true for environmental audits, because the relevant information is often technical in nature and is best presented by those possessing the appropriate technical expertise and direct experience with the particular facility. For example, in environmental audits, technical engineering details about waste water composition and flow, solid waste characterization, hazards associated with chemical raw materials and products, the operational, control, and monitoring requirements of permits, and the type, quantity, or impact of airborne toxins and other toxins, in most cases, will be beyond the understanding of corporate upper-level management. In any event, the Supreme Court rejected the "control group test" in *Upjohn Co. v. United States*, 449 U.S. 383, 397 (1981).

questioned in order that the corporation [can] obtain legal advice"[54] and "the communications [are] considered 'highly confidential' when made,"[55] then communications "concern[ing] matters within the scope of the employees' corporate duties"[56] are eligible for protection under the attorney-client privilege, regardless of whether the employees giving information to the attorney performed any "management" role.[57]

The third element of the attorney-client privilege also requires that the communication take place "primarily" for the purpose of obtaining legal advice or services. This standard creates some confusion, because frequently it is difficult to separate legal from nonlegal matters. This issue is particularly important in the context of environmental auditing, because audits, especially routine audits, have business, management, or technical purposes apart from addressing potential legal concerns.[58] Advice given principally for business, management, or technical purposes—purposes that could well be the motive for initiating an environmental audit—does not meet this test.[59]

Furthermore, the communication cannot be made for the purpose of committing a crime or tort.[60] The audit must be conducted in good faith with a view toward addressing existing and potential regulatory and liability concerns. It cannot be used as a backward-looking mechanism to channel potentially damaging or incriminating evidence, including previously known facts, to the attorney

54. *Id.* at 394.

55. *Id.* at 395.

56. *Id.* at 394; *see also* Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 609 (8th Cir. 1977) (en banc); Leer v. Chicago, M., St. P. & P. Ry., 308 N.W.2d 305 (Minn. 1981), *cert. denied*, 455 U.S. 939 (1982). Communications by employees regarding an environmental release can receive protection only if that release involved processes or materials within their authority or duties.

57. *Upjohn*, 449 U.S. at 397.

58. *See infra* notes 88–91 and accompanying text.

59. *See* Philadelphia v. Westinghouse Elec. Corp., 205 F. Supp. 830, 831 (E.D. Pa. 1962); *see also* United States v. Chevron U.S.A., Inc., 1989 U.S. Dist. LEXIS 12267, at *17–18 (E.D. Pa. Oct. 16, 1989) (finding that environmental compliance audit by in-house counsel was undertaken primarily for business purpose rather than for legal advice, defeating corporation's claim of attorney-client privilege); *Investigation Statements Not Privileged, May Be Discovered,* Aerojet *Court Says*, 5 Toxics L. Rep. (BNA) 1200, 1200 (Feb. 27, 1991) (discussing Aerojet-General Corp. v. Argonaut Ins. Co., No. 262425 (Cal. Jan. 3, 1991), which held that corporate investigation to evaluate soil contamination and cleanup strategies had dominant purpose of remediation rather than legal advice, defeating corporation's claim of attorney-client privilege).

60. United States v. United Shoe Mach. Corp., 89 F. Supp. 357, 358–59 (D. Mass. 1950).

and thereby prevent disclosure. This element is significant in the context of environmental audits because most industrial facilities have experienced events that could result in environmental liability. If, in hindsight, courts determine that the audit was conducted primarily for the purpose of raising a shield against the disclosure of these occurrences by telling the lawyer about them, assuming they were not properly addressed initially, they are likely to reject assertions of the attorney-client privilege.[61] In addition, when violations or environmental impacts persist, courts may require disclosure of audit reports as a means of determining the extent of enforcement culpability or the scope of tort liability.

Most corporations are thus subject to a "catch-22" situation. Because of the nature of corporate operations, changing regulatory requirements, and the evolving practices of managing environmental risk, a perfect compliance record is rare. Thus, audits that uncover hazards and benefit society may result in increased liability exposure for a corporation. If, on the other hand, audits were accorded categorical protection from discovery under the attorney-client privilege, a few unscrupulous operators might use the audit as a device to "plan" noncompliance and thereby avoid the expense of prudent environmental practices. In the authors' view, the societal cost of absorbing that minimal risk is overwhelmed by the benefits gained by protecting the audit report from disclosure.

The final element of the attorney-client privilege requires that the party asserting the privilege has not waived its protections, consciously or inadvertently. Any disclosure of a confidential communication to a third party outside of the attorney-client relationship could constitute a waiver.[62] For example, unintentional waivers may be effected by disseminating privileged information to employees who, by virtue or their responsibilities, have no demonstrable need to know the information,[63] or by making arguments or representations that use or depend upon the otherwise privileged communication in a legal proceeding.[64]

61. *Cf.* Union Carbide v. Dow Chem. Corp., 619 F. Supp. 1036, 1046 (D. Del. 1985) (recognizing crime-tort exception to attorney-client privilege in patent dispute); *In re* International Sys. & Controls Corp. Sec. Litig., 693 F.2d 1235, 1242 (5th Cir. 1982) (discussing courts' recognition of crime-fraud exception to the work product doctrine).

62. *See In re* Subpoenas Duces Tecum, 738 F.2d 1367, 1369 (D.C. Cir. 1984).

63. *See* CAHILL & KANE, *supra* note 1, at III-5 (indicating that indiscriminate circulation of audit reports within corporation may constitute privilege-voiding waiver).

A successful assertion of attorney-client privilege will limit discovery and adverse use of audit reports. However, failing to meet any condition of the privilege will create substantial uncertainty about a document's protection, because the judiciary is reluctant to withhold relevant information.[65] Even if the privilege's elements are substantially met, audit results still might be subject to discovery and adverse use by the government or toxic tort plaintiffs.

2. *Application to Management and Compliance Audits*

Because the two types of audits have fundamentally different functions, the attorney-client privilege will apply differently to management audits than to compliance audits.[66] In general, management audits are conducted predominantly for the purposes of enhancing managerial environmental risk contacts, improving business performance, or setting corporate policy, and not for obtaining legal advice.[67] Moreover, even if lawyers were to conduct management audits, when doing so, they are not predominantly "acting as a lawyer."[68] Accordingly, these management audits generally are not entitled to the protections of the attorney-client privilege.

Although as yet no court has addressed this issue, it is more likely that the attorney-client privilege could be invoked to protect corporations against discovery of compliance audits. Compliance audit reports may compile and "confess" a corporation's environmental violations and its knowledge of them. Therefore, unlike management reports, it is more likely that such compliance audit

64. *See* Anderson v. Nixon, 444 F. Supp. 1195, 1200 (D.D.C. 1978).

65. *See, e.g.*, United States v. Nixon, 418 U.S. 683, 710 (1974) ("[E]xceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth.").

66. For an explanation of the differences between management audits and compliance audits, see *supra* notes 6–8 and accompanying text.

67. Examples to the contrary would include audits to determine whether legally mandated management systems were in place, or audits to determine whether existing environmental management satisfies relevant duties of due care.

68. *Cf.* United States v. Chevron U.S.A., Inc., 1989 U.S. Dist. LEXIS 12267, at *17–18 (E.D. Pa. Oct. 16, 1989).

reports are being prepared primarily for the purpose of obtaining legal advice. Specific legal violations and their factual bases are addressed in compliance audits, strengthening the argument that the information contained in audit reports was gathered primarily for purposes of obtaining legal, rather than nonprivileged policy, business, or management advice.[69]

Nonetheless, at least in some circumstances, corporations will be unable to rely on the attorney-client privilege to protect even a compliance audit's potentially damaging results from disclosure. In particular, claims of attorney-client privilege may be rejected when an environmental audit is part of a routine program of investigation or when there are other indications that the audit is not primarily for legal purposes,[70] as well as when disclosures to third parties effectuate a waiver.[71]

Given the courts' reluctance to withhold information that might be relevant to a particular case,[72] the attorney-client privilege's failure to cover these compliance audit results represents a significant concern. Thus, any corporation considering an audit understandably will be wary; only reluctantly will it perform an honest and thorough investigation and assessment. In short, the gaps in attorney-client privilege protection for environmental audit reports discourage companies from undertaking or expanding socially desirable audit programs.[73]

69. However, compliance audits can contain information that the courts consider management or business advice, despite the assistance of an attorney, thus preventing application of the privilege. *See Chevron*, 1989 U.S. Dist. LEXIS 12267, at *17–18.

70. *See* Ohio v. CECOS Int'l, Inc., No. 85-CR-5240C through 85-CR-5263C (Ohio C.P. April 23, 1986) (holding that management audit report on hazardous waste contamination was not protected by attorney-client privilege, even though performed under direction of general counsel, because audit was not for primary purpose of seeking legal advice) (on file with the *Harvard Environmental Law Review*); CAHILL & KANE, *supra* note 1, at III-4 (explaining that audits for predominantly business, technical, or other nonlegal purposes will not receive the protection of the attorney-client privilege).

71. *See* T.H. TRUITT ET AL., ENVIRONMENTAL AUDITING HANDBOOK 53–58 (2d ed. 1983); Frost & Siegel, *supra* note 20, at 1213 (explaining that "[e]ven an inadvertent disclosure may constitute a waiver").

72. *See, e.g.*, United States v. Nixon, 418 U.S. 683, 710 (1974); *see also* Phillip R. Sellinger, *Attorney-Client, Work Product, and Joint Defense Privileges*, *in* ABA NATIONAL INSTITUTE ON ENVIRONMENTAL COMPLIANCE: ITS CRIMINAL AND CIVIL IMPLICATIONS TO CORPORATIONS, FINANCIAL INSTITUTIONS AND THEIR DIRECTORS AND OFFICERS 711, 715 (1987).

73. The inadequacies of the attorney-client privilege, the work product doctrine, and for that matter, the self-evaluation privilege, are all attributable to an unbalanced view of how environmental compliance and protection are best achieved. Granting enforcement authorities and private plaintiffs access to audit reports under exceptions to the traditional privileges evidences a societal bias in favor of litigation and government enforcement to achieve environmental, health, and safety protection. This Article argues that the bias i unjustified in light of the benefits of self-policing.

B. Attorney Work Product Doctrine

The attorney work product doctrine protects a broader variety of information and materials than does the attorney-client privilege.[74] However, the attorney work product doctrine is constrained, because the court has discretion to disregard the privilege when application of the privilege would create undue hardship[75] and because the privilege applies only to materials prepared in anticipation of litigation.[76]

The traditional rule of *Hickman v. Taylor* was adopted as Rule 26(b)(3) of the contemporary Federal Rules of Civil Procedure.[77] The Rule explains that

> a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means.[78]

74. *See* Sellinger, *supra* note 72, at 727. The work product doctrine was first recog nized in 1947 in Hickman v. Taylor, 329 U.S. 495 (1946). The Supreme Court held certai materials to be exempt from discovery because they represented the "work product of th lawyer." *Id.* at 511. The materials at issue in the case were notes concerning witnes statements taken by an attorney and his investigator "with an eye toward anticipate litigation." *Id.* at 497–98. Recognizing that a contrary rule would lead to "sharp" practice and a tendency to leave all but the most favorable information unwritten, the Court hel that "the general policy against invading the privacy of an attorney's course of preparatio is so well recognized and so essential to an orderly working of our system of legal proce dure," that absent a showing of great need and inability to obtain substantially equivale information from other sources, such materials will be privileged. *Id.* at 512. The Cou reasoned that the adversarial system requires a "zone of privacy" in which attorneys ma consider theories of argument and assess the strengths and weaknesses of their own case *Id.* at 511. The Court defined "work product" to include "interviews, statements, mem randa, correspondence, briefs, mental impressions, personal beliefs, and countless oth tangible and intangible" things. *Id.*

75. *See* Hickman v. Taylor, 329 U.S. 495, 511–12 (1946).

76. *See infra* notes 81–91 and accompanying text.

77. FED. R. CIV. P. 26(b)(3).

78. *Id.*

Nonetheless, even upon such a showing, "the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative" when such materials are requested through discovery.[79]

To protect audit results under the work product doctrine, (1) the audit must have been prepared in anticipation of litigation, (2) the privilege must not have been waived by a breach of confidentiality, and (3) the materials in question must not have been developed to further an unlawful end.[80] These elements, as well as the doctrine's exception and resulting disincentives, are discussed in detail below.

1. Anticipation of Litigation

Generally, if a corporation faces or expects to face a lawsuit or prosecution, it may commission a study of the underlying facts and evaluate potential claims and liability without the risk of adverse use of such assessments at trial.[81] In other words, work product prepared "in anticipation of litigation" will be protected from disclosure.

For work product to be considered prepared "in anticipation of litigation," an enforcement proceeding, prosecution, or lawsuit must be "fairly foreseeable"[82] and "imminent,"[83] although the doctrine does not require an action to have been commenced when the corporation begins its assessment.[84] Reports prepared for mere "litigation avoidance" will not qualify for protection, because any document arguably could fall into that category. As a general rule, the corporation must be legitimately concerned that some environmental, health, or safety violation or condition is about to be discovered and that, as a consequence, the government or some private party will bring enforcement proceedings or suit in the near future.[85]

79. *Id.*

80. *See infra* notes 81–95 and accompanying text.

81. *See In re* Grand Jury Investigation, 599 F.2d 1224, 1229 (3d Cir. 1979); *In re* Grand Jury Subpoena, 599 F.2d 504, 511 (2d Cir. 1979).

82. Enforcement Adm'r of SEC v. Coopers & Lybrand, 98 F.R.D. 414 (S.D. Fla. 1982); *see also* Detection Sys., Inc. v. Pittway Corp., 96 F.R.D. 152, 155 (W.D.N.Y. 1982).

83. SEC v. Worldwide Coin Invs., 92 F.R.D. 65, 66 (N.D. Ga. 1981).

84. Sneider v. Kimberly-Clark Corp., 91 F.R.D. 1, 6 (N.D. Ill. 1980) (allowing privilege for documents prepared up to several years in advance of litigation).

85. *See supra* notes 81–84 and accompanying text.

Moreover, the primary purpose of the audit must be to assist in the corporation's legal defense.[86] Thus, if an audit performed after an accident, release, or other incident that is likely to result in litigation is prepared primarily to achieve a business or management objective rather than a legal goal, a claim of privilege may prove insufficient.[87]

Even if the audit otherwise satisfies the requirement of preparation "in anticipation of litigation," it will not be protected under the attorney work product doctrine if it is performed in the "ordinary course of business."[88] Thus, routine audits to determine compliance, in the absence of an acute accident, release, or similar incident likely to result in litigation or enforcement proceedings, may not be protected from disclosure under the work product doctrine. Such audits may be viewed as having been performed within the "ordinary course of business" and thus with no expectation of imminent legal proceedings. The precise boundaries of this "ordinary course of business" exception are unclear. For example, a corporation's policy to respond to all unpermitted environmental releases, discharges, or accidents by preparing an audit may render the audit a routine business practice unprotected by the work product doctrine.[89]

This exception creates a dilemma. Audits should provide broad diagnoses of the existing and potential environmental, health, and safety problems of a facility with a view toward preventing or correcting these hazards. Thus, for many types of environmental audits to be useful to corporations and to the public at large,[90] the audits must be performed regularly and not only after accidents, releases, or similar occurrences. However, because such routine compliance or management system audits are not prepared "in anticipation of litigation," industry only rarely

86. *See* Scott Paper v. Celicote, 103 F.R.D. 591 (D. Me. 1984); Soeder v. General Dynamics Corp., 90 F.R.D. 253 (D. Nev. 1980).

87. *Celicote*, 103 F.R.D. at 595; *Soeder*, 90 F.R.D. at 255 (holding that routinely prepared post-crash in-house reports are not privileged since they are not necessarily "in preparation for litigation" and have predominantly economic or business-related purposes); *see also* Janicker v. George Wash. Univ., 94 F.R.D. 648 (D.D.C. 1982).

88. *See* United States v. Gulf Oil Corp., 760 F.2d 292 (Temp. Emer. Ct. App. 1985); Ohio v. CECOS Int'l, Inc., No. 85-CR-5240C through 85-CR-5263C (Ohio C.P. April 23, 1986) (holding that environmental audit of existing hazardous contamination was discoverable because it was fact-finding effort prior to legitimate anticipation of litigation) (on file with the *Harvard Environmental Law Review*).

89. *See Soeder*, 90 F.R.D. at 255.

90. *See supra* notes 21–22 and accompanying text.

will be able to rely on the work product doctrine to prevent disclosure of these audit results,[91] and thus may choose not to engage in these beneficial audits.

2. Waiver by Breach of Confidentiality

As with the attorney-client privilege, reports that are disclosed or widely disseminated to corporate employees without a "need to know" will not receive the protection of the work product doctrine.[92] Yet, maintaining the requisite level of confidentiality will defeat one of the primary purposes of the audit—that of sensitizing employees to environmental concerns and training them to implement compliance and risk management strategies. Indeed, "[p]reserving confidentiality would require locking up the audit reports and files and limiting distribution"[93] to a few key management-level employees who are directly involved in managing the potential or existing litigation.

To avoid privilege-threatening disclosure, a corporation probably would have to deny employees access to information needed by them to pursue the audit's recommended improvements. Thus, this legal standard impairs a corporation's ability to remedy uncovered violations and conditions and, consequently, undermines its incentives to perform an audit in the first place. If legal proceedings are truly imminent, corporations will commission audits to aid in their defense; but such audits simply will not provide the corollary benefits of overall increased environmental protection and enhanced public health and safety.

The confidentiality requirement also frustrates auditing in other ways. Audits sometimes are motivated by a corporation's desire to show the public its attention to and concern about environmental, health, and safety problems. To successfully pursue the "public image" benefits of a rigorous audit program, a corporation usually will make some disclosures. But revealing some of the audit results jeopardizes any claim of privilege with respect to

91. It is unlikely that merely asking the corporation's legal department to review the audit report would guarantee against disclosure in discovery. CAHILL & KANE, *supra* note 1, at III-8.

92. *See, e.g., In re* Continental Ill. Sec. Litig., 732 F.2d 1302 (7th Cir. 1984) (holding that work product doctrine may not be asserted when confidentiality of audit report is not maintained).

93. Daily Rep. for Execs. (BNA) No. 225, at A-10 (Nov. 21, 1986).

audit results not voluntarily revealed, because any partial disclosure of a document generally waives protection of the entire document.[94] Persuading corporations to pursue internal environmental audits under these circumstances may prove quite difficult.

3. Not to Further an Unlawful End

As a final condition for invoking the work product doctrine, the attorney's purpose in preparing the audit document must not have been to further an unlawful end.[95] Environmental audit reports prepared by inexperienced consultants, unreviewed by counsel, might well offer advice on how violations or environmental conditions may be hidden or remediated in a manner less stringent than required by law. Such reports will not receive protection from disclosure under the work product doctrine, because they could be construed as promoting unlawful purposes or practices.

For the vast majority of corporations, this "not to further an unlawful end" limitation does not present a serious issue. However, over-zealous plaintiff's counsel, enforcement authorities, and prosecutors might mischaracterize the purpose of the audit, forcing corporations preparing work product doctrine audits with the best intentions to refute claims that such audits were prepared for the purpose of secreting relevant damaging information. This possibility is one of the many factors that renders the application of the doctrine uncertain and that thus discourages candid, thorough self-evaluation.

4. The "Substantial Need" and "Undue Hardship" Exception

Even if an audit report meets the work product doctrine's requirements, there is still a risk that the report will be discoverable. Under the work product doctrine, when there is "substantial need" for a document and protection would create an "undue hardship" on the party seeking discovery, an otherwise valid claim of privilege may be overridden by the courts.[96] However, "opinion

94. *See, e.g.*, International Paper Co. v. Fibreboard Corp., 63 F.R.D. 88, 92 (D. Del. 1974) (holding that partial releases constitute full waiver in order to prevent corporations from waiving protection to only favorable parts of otherwise privileged document).

95. *See* Union Carbide v. Dow Chem. Corp., 619 F. Supp. 1036 (D. Del. 1985).

96. FED. R. CIV. P. 26(b)(3); *see also* CAHILL & KANE, *supra* note 1, at III-7.

work product," which is the likely classification for audit reports, is accorded "almost absolute protection" from discovery when the doctrine's requirements are met.[97]

5. *Disincentives to Auditing Under the Current State of the Doctrine*

Fear of prosecution has sparked the desire to protect environmental audits with the attorney-client privilege and work product doctrine. Yet the pursuit of such protection carries with it its own disincentives to auditing. Under the attorney-client privilege, for example, to protect audit documents from discovery, an attorney must supervise the auditing process directly. This may not create a significant additional burden for larger corporations with in-house counsel. For small and medium-sized companies, however, the additional cost associated with hiring attorneys, who often will make little direct contribution to the outcome or performance of the audit, may be prohibitive.[98]

Nevertheless, the principal disincentive to auditing remains the uncertainty and incomplete coverage of the current privileges.[99] Under the work product doctrine, routine audits that address chronic operational problems will be subject to the risk of discovery. Yet, these routine audits are essential to the revelation and remediation of lingering, low-intensity environmental problems or management difficulties that often are more preventable, and that, over time, are potentially more dangerous than more acute and easily recognized problems. Routine audits detect chronic environmental problems before they reach crisis proportions. Thus, it is unfortunate that these audits are the ones least likely to be protected by the traditional privileges.

97. Sporck v. Peil, 759 F.2d 312, 316 (3d Cir.), *cert. denied*, 474 U.S. 903 (1985).

98. *See Colorado House State Affairs Committee, Hearings on H.B. 1204*, 57th Leg., 2d Reg. Sess. 3 (1990) (testimony of Jarvis Secomb, senior counsel with U.S. West) (on file with the *Harvard Environmental Law Review*).

99. The attorney work product doctrine probably provides reasonably comprehensive coverage for audits performed in response to known accidents, spills, releases, or other similar occurrences, but does not provide protection from disclosure for "ordinary course of business" management audits or routine compliance audits.

C. *"Critical Self-Analysis" Privilege*

When courts have determined that environmental audit reports and other similar internal self-analyses are not protected by the two traditional privileges discussed above, attorneys representing industry in environmental prosecutions or other legal proceedings sometimes have argued that the reports are protected by the common law "critical self-analysis" privilege.[100] This privilege covers documents containing constructive internal criticism; its purpose is to encourage the free flow of self-critical information within companies, in order to improve efficiency, quality, services, products, or safety.[101]

The "critical self-analysis" privilege finds its roots in *Bredice v. Doctor's Hospital*.[102] In *Bredice*, a medical malpractice suit, the plaintiff sought discovery of staff meeting notes that might have been relevant to the hospital's care of the plaintiff's relative.[103] The defendant hospital asserted that the notes were "entitled to a qualified privilege," because requiring disclosure would chill the internal self-criticism vital to improving the quality of health care.[104] On the basis of this "overwhelming public interest,"[105] the court held that the notes were privileged.[106] Some states have codified the results of *Bredice* with respect to records of hospital peer review and staff meetings.[107]

Defense attorneys have raised the self-critical analysis privilege in a variety of internal investigation contexts,[108] including

100. *See* United States v. Dexter Corp., 132 F.R.D. 8 (D. Conn. 1990) (holding corporation not to have "privilege against disclosure of self-evaluative documents" in enforcement action under Clean Water Act §§ 309(b), 309(d), 311(b)(6)(B) , 33 U.S.C. §§ 1319(b), 1319(d), 1321(b)(6)(B) (1988)).

101. *See Dexter Corp.*, 132 F.R.D. at 8–9.

102. 50 F.R.D. 249 (D.D.C. 1970).

103. *Id.* at 249.

104. *Id.* at 250.

105. *Id.*

106. *Id.* at 251.

107. *See, e.g.*, COLO. REV. STAT. § 12-36.5-104(10) (1989); MO. REV. STAT. § 537.035 (1973).

108. *See, e.g.*, Banks v. Lockheed-Georgia Co., 53 F.R.D. 283 (N.D. Ga. 1971) (holding corporate self-evaluation of affirmative action programs to be privileged); Richards v. Maine C.R.R., 21 F.R.D. 590 (D. Me. 1957) (finding railroad company's internal investigation of train accident to be privileged); Berst v. Chipman, 653 P.2d 107 (Kan. 1982) (denying self-critical analysis privilege for National Collegiate Athletic Association internal investigation); City Council v. Superior Court, 21 Cal. Rptr. 896 (Cal. Ct. App. 1962)

environmental audits.[109] However, in many cases not involving environmental issues, the courts have denied the privilege, particularly when the government was the opposing party.[110]

Since *Bredice*, the courts have struggled with the appropriate scope of the self-critical analysis privilege. In *Webb v. Westinghouse Electric Corp.*,[111] the court described the typical situations in which the privilege has been accepted. These are (1) when the materials have been prepared pursuant to governmental requirements, (2) when the materials are subjective and evaluative, and (3) when the policy interest served by withholding the documents clearly outweighs the need of the party seeking the documents.[112] The court recognized, however, that in considering this privilege "[i]t is not possible to draw a bright line."[113]

It is difficult to apply these guidelines to the context of environmental audits. When the government suggests but does not mandate preparation of documents, as is the case with audits,[114] the privilege's applicability is uncertain.[115] Moreover, under the *Webb* standard, quantifying the public policy interest is purely subjective. In the case of audits, however, the policy arguments for excluding reports from discovery are compelling. The question has been posed: "Why would anyone want to undertake voluntary steps to ensure that their company is in compliance with the law if their efforts could very well land them in jail?"[116] There can be no more potent deterrent to valuable environmental auditing,

(holding that public employee personnel files qualify for self-criticism privilege when public welfare considerations outweigh interest in discovery).

109. United States v. Dexter Corp., 132 F.R.D. 8 (D. Conn. 1990).

110. *See, e.g.*, Emerson Elec. Co. v. Schlesinger, 609 F.2d 898 (8th Cir. 1979); United States v. Noall, 587 F.2d 123 (2d Cir. 1978), *cert. denied*, 441 U.S. 923 (1979); Reynolds Metals Co. v. Rumsfeld, 564 F.2d 663 (4th Cir. 1977), *cert. denied*, 435 U.S. 995 (1978); *Dexter Corp.*, 132 F.R.D. at 9 (citing FTC v. TRW, Inc., 628 F.2d 207, 210 (D.C. Cir. 1980)).

111. 81 F.R.D. 431 (E.D. Pa. 1978).

112. *Id.* at 434.

113. *Id.*

114. *See infra* Part III.D–E (discussing policies designed by EPA and DOJ ostensibly to encourage environmental auditing).

115. It is ironic and unfortunate that courts have most often confined the self-criticism privilege to cases involving government-required reports. Their rationale is that fear of discovery raises a real concern that the regulated entity will not candidly evaluate problems in response to government requirements and will set unambitious performance goals. *See Webb*, 81 F.R.D. at 434. Nonetheless, this public policy argument for encouraging candid responses seems much weaker when reporting is required than when it is not required. In the latter case, absent a privilege, investigation or reporting may not be pursued at all.

116. *Auditing and Criminal Enforcement*, ENVTL. F., Jan./Feb. 1992, at 36, 36.

which, by the admission of all parties involved,[117] is of critical public policy importance.

In the specific context of environmental audits, a claim of privilege for self-critical evaluations was rejected in *United States v. Dexter Corp.*[118] While EPA itself has acknowledged the enormous public interest in self-evaluation and self-regulation by potential environmental violators,[119] the government has opposed a privilege.[120]

In *Dexter*, the defendant corporation allegedly had violated the Clean Water Act's provisions prohibiting the discharge of oil or hazardous waste into navigable waters.[121] The corporation asserted a critical self-analysis privilege for certain self-evaluative documents, arguing that there was an overwhelming public interest in encouraging candid and thorough internal self-criticism by companies that may discharge wastes into the nation's waterways.[122] Despite the apparent public interest in granting a privilege, the court held that the presence of the government as a party made the point moot.[123] The court declared that Congress and the agency it empowered define the "public interest" by statute and action,[124] and in that case, the legislature had "intimated its will, however indirectly,"[125] that enforcement against polluters was in the public interest.[126] The court thus held assertions of privilege rooted in

117. *See infra* Part III.D–E.

118. 132 F.R.D. 8, 8 (D. Conn. 1990).

119. EPA Auditing Policy Statement, 51 Fed. Reg. 25,004, 25,006 (1986) ("Auditing can result in improved environmental performance, help communicate effective solutions to common environmental problems, focus facility managers' attention on current and upcoming regulatory requirements, and generate protocols and checklists which help facilities better manage themselves. Auditing also can result in better-integrated management of environmental hazards, since auditors frequently identify environmental liabilities which go beyond regulatory compliance.").

120. *Id.* at 25,007; *see also Analysis of Colorado H.B. 1204 (Self-Evaluation Privilege), before the Colorado House Committee on State Affairs* (Mar. 8, 1990) (script for videotaped testimony given by James M. Strock, U.S. EPA Assistant Administrator for Enforcement, stating that "[t]he Environmental Protection Agency strongly opposes this bill," which would provide a privilege for self-critical environmental auditing) (on file with the *Harvard Environmental Law Review*).

121. *Dexter Corp.*, 132 F.R.D. at 9 (citing 33 U.S.C. §§ 1319(b), 1319(d), 1321(b)(6)(B)).

122. *Id.* at 8.

123. *Id.* at 9.

124. *Id.*

125. *Id.* (citing FTC v. Jantzen, Inc., 386 U.S. 228, 233 (1967) (quoting Johnson v. United States, 163 F. 30, 32 (1908) (Holmes, J.))).

126. *Id.* at 10.

public interest considerations to be invalid as against the governmental declaration of policy.[127]

This holding leads to a troubling result: if the legislature, or possibly even an agency, declares a policy against something, courts will find, ipso facto, that discovery is in the public interest if it improves the enforcement outcome of that case. The idea of a self-critical analysis privilege becomes moot when courts adopt this view. This assumption of congressional omniscience is misguided. At the very least, it is overinclusive to find that a legislative provision that bans the discharge of pollutants makes withholding any relevant document, regardless of its beneficial nature, inherently antithetical to the public interest. But under the *Dexter* holding, no public policy argument, no matter how strong, can override the court's broadest interpretation of the legislative declaration as the definitive word on the public interest.

Environmental auditing, no less than hospital peer review[128] or employee affirmative action records,[129] warrants the protection of the self-critical analysis privilege. Applying the privilege to environmental audits would facilitate the discovery, diagnosis, and correction of environmental dangers. Absent some reliable protection, accorded by the attorney client privilege, work product doctrine, or critical self-evaluation privilege, however, corporations may be reluctant to fully audit their facilities, understandably fearing the heightened risk of prosecution, enforcement, and private litigation that such assessments may invite.

D. EPA Policy Statement on Auditing

In 1986, EPA issued a policy statement on environmental auditing ("Policy Statement")[130] endorsing corporate self-auditing as a means of achieving "better identification, resolution and avoidance of environmental problems, as well as improvements to management practices."[131] It recognized that government "requests for

127. *Id.* at 9–10.
128. Bredice v. Doctor's Hosp., 50 F.R.D. 249 (D.D.C. 1970).
129. Banks v. Lockheed-Georgia Co., 53 F.R.D. 283 (N.D. Ga. 1971).
130. EPA Environmental Auditing Policy Statement, 51 Fed.Reg. 25,004 (1986).
131. *Id.* at 25,006.

audit reports could inhibit auditing in the long run, decreasing both the quantity and quality of audits conducted."[132]

As a matter of policy, however, EPA did not guarantee that voluntarily-generated audit material would not be used by the government in enforcement actions. The Policy Statement provides merely that the Agency "will not routinely request environmental audit reports."[133] This indicates that EPA is well aware of industry's concern about the use of environmental audit reports in enforcement actions and civil litigation.[134]

In an effort to assuage corporate fears, the Policy notes that when information in an audit report is needed, EPA will seek that information, and not the report itself; and that when EPA needs specific portions of a report, it will seek only such portions, and not the full report.[135] In implementing the Policy, it has been EPA's practice to address the questions of access to audit reports on a case-by-case basis.

Corporations considering internal audits can take little comfort in EPA's Policy. The government possesses particularly broad authority to compel the disclosure of documents and information in company files. A number of environmental statutes explicitly authorize EPA to require regulated entities to prepare and disclose

132. *Id.* at 25,007. In addition to its Policy Statement on auditing, EPA has taken several other steps to encourage industry compliance through accommodation including use of its flexible "Policy on Civil Penalties." COURTNEY M. PRICE, U.S. ENVTL. PROTECTION AGENCY, POLICY ON CIVIL PENALTIES (1984) (on file with the *Harvard Environmental Law Review*). *See Swift Resolution, Equitable Treatment Called Primary Goals of EPA Penalty Policy*, 14 Envt. Rep. (BNA) 1904 (Mar. 2, 1984); 49 Fed. Reg. 10,575 (Mar. 21, 1984) (announcing availability of "Penalty Policy"); *see also* U.S. Envtl. Protection Agency, Polychlorinated (PCB) Penalty Policy (Apr. 9, 1990) (on file with the *Harvard Environmental Law Review*). The "Penalty Policy" "establishes a three-prong analysis for calculating the penalty for settling a given case." F. Henry Habicht II & Terrell E. Hunt, *Negotiated Settlement of EPA Civil Enforcement Cases*, *in* ENVTL. L. INST., LAW OF ENVIRONMENTAL PROTECTION § 8.03[2][d][i][B], at 8-143 (Sheldon M. Novick et al. eds., 1988). This includes weighing the "*economic benefit* of the delayed compliance," *id.*, and "the *gravity* of the violation," *id.* at 8-143 to 8-144, while also allowing "certain upward and downward *adjustments* to be made based upon the circumstances and the attitude of the defendant." *Id.* at 8-144. EPA also adopted a mitigation policy that reduced penalties in exchange for vigorous compliance activity on the part of violators. *See* Memorandum from Edward E. Reich to Headquarters Enforcement Office Directors (Feb. 12, 1991) (on file with the *Harvard Environmental Law Review*).

The Department of Justice has pursued similarly accommodating policies. *See, e.g.*, DOJ GUIDANCE, *supra* note 22; *see infra* Part III.E.

133. EPA Environmental Auditing Policy Statement, 51 Fed. Reg. 25,004, 25,00 (1986).
134. *Id.*
135. *Id.* at 25,005.

documents relating to potential environmental violations.[136] In addition, audits have been required as a condition of a violator's sentence,[137] as part of an injunctive remedy in a civil prosecution, and as part of an administrative settlement agreement or judicial consent decree.[138] More significantly, environmental auditing is almost indispensible for obtaining the information necessary to comply with laws mandating environmental reporting and record-keeping[139] and to complete permit applications.[140] For example,

136. *See, e.g.*, Clean Air Act § 114, 42 U.S.C. § 7414; Clean Water Act § 308, 33 U.S.C. § 1318; Toxic Substances Control Act § 111, 15 U.S.C. § 2610; Comprehensive Environmental Response, Compensation, and Liability Act § 104(e), 42 U.S.C. § 9604(e); Resource Conservation and Recovery Act § 3007, 42 U.S.C. § 6927; *see also* George Van Cleve, *The Changing Intersection of Environmental Auditing, Environmental Law and Enforcement Policy*, 12 CARDOZO L.J. 1215, 1218–19 (1991). EPA officially has argued against any general government-mandated environmental auditing program. "[B]ecause audit quality depends to a large degree upon genuine management commitment to the program and its objectives, auditing should remain a voluntary activity." EPA Environmental Auditing Policy Statement, 51 Fed. Reg. 25,004, 25,007 (1986).

137. *See, e.g.*, *Wyoming Firm Hit with $1.25 Million Fine; Largest RCRA Criminal Penalty, Justice Says*, 21 Env't. Rep. (BNA) No. 6, at 317 (June 8, 1990)) (discussing United States v. Unichem Int'l, Inc., No. DC90-064 (D. Wyo. May 31, 1990)).

138. EPA increasingly requires corporations to institute environmental auditing programs as a condition of settlement in many categories of environmental enforcement actions. *See* EPA Environmental Auditing Policy Statement, 51 Fed. Reg. 25,004, 25,007 (1986) (stating that EPA is likely to require auditing in consent decrees when violations in question at least partially can be attributed to poor environmental management systems or when investigation suggests that similar violations are likely to be found elsewhere at facility); Memorandum from Thomas L. Adams, Jr., Assistant Administrator for Enforcement and Compliance Monitoring, to Addressees, Final EPA Policy on the Inclusion of Environmental Auditing Provisions in Enforcement Settlements (Nov. 14, 1986) (on file with the *Harvard Environmental Law Review*). For a further discussion of the use of environmental audits in administrative settlement agreements and consent decrees, see Wasserman, *supra* note 21, §§ 8.03[4][a] to 8.03[5], at 8-184 to 8-198.

Incorporating audit requirements in injunctions and consent decrees is authorized by environmental laws permitting any "appropriate relief." *See, e.g.*, Clean Water Act § 309(b), 33 U.S.C. § 1319(b) (1988); Resource Conservation and Recovery Act § 3008(a), 42 U.S.C. § 6928(a) (1988). Additionally, there may be legislation on the horizon specifically authorizing, or even requiring, audits in some circumstances. By voice vote, the Senate passed an amendment to the Senate's Violent Crime Control Act of 1991, S. 1241, 102d Cong., 1st Sess. (1991) (as amended by Wofford Amendment No. 564, 137 CONG. REC. S9308 (daily ed. July 9, 1991)), proposed by Senator Harris Wofford (D-Pa.) which, if enacted, "would require . . . U.S. court[s] to require corporations and organizations convicted of felony environmental offenses to pay for an environmental compliance audit, to be completed by a court-appointed independent expert, and to require that the [corporation or other] organization implement the recommendations." *Senate Approves Environmental Audit Amendment to Crime Bill*, Daily Rep. for Execs. (BNA) No. 132, at A-24 (July 10, 1991).

139. For example, Resource Conservation and Recovery Act § 3007, 42 U.S.C. § 6927 (1988), and Clean Water Act § 308(a), 33 U.S.C. § 1318(a) (1988), reporting requirements cannot be completed without some degree of internal corporate investigation and evaluation of environmental conditions at a facility.

140. *See* Van Cleve, *supra* note 136, at 1219. Information necessary to file permit applications for a given facility might be acquired only by some level of corporate self-investigation. Issuing agencies almost always will require information with permit applications about quantities of pollutants emitted or discharged, monitoring systems, and other such data that may not be available without an audit. Additionally, given the broad language found in provisions such as Clean Water Act § 402(a)(1), 33 U.S.C. § 1342(a)(1) (1988), authorizing any permit conditions reasonably necessary to effectuate statutory purposes, government-issued emission, discharge, or operations permits may contain monitoring and reporting conditions.

reporting and record-keeping requirements under the Emergency Planning and Community Right-to-Know Act[141] make certain types of auditing a virtual prerequisite to collecting the required information in some circumstances.[142]

EPA specifically has reserved the right to request and obtain access to audit reports in at least four circumstances. First, EPA may seek audit reports that might contain information relevant to its ability to "accomplish its statutory mission."[143] Second, EPA may seek an audit report when the audit was conductd pursuant to consent decrees or other settlement agreements, and third, the government may seek access to an audit report that it deems to be "material to a criminal investigation."[144] When "state of mind or intent are a relevant area of inquiry, such as during a criminal investigation,"[145] audit reports may be crucial to establishing the level of knowledge that the company—and individuals within the company—had of violative conditions. Finally, when a company asserts the sophistication of its management practices as an affirmative defense in an enforcement action, EPA may review both the overall environmental oversight program and the specific products of the program, namely, the reports it generates, to determine whether the violation was an aberration.[146]

These are not the only situations in which EPA will seek access to audit reports. The Policy notes that the list is "illustrative rather than exhaustive, since there doubtless will be other situations, not subject to prediction in which audit reports rather than information may be required."[147] As Leonard Fleckenstein of EPA's Office of Policy, Planning and Evaluation put it, EPA's "intent is not to request audit reports except in circumstances

141. 42 U.S.C. §§ 11,001–11,050 (1988).

142. *See, e.g.*, *id.* § 11,023 (regarding toxic chemical inventory release reporting).

143. EPA Environmental Auditing Policy Statement, 51 Fed. Reg. 25,004, 25,007. For example, data regarding a given chemical's adverse impact upon workers may be essential to EPA's ability to make protective regulatory judgments about that chemical.

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

where we feel having the report is critical . . . [but EPA must] leave the door open to protect [itself] and allow for discretion."[148]

Nonetheless, these "exceptions," by providing EPA with broad flexibility and discretion to request audit reports, might swallow the rule that EPA will not seek access to audit reports. Thus, EPA's equivocal "assurance" does not instill confidence that the reports generated by thorough self-evaluations would be protected from disclosure. As the Supreme Court has observed in another context, "[a]n uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all."[149] Although "EPA for the most part has adhered to its policy" of not routinely requesting audit reports,[150] in the absence of stronger assurances, the risk of criminal prosecution and individual liability casts a shadow over EPA's entire effort to encourage auditing.

E. Department of Justice Guidance on Prosecutorial Discretion

On July 1, 1991, DOJ's Land and Natural Resources Division released a policy guidance document ("Guidance") to its prosecuting attorneys,[151] stating that auditors who promptly disclose and correct environmental violations should receive favorable prosecutorial discretion.[152] The DOJ Guidance describes how and under what circumstances auditing will reduce the auditor's risk of criminal prosecution for environmental violations. The Guidance specifically advises prosecutors, when deciding whether to bring criminal charges and what penalties to seek, to look favorably upon (1) a corporation's voluntary, timely, and complete disclosure of violations to the relevant agencies, (2) its cooperation with investigators, (3) its preventive measures and compliance programs, (4) its additional compliance efforts, and (5) its internal

148. *Several Firms Concerned About EPA Use of Data Developed in Environmental Audits*, Daily Rep. for Execs. (BNA) No. 27, at A-7 (Feb. 10, 1986).

149. Upjohn Co. v. United States, 449 U.S. 383, 393 (1981).

150. *Companies Must Have Plan*, *supra* note 15, at 1684.

151. DOJ GUIDANCE, *supra* note 22.

152. *Id.* at 2–4. The stated intent of the DOJ Guidance is "to encourage self-auditing, self-policing and voluntary disclosure of environmental violations by the regulated community by indicating that these activities are viewed as mitigating factors in the Department's exercise of criminal environmental enforcement discretion." *Id.* at 1.

discipline for responsible parties.[153] However, the Guidance does not specify the degree of lenience considered appropriate under different circumstances.

The Guidance emphasizes prompt and total disclosure of violations, assuring industry that the Department will exercise restraint in prosecuting those who disclose.[154] Moreover, even without disclosure, DOJ prosecutors are instructed to consider the presence of auditing and compliance efforts as important mitigating factors, when such efforts "include sufficient measures to identify and prevent future noncompliance, and . . . [are] adopted in good faith in a timely manner."[155]

Despite DOJ's assurances, there still remain several concerns about the adverse use of audit results. First, the DOJ Guidance renders moot the issue of privilege, for if a corporation fully complies with two explicit requirements of the Guidance, it will have waived any claims of privilege under the attorney-client and work product doctrines.[156] These two requirements are (1) that audit results be disclosed to the government, and (2) that audits be prepared in the normal course of business and not in response to the threat of litigation.[157]

153. *Id.* at 2–5. Among prosecutors, it is a long-recognized ethic that to be considered "prompt," disclosure must be made to the government as soon as unambiguous evidence of a violation has been obtained, while to be considered "voluntary," disclosure must be made prior to and independent of any knowledge that the company is the target of investigation or scrutiny. If the company delays reporting, or reports violations only after it has deduced that it is the target of an inquiry or investigation, the company does not warrant the special lenience allowed under the DOJ Guidance. Remarks by Ronald G. Woods, U.S. Attorney for the Southern District of Texas, at Fourteenth Annual Corporate Counsel Institute, Doubletree Hotel, Houston, Texas (Apr. 24, 1992).

In another regulatory context, a voluntary disclosure program was initiated to encourage self-policing among Department of Defense contractors, to reduce the likelihood of accounting fraud. *See United States v. Rockwell International Corp.*, No. 89-50120, 1991 U.S. App. Lexis 1257, at *1 (9th Cir. 1991). Under this program, the Department will consider such disclosure and subsequent cooperation as mitigating factors. *Id.* In *Rockwell International*, however, Rockwell's disclosure did not meet the "voluntary disclosure" requirement since Rockwell waited until the eve of indictment to disclose a violation which the Defense Contract Audit Agency had already uncovered. *Id.* at *21.

154. DOJ GUIDANCE, *supra* note 22, at 2–3.

155. *Id.* at 4. Department officials personally have provided even greater assurances to industry. Barry Hartman, Deputy Assistant Attorney General of the Environment and Natural Resources Division, has stated, "[W]e are not interested in creating disincentives . . . . If you do a good faith audit you won't be prosecuted." *DOJ Plans to Issue*, *supra* note 16, at 484. Hartman also has claimed, "We've never hung anyone on a good-faith audit." *Id.*

156. *See supra* Part III.A–B.

157. DOJ GUIDANCE, *supra* note 22, at 5.

Disclosing to the government audit results that suggest environmental violations, as DOJ urges,[158] will foreclose the auditor's option of claiming any traditional privilege in a government prosecution or other enforcement proceeding or in a civil action by private parties. As discussed in Part III.A and B above, such disclosure almost certainly would constitute a waiver of both the attorney-client privilege and attorney work product protection, rendering the audit results fully discoverable in future enforcement proceedings or lawsuits.[159] Even if EPA and DOJ refrained from using the disclosed audit reports in enforcement actions against a corporation, such disclosure would prevent a corporation from asserting the attorney-client privilege or work product doctrine in third party civil toxic tort, nuisance, and other actions.

Thus, DOJ's Guidance creates a serious corporate dilemma. According to the Guidance, DOJ will treat a company that fails to disclose the results of its audit as uncooperative, and such a company will be ineligible for lenient prosecutorial treatment.[160] Yet disclosure may cost the company the protection of traditional privileges.[161] This combination of factors discourages the company from performing an audit in the first place.

The second requirement of the DOJ Guidance also conflicts with traditional privileges. According to the Guidance, prosecutorial lenience is appropriate only when the audit program is "done in the normal course of business."[162] Prosecutors will not be lenient if the corporation initiated the audit "because it knew it was going

158. *Id.*

159. *See In re* Grand Jury Subpoenas Dated Dec. 18, 1981 & Jan. 4, 1982, 561 F. Supp. 1247, 1259–60 (E.D.N.Y. 1982) (holding that release of documents to member of Congress constitutes waiver of attorney-client privilege); Church of Scientology v. Cooper, 90 F.R.D. 442 (S.D.N.Y. 1981) (finding waiver when substance of communications with attorney was disclosed to third party). *But see* Diversified Indus. v. Meredith, 572 F.2d 596, 611 (8th Cir. 1977) (en banc) (finding in somewhat unclear terms that disclosure to SEC in "separate and nonpublic" investigation gave rise to only limited waiver of attorney-client privilege). In addition, merely reporting the fact of a violation without fully disclosing the audit report itself could waive the privilege with respect to the report. *See, e.g.*, Smith v. Alyeska Pipeline Serv. Co., 538 F. Supp. 977, 979 (D. Del. 1982) (holding that disclosure of some privileged matter waives privilege regarding remainder of communications relating to same subject matter); International Paper Co. v. Fibreboard Corp., 63 F.R.D. 88, 92 (D. Del. 1974) (finding that once party discloses "certain of the factual details" within scope of privileged communication, opponents may discover "other relevant factual details leading up to and involving" same matters).

160. DOJ GUIDANCE, *supra* note 22, at 11–13.

161. *See supra* Part III.A–B.

162. DOJ GUIDANCE, *supra* note 22, at 5.

to be investigated."[163] Sound prosecutorial policy may warrant more lenient treatment for the company that makes auditing a corporate policy, as opposed to the company that only embarks on an audit when it finds itself threatened with or subject to prosecution. However, the DOJ Guidance's requirement that audits be routine eliminates the protection of the attorney-client privilege and attorney work product doctrine.[164] Thus, a company will never be able to gain those traditional forms of protection for its audit and comply with DOJ recommendations at the same time.

Thus, on the one hand, the DOJ Guidance, with its "disclosure" and "normal course of business" prerequisites for obtaining prosecutorial lenience, forces companies to strip themselves of other legal protections. On the other hand, if companies decide to protect their audits and invoke these privileges, DOJ may prosecute them as vigorously as if they had not audited in the first place.[165]

A second shortcoming of the DOJ Guidance is that auditing is only one factor in the mitigation scheme. Indeed, auditing alone may not be enough to assure prosecutorial lenience. The DOJ Guidance states that "[i]t is unlikely that any one factor will be dispositive in any given case. All relevant factors are considered and given the weight deemed appropriate in the particular case."[166] This vague statement undermines the likelihood that the Guidance will be implemented in a predictable manner and ultimately reduces the corporation's incentive to audit and disclose the results to DOJ.

Beyond these technical objections, the fact that the government retains broad prosecutorial discretion with respect to audit results is a third shortcoming of DOJ's policy. Like the EPA Policy Statement, DOJ's Guidance does not close the door on the adverse use of audit results. DOJ cautioned that the Guidance's commitment on audits will "not be a recipe to avoid prosecution."[167]

163. *DOJ Plans to Issue*, *supra* note 16, at 484.

164. As discussed in Part III.B above, to claim the protection of the work product doctrine, material must be prepared in anticipation of litigation, and not in the normal course of business. And, as explained in Part III.A, audits done in the normal course of business are likely to be seen as pursuing a management, rather than a legal, purpose, voiding the privilege.

165. DOJ GUIDANCE, *supra* note 22, at 9–12.

166. *Id.* at 2.

167. *DOJ Plans to Issue*, *supra* note 16, at 484. In fact, the Guidance explicitly disavows any concrete limitation on prosecutorial authority.

Despite DOJ's suggestion not to prosecute if a corporation discloses and takes corrective actions, any individual prosecutor still might, consistant with the Guidance, pursue a full-scale criminal prosecution based upon the disclosed information.[168] Such a course of action may be likely in a highly visible case where the prosecutor feels public pressure.[169] Because using internal documents may improve the odds of obtaining a conviction, only prosecutors who place a higher value on the overall policy goal than on individual prosecutorial success will be likely to resist using audit reports as evidence in such circumstances.

DOJ has attempted to reassure the regulated community by issuing the Guidance and by making broad but nonbinding assurances about its policy not to pursue audit results. Nevertheless, DOJ assertions that "[i]f you do a good faith audit you won't be prosecuted"[170] ring hollow when DOJ refuses to surrender the option of using audits in prosecutions against corporations.

F. Summary of Existing Protections for Environmental Audits

Current law and policies regarding environmental auditing present many corporate officers with a dilemma: they fear that if they perform such internal investigations in an attempt to reduce the long-term risks associated with environmental hazards, they may increase their short-term risks of successful criminal or civil enforcement actions or private civil suits against them. Although EPA argues that the existing threat of environmental liability and "a credible enforcement program," particularly the threat of criminal penalties, creates "a strong incentive for regulated entities to

> The criteria set forth above are intended only as internal guidance . . . . They are not intended to, do not, and may not be relied upon to create a right or benefit, substantive or procedural, enforceable at law by a party to litigation with the United States, nor do they in any way limit the lawful litigative prerogatives, including civil enforcement actions, of the Department of Justice or the Environmental Protection Agency.

DOJ GUIDANCE, *supra* note 22, at 14; *cf.* Heckler v. Chaney, 470 U.S. 821, 821–22 (1985) (holding that agency's exercise of prosecutorial discretion is not reviewable).

168. DOJ GUIDANCE, *supra* note 22, at 14.

169. *See supra* note 15 (discussing increasingly harsh treatment of environmental criminals).

170. *DOJ Plans to Issue*, *supra* note 16, at 484 (quoting Barry Hartman).

audit,"[171] it remains true that auditing that uncovers and documents environmental violations may heighten the risk of liability.

Traditional privileges and governmental assurances provide only a patchwork of protections against the disclosure and adverse use of results from audit reports. The inadequacy of these existing protections continues to counteract the positive incentives for environmental auditing created by increased enforcement.

STOP HERE

IV. PRO-AUDITING POLICY ALTERNATIVES: CAPS AND PRIVILEGES

Because promoting effective corporate self-auditing and self-policing[172] is in the best interest of government, corporations, the public, and the environment,[173] incentives should be changed to encourage corporations to perform audits. The fundamental goal of such environmental policy is the protection of public health and the environment through full compliance, with enforcement actions functioning not as ends in themselves, but as means to achieve broader social goals.[174]

In light of the inherent limits on government resources, a policy that emphasizes punishment over prevention will fail to reach most violators. Because it would discourage self-auditing, self-policing, and other well-intentioned environmental initiatives, a punishment-centered policy would leave even more environmental hazards hidden and unremedied. For prosecutors and those who would prefer severe punishment, foregoing retribution for environmental violations may be unsatisfying. In the long run, however, an emphasis on remediation and deterrence will provide greater social benefit and help achieve the country's environmental protection goals.

171. EPA Auditing Policy Statement, 51 Fed. Reg. 25,004, 25,007 (1986).

172. "Self-policing" does not imply a hands-off policy by government when a corporation has been demonstrably irresponsible. Rather, it is an approach that recognizes government's limited resources for monitoring, remediation, compliance, and enforcement, and that emphasizes both deterrence and positive incentives to encourage industry compliance. A truly hands-off policy would eliminate the credibility of compliance incentives; the proposals made in this Article would not.

173. *See* Lavelle, *supra* note 11, at 3; *see also* EPA Environmental Auditing Policy Statement, 51 Fed. Reg. 25,004; DOJ GUIDANCE, *supra* note 22, at 1.

174. As Judson Starr, former DOJ Environmental Crimes Chief, has stated, "Enforcement itself, is not a success. The success is . . . compliance that is achieved by enforcement." *Colorado Hearings*, *supra* note 34, at 7 (testimony of Judson W. Starr).

Given the limited and increasingly taxed resources of government, these goals cannot be achieved without corporate self-auditing and self-policing. Any comprehensive program to encourage self-auditing should include (1) a short-term policy that provides strong incentives to audit, identify, correct, and equitably resolve enforcement liability relating to past violations, and (2) forward-looking, long-term policies that will achieve future compliance. The first goal can be satisfied by a Compliance Audit Amnesty Program ("CAAP"), modelled on a program already tested by EPA.[175] The second goal can be achieved by an Environmental Star Program ("En Star"), a voluntary self-policing program made available to companies with exemplary auditing and compliance records, modelled on a program already tested by OSHA,[176] and by a limited statutory privilege for environmental audits, similar to one passed by the Colorado legislature in 1990, but later withdrawn under threat of veto.[177] Adoption of programs like these three in the auditing context would promote the discovery and correction of past environmental errors, while simultaneously encouraging the prevention of present and future harms. Finally, because it would take some time for the first three policies to go into effect, EPA should revise its Environmental Auditing Policy Statement to provide industry with immediate reassurances and pro-auditing incentives.

A. The Compliance Audit Amnesty Program: Prompt Discovery and Correction of Past Violations

Sound environmental risk management requires reliable data on the risks posed by specific industrial practices or ecological impacts. Only if key information is revealed to government agencies, and through them to society as a whole, can intelligent decisions be made about how to manage environmental risks. One way to gain such information is by providing limited amnesty to specific categories of environmental offenders.

175. See *infra* Part IV.A.1 for discussion of the Compliance Audit Program ("CAP") under the Toxic Substance Control Act, 15 U.S.C. §§ 2601–2671 (1988) ("TSCA").

176. See *infra* Part IV.B.1 for discussion of the OSHA Star Program.

177. See *infra* Part IV.C.1 for discussion of the Colorado bill.

An amnesty program that offers a binding promise of limited lenience for a specified period is one way to eliminate the disincentives to voluntary auditing and disclosure inherent in existing policies.[178] The purpose of such an amnesty is to encourage the investigation of existing environmental dangers and the disclosure of important information to the agencies responsible for dealing with such problems.

Public support for the idea of an amnesty may be weakened by the perception that it coddles environmental criminals. To combat this perception, under EPA's first prototype CAP program, all companies reporting past violations were required to pay stipulated penalties, although such penalties were substantially less than the penalties that would normally be assessed under applicable penalty policies.[179] Stipulating penalties guaranties that violators do not completely escape punishment, as they might under a less stringent "amnesty for audits" program.

The Compliance Audit Amnesty Program proposed here would remove the current disincentives to auditing in the same way as would a general amnesty. It would have three crucial elements: (1) the violator would be required to report specified information to the relevant agency immediately upon discovery, (2) the violator would be obligated to correct all uncovered environmental hazards, and (3) the violator would be penalized, though less severely than in ordinary circumstances, to demonstrate some elements of retribution and to remove profits gained from noncompliance. By satisfying a popular desire for retribution and requiring the correction of all uncovered violations, a CAAP program would avoid the fundamental disadvantages of a less stringent amnesty policy.

1. A Prototype Program: The Compliance Audit Program Under the Toxic Substances Control Act

In the context of the Toxic Substances Control Act ("TSCA"),[180] EPA has recognized that "[u]p-to-date information

178. A proposal for a national "limited amnesty provision for firms that undergo environmental audits" was suggested in 1988 by Massachusetts Governor Michael Dukakis. *Bush, Dukakis Outline Environmental Issue Stands*, Daily Rep. for Execs. (BNA) No. 180, at A-1 (Sept. 16, 1988).

179. *See infra* Part IV.A.1.

180. 15 U.S.C. §§ 2601–2671 (1988).

on hazards and exposure is vital in supporting EPA efforts to protect human health and the environment from risks from toxic chemicals."[181] Thus, "[c]ompanies that do not report vital information are undermining the effectiveness of the early warning system" that the disclosure requirements are designed to provide.[182]

To solve the problem of under-reporting, in early 1991 EPA announced the Compliance Audit Program ("CAP"),[183] a mechanism for encouraging corporate self-auditing for potential violations of TSCA section 8(e).[184] The TSCA CAP program was an indirect outgrowth of an administrative enforcement action against Monsanto Company, Inc., in which EPA alleged that Monsanto had delayed reporting the results of a carcinogenicity study required by section 8(e).[185] Under the terms of an administrative consent decree, Monsanto was fined $198,000 and was required to conduct a corporate-wide environmental audit of all toxic data in its possession and to report test results meeting EPA's reporting criteria, subject to stipulated penalties.[186] The TSCA CAP program

181. Notice of Registration and Agreement for TSCA section 8(e) Compliance Audit Program, 56 Fed. Reg. 4128, 4128 (1991) [hereinafter CAP Notice]. This is uniquely true of the human health and environmental toxicity data required to be submitted to EPA under TSCA section 8(e)'s "Notice of Substantial Risk" provisions. Notification of Substantial Risk Under Section 8(e), Statement of Interpretation and Enforcement Policy, 43 Fed. Reg. 11,110 (1978). Reporting under TSCA section 8(e) requires companies to make sophisticated judgments regarding the acute and chronic toxicity of specific chemical substances with respect to human health, environmental effects, and emergency incidents of environmental contamination. 56 Fed. Reg. 4128. Since knowledge of such risks is vital to public health and welfare, the Agency uses "reporting and recordkeeping provisions that enable EPA to obtain and disseminate information needed to set priorities and perform risk assessments." *Id.*

182. 56 Fed. Reg. 4128.

183. *Id.*

184. 15 U.S.C. § 2607(e) (1988) (requiring notice to EPA of manufacture, processing, or distribution of chemicals that pose "substantial risk" of injury to human health or environment). The violation referred to here is not a release or contamination, but a failure to report agency-mandated information.

185. Monsanto Co., No. TSCA 89-H-21 (1990).

186. *Enforcement: Monsanto Agrees to Conduct Audit, Pay $198,000 to Settle Late Substantial Risk Notice Charges*, 13 Chem. Reg. Rep. (BNA) 1283, 1283 (Jan. 5, 1990). EPA had issued the complaint against Monsanto in August 1989. *Id.* The consent agreement also required Monsanto to pay stipulated penalties for information submitted to the Agency under the audit of $6,000 per animal or aquatic species study and $10,000 for studies involving humans that were not previously available to EPA. If the information was available to EPA, either through an FYI submission or by publication in scientific literature before September 1, 1989, then such penalties were reduced to $1,000 per animal or aquatic species study and $5,000 for studies involving humans. *Id.* The Monsanto decision was the first time a company was required to pay stipulated penalties for information submitted to the Agency as part of a corporate-wide environmental audit conducted pursuant to a consent agreement. *Id.*

was modelled after EPA's approach in the Monsanto consent agreement.[187]

The CAP program consisted of agreements between EPA and TSCA-regulated entities encouraging these companies to identify and report to EPA data meeting the reporting standard of section 8(e), but, by design or inadvertence, previously not reported.[188] Participating companies were required to take the following three actions: (1) to conduct a thorough and candid compliance audit to root out violations under section 8(e), (2) to disclose all results of the report to EPA, and (3) to promptly correct any violation.[189] In return, EPA agreed to forego criminal prosecution and to place a ceiling on governmental civil penalties at $6,000 to $15,000 per report, with an ultimate maximum fine of $1,000,000[190]—a penalty substantially smaller than the potential maximum under ordinary application of agency penalty policies.[191] Participants were given a short period of time to register for the program[192] and a stipulated period after signing the agreement within which to complete the required audit.[193] Taken as a whole, this approach created an immediate incentive for industry to correct violations of the law's reporting requirements by auditing and disclosing promptly. It defined a corporation's potential exposure to liability and eliminated the possibility that EPA or DOJ would use audit results to seek criminal penalties against a participating company.[194]

At least one state environmental agency already has put an amnesty program in place. In the summer of 1991, the Texas Water Commission ("TWC") announced an amnesty program to encourage the registration of unregistered underground petroleum storage

187. U.S. ENVTL. PROTECTION AGENCY, ENFORCEMENT ACCOMPLISHMENTS REPORT: FY 1991, at 5-15 (1992) (on file with the *Harvard Environmental Law Review*).

188. CAP Notice, 56 Fed. Reg. at 4129.

189. *Id.*

190. *Id.* at 4130.

191. For corporations not participating in the CAP, maximum penalties for violations under section 8(e) were civil penalties of $25,000 per day for each violation, with no total limit, and criminal penalties including fines of $25,000 per day for each violation and imprisonment of one year. 15 U.S.C. § 2615 (1988).

192. Three months were allowed for CAP signup under the initial notice. CAP Notice, 56 Fed. Reg. at 4128. The deadline for registration was extended by another notice, 56 Fed. Reg. 19,514 (Apr. 26, 1991), and again, 56 Fed. Reg. 28,458 (June 20, 1991), resulting in a registration period of five months in total.

193. One hundred and eighty days from the sign-up deadline were allowed for completion of relevant audits and reporting. CAP Notice, 56 Fed. Reg. at 4129.

194. *See id.*

tanks ("UPST").[195] The TWC's goal in initiating the program was to improve its UPST inventory so that the TWC and current and future UPST property owners could guard against the risk of future releases.[196] The expanded inventory will help owners upgrade their UPSTs, anticipate leaks, remove unsound tanks, and remediate contaminated soil before further environmental harm occurs.

The TWC provided two strong incentives for participation. First, late-registrants were shielded from penalties attributable to their failure to register on time.[197] Second, once registered, tank owners were eligible to receive reimbursement from the Texas Tank Remediation Fund for the cost of removing leaking UPSTs and surrounding contaminated soil.[198] To maintain public credibility and to retain sufficient leverage to motivate necessary cleanups, the program did not apply to unregistered tanks discovered independently by the Texas Water Commission[199] and did not forgive penalties associated with violations of other UPST regulatory requirements. Nor did it allow tank owners or operators to avoid the nonreimbursable cost of remediation in the event of contamination. Over 1920 additional registration forms were filed during this five month program.[200]

195. Office of Pub. Info., Texas Water Comm'n, Water Commission Announces 90-Day "Amnesty" for Tank Registration (July 19, 1991) (press release) (on file with the *Harvard Environmental Law Review*).

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.*

200. Telephone Interview with Donald Kennedy, Registration Coordinator, Petroleum Storage Tank Division, Texas Water Commission (May 11, 1992).

In a different regulatory context, that of airline safety inspections, the Federal Aviation Administration ("FAA") also recently has initiated a voluntary disclosure amnesty program. Federal Aviation Admin., U.S. Dep't of Transp., Compliance/Enforcement Bulletin No. 90-6 (Mar. 29, 1990) (on file with the *Harvard Environmental Law Review*). This program encourages air carriers which are required to carry out maintenance and operations programs to report and correct violations detected in self-evaluation audits. *Id.* at 22. The FAA instituted this policy as an incentive to internal evaluation, recognizing that such entities are in the best position to monitor their own compliance, and have far greater resources to do so than the government. *Id.* at 23. Under the program, the FAA agrees to forego imposing civil penalties upon certificate holders who voluntarily and promptly disclose a violation and take immediate actions to correct the violation and preclude its reoccurrence. *Id.* at 24. The policy also provides that "the nature and extent of a certificate holder's voluntary remedial action may be considered in mitigation of any civil penalty otherwise appropriate." *Id.* The policy stipulates that maximum penalties may be sought if the certificate holder fails to promptly disclose a violation of which it was or should have been aware. *Id.*

2. *Broad Application of the CAAP Concept*

As the risk of large environmental penalties grows, the CAAP option becomes more attractive to both government and industry. The prototype, the TSCA CAP program, was an experimental pilot project confined to one highly technical and complex area of environmental law governing the reporting to EPA of information on substantial environmental risks.[201] The incentives-based principle of the CAAP is viable in many settings. From the government's standpoint, a CAAP should be an attractive adjunct to ongoing compliance efforts (1) in regulatory contexts where compliance is difficult to monitor or where violations are difficult to detect, (2) when the violative condition, if left uncorrected, could expand over time to exacerbate the associated harm, (3) as needed to encourage registration, permitting, or other one-time actions to identify a specific regulated community and establish the "regulatory net," or (4) in mature regulatory programs where compliance levels are generally high and there is no perceived need to "send a message" to the regulated community.

Thus, a CAAP program might be used to identify, report, and remediate any soil contamination at or near an industrial facility which, if left uncorrected, may threaten groundwater.[202] The CAAP concept also would apply to the submission of new chemicals for toxicological review under TSCA's premanufacture notification requirements,[203] release reporting under the Toxic Chemical Release Inventory,[204] and chemical and oil spill reporting under CERCLA[205] and the Clean Water Act.[206] The CAAP concept also could be applied to permitting requirements of the Clean Water Act designed to protect against wetlands destruction.[207] Such a program may forgive penalties for past encroachment upon wetlands if the violators agree to create or expand wetlands of equal

201. *See supra* note 181 and accompanying text.

202. *See, e.g., supra* notes 195–200 (discussing TWC amnesty program for unregistered underground petroleum storage tanks).

203. Toxic Substances Control Act § 5, 15 U.S.C. § 2604 (1988).

204. Emergency Planning and Community Right-to-Know Act of 1986 § 313, 42 U.S.C. § 11,023 (1988) (requirements to file a toxic chemical release form).

205. Comprehensive Environmental Response, Compensation, and Liability Act § 103, 42 U.S.C. § 9603 (1988).

206. Clean Water Act § 311, 33 U.S.C. § 1321 (1988).

207. Clean Water Act § 404, 33 U.S.C. § 1344 (1988).

or higher quality, thus contributing significantly to the Bush Administration's commitment to "no net loss" of wetlands.[208]

With respect to the use of the CAAP concept in mature environmental programs, a CAAP could be used to remove the risk of enforcement liability against facilities that, because of technical complexities, may have failed to comply with the terms of air and water permits for significant periods of time. A CAAP program wiping the enforcement slate clean would encourage such permit holders to seek from regulatory experts the technical assistance they need to properly recalibrate or re-engage their monitoring or control equipment and to return to long-term compliance.[209]

Despite these benefits, CAAP programs are subject to criticism. First, CAAPs arguably could weaken enforcement by reducing the maximum penalty. However, there are no indications that such excessive lenience would occur. Indeed, a penalty cap can be lower than the allowable maximum and still encourage disclosure without eliminating all punishment. Moreover, government performance over the past decade shows an almost uninterrupted series of record annual enforcement penalties.[210] There is nothing to suggest that federal or state regulators would agree to overly lenient enforcement policies, even in the context of a CAAP.

Beyond this, EPA is unlikely to propose a CAAP in all regulatory areas. Rather, the CAAP concept most likely would be applied on a program-by-program basis. Moreover, even if retroactive enforcement were somewhat weakened, a broad-based CAAP would have no impact whatsoever on EPA's enforcement of future violations. In such cases, EPA still could use the full array of traditional punitive and deterrent sanctions.

Concerns about weakened enforcement arise from the notion that violators "deserve" heavier punishment. But, because the primary goal of environmental enforcement is compliance, not retribution, the beneficial incentives for auditing and remediation embodied in a CAAP program far outweigh the costs.

208. *See* Bill Peterson, *Bush Vows to Fight Pollution, Install 'Conservation Ethic'; Speech Distances Candidate From Reagan*, WASH. POST, Sept. 1, 1988, at A1.

209. In CAAP programs the time limits for completing an audit, the scope of required remedial action, the degree of penalty abatement, and the size of the maximum penalty will vary with the nature of the environmental problem, its potential for harm, its remedial costs, and the difficulty of detecting the triggering environmental violation.

210. *See supra* note 15.

Second, some may believe that the appearance of lenience would render a CAAP program politically untenable. Given growing concern about environmental violations,[211] any appearance that penalties are being reduced may create suspicion and hostility within the environmental community and the general public. However, pursuit of maximum penalties without regard to the long-term public policy implications will discourage corporate efforts to identify and correct violations and other potential environmental hazards. If the public goal is environmental improvement rather than punishment of violators, then EPA must demonstrate courage and leadership by adopting new policies fostering this result.

A third objection to the CAAP concept, one that emerged in the pilot TSCA CAP, is that low participation can undermine the program's effectiveness. After giving industry three months—later extended to five months—to sign up under the TSCA section 8(e) CAP, participation from the regulated community was slow to materialize.[212] Like the tradeable permits approach to emissions control,[213] the CAP idea had strong theoretical appeal. In practice, however, also like tradeable permits,[214] initial entry into the program was limited.[215] But the tradeable emissions permits analogy

211. *See supra* note 15.

212. Although there was a slow early response to the TSCA CAP program, 123 companies had signed up as of February, and EPA had received over 500 reports of TSCA section 8(e) studies in the three months since the program began. Telephone Interview with Phillip L. Milton, Compliance Division, Office of Compliance Monitoring, Office of Pesticides and Toxic Substances, U.S. EPA (Mar. 4, 1992); *see also* U.S. ENVTL. PROTECTION AGENCY, ENFORCEMENT ACCOMPLISHMENTS REPORT: FY 1991, at 5-14 to 5-15 (1992) (on file with the *Harvard Environmental Law Review*). Many more reports were expected before the February 28, 1992, deadline. Contrasting these numbers with the only 2000 reports EPA received between 1978 and 1991 suggests that the CAP program led directly to a sharp increase in section 8(e) reporting. Telephone Interview with Phillip L. Milton, Compliance Division, Office of Compliance Monitoring, Office of Pesticides and Toxic Substances, U.S. EPA (Mar. 4, 1992).

213. Emissions permits trading involves the issuance of transferable licenses to pollute in limited quantities, which, in theory, would result in the least socially-costly regime of pollution reduction. *See, e.g.*, TOM TIETENBERG, ENVIRONMENTAL AND NATURAL RESOURCE ECONOMICS 345 (2d ed. 1988).

214. Trading of air emissions permits under the Clean Air Act was slow to begin. Robert W. Hahn & Gordon L. Hester, *Where Did All the Markets Go? An Analysis of EPA's Emissions Trading Program*, 6 YALE J. ON REG. 109, 151 (1989) (stating that "greatest disappointment of emissions trading" has been "failure of active markets in emission reduction credits to develop"). However, the slow start may be attributable to political obstacles, *see* Gordon L. Brady et al., *Political Limits of the Market for 'BAT Medallions'*, REGULATION, Winter 1990, at 61, or to the greater transaction costs associated with trades prior to the development of familiar procedures, *see* Brennan Van Dyke, Note, *Emissions Trading to Reduce Acid Deposition*, 100 YALE L.J. 2707, 2724 (1991).

215. Perhaps corporate unfamiliarity with the program, mistrust of EPA and its

provides a compelling case in favor of new, broader CAAP programs: as the size of and exposure to such programs grow, their efficacy and impact increase as well.[216] Broad implementation of the CAAP concept, and the discussion it would stimulate, would foster understanding and familiarity with such programs, making significant increases in participation likely. Additionally, new CAAPs would encourage auditing at virtually no cost. Thus, even limited participation in respective programs should not prevent government from exploiting a CAAP program's potential to increase auditing activity.

The Compliance Audit Amnesty Program concept reorders short-term incentives for environmental audits. Industry would perceive immediate advantages and limited danger in choosing to identify, disclose, and correct environmental dangers.[217] By strictly limiting the time to enroll and the time to report, EPA could create a sense of urgency and enthusiasm, a sense that one must join now or forever lose the chance to do so. Furthermore, by limiting possible penalties for violators who participate in the program, a CAAP program would provide industry with a choice between certain, small, near-term penalties and the uncertain risk of much larger penalties or criminal sanctions in the future.

Given EPA's limited resources, government monitoring and enforcement of environmental dangers always will be incomplete without the assistance of industry. By increasing industry's incentives to uncover and disclose these problems immediately, knowledge and correction of dangers to human health and safety and the environment can be enhanced in the near term.

B. The Environmental Star Program: Voluntary Self-Policing

EPA should take additional steps to encourage auditing in a manner that does not raise the specter of enforcment liability. One approach would be to adopt an Environmental Star Program ("En Star") modelled after a self-evaluation/self-policing program pioneered by the U.S. Occupational Safety and Health Administration ("OSHA"). The En Star Program would, for example, be available only to companies that have implemented sound internal management programs, have established exemplary compliance and remediation records, and would agree to achieve voluntary emissions or discharge reductions. By relying more heavily upon self-policing, the government could redirect its compliance monitoring and enforcement resources by reducing its regulatory oversight of complying industry leaders.

1. The OSHA Star Program

In July 1982, OSHA announced three special self-policing programs that allowed companies with exemplary worker protection programs to enjoy a special regulatory relationship with the Agency.[218] These programs arose from the recognition that, in protecting workers, the government has neither the wisdom nor the resources to require and enforce the most appropriate compliance methods.[219] The most advanced of these programs, the Star Program, is available to industry leader companies that establish management systems for preventing or controlling hazards,[220] demonstrate a solid history of compliance with OSHA standards,[221] and exhibit a willingness to exceed minimum regulatory requirements.[222]

The Star Program entrusts these industry leaders with a special mandate to conduct self-evaluation compliance audits and

motivations in proposing such a program, and the program's relatively narrow application, all limited participation by a cautious regulated community. This experience suggests that, by itself, a CAAP initially may not attract broad participation. However, selective participation may be one of the program's best attributes. The companies that are likely to participate in one-time programs of these kinds may be the companies that have the greatest need to review their compliance status and to implement corrective action.

216. *See* Van Dyke, *supra* note 214, at 2724 (explaining that before trading procedures are streamlined to become less cumbersome, high transactions costs will deter development of markets).

217. *See* CAP Notice, 56 Fed. Reg. at 4129.

218. These three programs, entitled Star, Try, and Praise, were implemented in Notice of Voluntary Protection Programs, 47 Fed. Reg. 29,025, 29,026–28 (July 2, 1982) [hereinafter "Star Notice"], after having been introduced for notice and comment earlier in the year, 47 Fed. Reg. 2796 (January 19, 1982). They were designed to recognize companies with strong health and safety programs and establish a model for going beyond "mere compliance" in employee protection. Notice of Changes to Voluntary Protection Programs, 50 Fed. Reg. 43,804 (Oct. 29, 1985) [hereinafter "Amended Star Notice"].

219. Amended Star Notice, 50 Fed. Reg. at 43,811.

220. *See* Clarifications to the Voluntary Protection Programs (VPP) Regarding Injury Rates and Referrals, 53 Fed. Reg. 26,339, 26,341 (July 12, 1988) [hereinafter "Star Clarification Notice"].

221. *Id.*

222. *Id.* at 26,339, 26,343. Star program participants are nearly 70% below their respective industry averages in the rate of workplace injuries; they are 80% below the national average in median lost workdays. Amended Star Notice, 50 Fed. Reg. at 43,805.

promptly correct any compliance problems[223] in exchange for reduced inspections,[224] priority in variance requests,[225] and technical compliance assistance from the Agency.[226] In addition to these benefits, participation in the Star Program is a source of prestige and recognition.[227] The Star Program has increased management involvement in employee safety matters, resulting in improved productivity and morale,[228] reduced costs,[229] and enhanced employee awareness of and involvement in safety and health matters.[230]

As implemented by OSHA, the Star Program is available only to companies meeting strict qualifying criteria. These include (1) an injury/accident rate below the industry average, (2) a fully integrated employee health and safety management system, (3) a written corporate policy and established programs on employee health and safety, (4) training in handling of hazardous substances, operating processes, and use of protective clothing, (5) a documented management accountability system with corrections and rewards, and (6) a reliable system for employees to notify management of hazardous situations and to track management's responses.[231]

Upon being selected to participate in the Star Program, a company assumes primary responsibility for compliance monitoring at its facility.[232] Thereafter, the frequency and nature of OSHA inspections change dramatically. While most major OSHA sites are subject to annual compliance inspections, Star sites are entirely

223. Star Clarification Notice, 53 Fed. Reg. at 26,342.

224. This is of limited benefit since sites with good enough compliance records to qualify for Star were unlikely to be inspected anyway. *See* James Chelius & Harry F. Stark, *OSHA's Voluntary Protection Program*, 35 LABOR L.J. 167, 169 (1984).

225. However, no participant requested a variance in the first three years of the program, Amended Star Notice, 50 Fed. Reg. at 43,907. Thus, the variance provision was later deleted. *Id.* at 43,910.

226. *Id.* at 43,805.

227. Participants are described as "recognized employers," Star Clarification Notice, 53 Fed. Reg. at 26,341, and are entitled to use the Star logo, *id.* at 26,342. Such recognition with the Agency and with the participants' competitors, customers, and employees is a valuable incentive for participation.

228. Sites polled by OSHA indicated that Star participation filled employee needs for recognition and job fulfillment, thus contributing to improved morale and safety awareness. Amended Star Notice, 50 Fed. Reg. at 43,808.

229. Participating sites exhibited up to 11% fewer injuries and reductions in worker's compensation costs of up to 48%. *Id.*

230. *Id.*

231. *Id.* at 43,812–13.

232. *Id.* at 43,809.

removed from enforcement inspection lists.[233] In lieu of enforcement actions, Star companies are subjected to in-depth inspections every three years to determine whether they continue to qualify for Star recognition.[234] This reverification assessment is performed by OSHA's safety and health professionals, not by its enforcement staff.[235] Care is taken to separate from enforcement any information obtained by OSHA through the Star application and verification process, because such information is being voluntarily presented to OSHA.[236] When hazardous conditions are found, OSHA's safety and health professionals expect action appropriate to the hazard, but do not refer cases to OSHA's enforcement staff except in instances of valid employee complaints, serious accidents, or fatalities.[237] The Star approach recognizes companies that provide superior workplaces and works with them more cooperatively to correct hazards, conditioning OSHA's ongoing lenience on continued safety and agreement to specific remediation schedules and corrective measures for hazards or other regulatory concerns that arise.[238]

2. Application in the Environmental Auditing Context: The En Star Program

A voluntary self-policing program similar to OSHA's has much to recommend it in the environmental arena. From the regulator's standpoint, an Environmental Star Program ("En Star") could enable regulatory agencies to reallocate a substantial share of their compliance monitoring resources away from facilities with few compliance problems and toward marginal operators.

233. Star Clarification Notice, 53 Fed. Reg. at 26,341, 26,342.

234. Star Notice, 47 Fed. Reg. at 29,025, 29,029.

235. What Happens When OSHA Comes Onsite for VPP?, OSHA Voluntary Protection Programs, at 2 [hereinafter OSHA Comes Onsite] (on file with the *Harvard Environmental Law Review*).

236. A 1984 study of private sector attitudes toward the Star program indicated that the risk potential Star participants feared the most was the possibility that a VPP verification assessment could lead to enforcement action. *See* Star Clarification Notice, 53 Fed. Reg. at 26,339.

237. *Id.* at 26,347. Star participants will be informed in advance of any enforcement referral. *Id.*

238. *Id.* at 26,342; *see also* OSHA Comes Onsite, *supra* note 235, at 2.

In recent years, EPA has devoted special attention to the strategic targeting of its scarce inspection resources.[239] In each environmental program, program managers establish annual compliance monitoring priorities,[240] which reflect careful and strategic consideration of those aspects of the program about which program managers are most concerned. Inspection priorities are then set, taking into account such factors as the potential environmental impact,[241] the maturity and sophistication of the underlying regulatory program,[242] the compliance history of the facility, the need to "send a special message,"[243] or the need to utilize new sanctions or a new enforcement approach.[244]

239. For background information on EPA's policies on the strategic use of inspectional resources, see U.S. EPA, ENFORCEMENT IN THE 1990'S PROJECT 4-59 to 4-63 (1991). For discussion of the application of strategic planning principles in each program area, see OFFICE OF ENFORCEMENT, U.S. EPA, ENFORCEMENT FOUR-YEAR STRATEGIC PLAN: ENHANCED ENVIRONMENTAL ENFORCEMENT FOR THE 1990S, Part Four, Program-Specific Components (1991).

240. U.S. EPA, ENFORCEMENT IN THE 1990'S PROJECT 4-61 to 4-63 (1991).

241. Here EPA program managers weigh the likely adverse environmental impact of a violation, based upon the volume, toxicity, geographic area and ecosystems impacted, and exposure pathways of the chemicals involved in the various industry sectors subject to a regulatory program. EPA will seek broader inspection coverage in sectors posing the greatest risks. *See* OFFICE OF ENFORCEMENT, U.S. EPA, ENFORCEMENT ACCOMPLISHMENTS REPORT, FY 1990, at 2-2 (1991).

242. In general, EPA's inspection strategies allocate more resources to inspections in the first years of a new regulatory program. The number of inspections in more mature programs typically diminishes to a "maintenance" level. This level of inspections is designed to demonstrate an enforcement "presence" and to show there is a credible risk that violations will be detected and enforced. *See* U.S. EPA, FY 1988 ENFORCEMENT ACCOMPLISHMENTS REPORT D-22 (1988).

243. In the implementation of a new regulatory program, EPA or the state may concentrate inspections upon a given industry, geographic area, river basin, air shed, or toxic chemical to make a special point about compliance. Over the past few years, EPA has mounted special enforcement initiatives with regard to asbestos abatement projects, PCB disposal practices, pretreatment of industrial discharges into publicly owned treatment works, the release of fugitive air toxics, and environmental problems within specific geographic areas, including Boston Harbor, Puget Sound, the Great Lakes, and the Kahwha Valley in West Virginia. *See* OFFICE OF ENFORCEMENT AND COMPLIANCE MONITORING, U.S. EPA, ENFORCEMENT ACCOMPLISHMENTS REPORT: FY 1989 (1990); OFFICE OF ENFORCEMENT, U.S. EPA, ENFORCEMENT ACCOMPLISHMENTS REPORT: FY 1990 (1991).

244. At times, enforcement initiatives focus on the remedy of choice rather than upon the chemical or industry to be controlled or the geographic area to be protected. For example, EPA affirmatively will seek out a case in which criminal sanctions or the contract listing remedy may be used. In 1988, EPA issued guidance expanding the applicability of the contractor listing remedy against asbestos demolition and renovation companies. *See* OFFICE OF ENFORCEMENT AND COMPLIANCE MONITORING, U.S. EPA, FY 1988 ENFORCEMENT ACCOMPLISHMENTS REPORT 23 (1988). This policy helped justify the use of the listing remedy as a part of the 1990 asbestos enforcement initiative. Other examples include the use of criminal sanctions for wetlands violations, *id.* at 45, and the use of Section 104(e) information requests to gather information. OFFICE OF ENFORCEMENT AND COMPLIANCE MONITORING, U.S. EPA, ENFORCEMENT ACCOMPLISHMENTS REPORT: FY 1989, at 56 (1990).

Before EPA adopted this policy of strategic planning, compliance monitoring schemes typically required, for example, that all "major" sources of air or water pollution be inspected once a year. Today's more sophisticated approach suggests EPA's need and willingness to inspect some facilities less frequently when the application of targeting criteria indicates that resources would be better spent elsewhere. The inspection of a large facility requires the investment of substantial resources. Thus, less frequent inspection of just one "major" source may provide resources for the inspection of a number of smaller marginal sources. Because most of the companies that should qualify for En Star participation would be "major" sources, regulatory agencies would save substantial resources in reduced inspectional costs by implementing an En Star program.

The Texas Air Control Board ("TACB") has tentatively endorsed the En Star concept and has appointed a Task Force to investigate the concept and to make specific recommendations to the TACB. Representatives of industry and public interest groups lead the Task Force, which also includes community groups, EPA's Dallas regional office, and TACB staff.[245]

EPA also may consider the En Star concept. EPA recently told the Chemical Manufacturer's Association that it was investigating the relationship between the En Star concept and EPA's pollution prevention and resource recovery voluntary reduction programs.[246]

3. Advantages and Disadvantages of En Star Program

An En Star Program could accomplish a wide range of environmental policy objectives. EPA and the states could establish criteria for En Star participation that reflect substantive environmental concerns and regulatory objectives particularly relevant to given industries or geographic areas. Furthermore, as a condition of participation, sources could be required to achieve specific pollution prevention targets, voluntary reductions in toxic air emissions, or volumetric reductions in generated wastes. In other contexts, participants could be required to meet specific resource

245. *TACB Task Force Fever*, ENVTL. ALERT, Mar. 16, 1992, at 4, 5.

246. Telephone interview with F. Henry Habicht, Deputy Administrator, U.S. EPA, Apr. 15, 1992.

recovery or reclamation goals or to accomplish specified levels of performance in contaminant removal, soil or groundwater remediation, or other corrective action. The authorizing agencies could negotiate directly with a qualifying company about the specific environmental performance "beyond mere compliance" that would be a condition of that company's participation. While agency demands must reflect the reasonable limits of technology and company resources, the En Star concept may provide a unique opportunity to achieve a significant measure of extra-regulatory environmental protection.

EPA also could define En Star participation criteria in terms of a company's environmental management program, requiring internal oversight programs meeting the criteria set forth in EPA's Environmental Auditing Policy.[247] Thus, participation in an En Star program will provide substantial benefits related to the conduct of expansive auditing programs.[248]

Companies may view the En Star Program as providing valuable opportunities for them. Most companies find that inspections disrupt normal operations and intrude upon confidential and proprietary information.[249] Thus, even companies in full compliance will realize efficiencies from less frequent interruptions by the government. Moreover, environmental standards currently are so broad in their coverage, specific in their application, and technically complex in their detail, that *some* violation of *some* standard—however insignificant in its environmental impact—can be found in almost any inspection.[250] Consequently, reducing the frequency of negotiations to resolve technical compliance problems has considerable value to a company. More importantly, qualifying companies would develop reputations for being concerned about the community and the environment among their employees, neighbors, customers, and corporate peers.

247. EPA's Auditing Policy states that an effective auditing program will involve (1) access to and support of top management, (2) independence from activities being audited, (3) an appropriate mix of technical, regulatory, process, and legal talent, (4) a program to assure the quality and independence of the audit function itself, (5) written procedures, (6) the ability to gather and evaluate samples, data, and regulatory documents, (7) written reports containing candid findings and concrete recommendations, and (8) prompt corrective action where warranted. 51 Fed. Reg. at 25,009.

248. *See supra* notes 20–24 and accompanying text.

249. *See* CAHILL & KANE, *supra* note 1, at I-16.

250. *Id.* at I-1 (describing compliance under contemporary regulations as "an almost overwhelming exercise"); *id.* at I-4 (suggesting that "one can only wonder if 'fail-safe' management of compliance is, indeed, an achievable objective").

In addition, the qualifying process will foster significant positive interaction between the company and the agency. Such interaction should help create a presumption in the mind of the regulators that the company is committed to environmental protection. Thus, participation in the En Star program may encourage the agency to look favorably upon the company's permit applications or petitions to use alternative technologies.[251] Developing close regulatory ties also should help participating companies anticipate regulatory requirements and forecast their own time-sensitive capital demands.

However, such an En Star Program is not without risks to both the companies and the agencies. Companies recognize that reporting any violation to a regulatory body is fraught with uncertainty. The company and agency may have vastly different interpretations of applicable regulations or of the corrective measures appropriate to the circumstances. Special interests may seek to participate in the resolution of specific compliance matters, and such resolution may entail substantial capital or operating costs. Because participants will be expected to exceed mere compliance, the En Star Program may lead both the regulators and the public to expect more from nonparticipating companies. State agencies may be concerned that an En Star Program initiated at the state level will require significant coordination with, and perhaps direct participation by, EPA. Furthermore, unless citizens participate in the design of the En Star Program, skeptical members of the public may view the program as a conspiracy between the agency and industry.[252]

One crucial element of the En Star Program that must be addressed is the degree of protection it would provide to internal self-evaluation reports. Companies would be expected to perform routine compliance checks using protocols at least as stringent as those used by agency inspectors. The En Star Program may require that certain categories of violations be disclosed to the authorizing agency. It need not, however, require the company to disclose the audit report itself. Thus, the En Star Program could require the

251. *See, e.g.*, Memorandum from Samuel B. Chamberlain, Sterling Chemicals, Inc. to Jadena Henneke, Regional Director, TACB (October 4, 1991) (arguing that preferential access to regulatory agency in permitting and technology considerations would be crucial to success of an En Star program) (on file with the *Harvard Environmental Law Review*).

252. *Id.*

disclosure of specific factual information while protecting its analytical or evaluative content. The precise scope of these protections and the mechanism through which they would be guaranteed would be specified in a protocol defining the En Star program.[253] However, under current privilege doctrine, the release of any part of the audit report might be enough to constitute a waiver of the company's privilege, rendering the audit report discoverable by other agencies or private parties.[254] The following section outlines a potential solution to this problem.

C. A Limited Statutory Privilege for Audits: Encouraging Long-Term Systematic Self-Evaluation

A new, broader application of the CAAP concept would encourage one-time auditing, foster disclosure, and accelerate remedial action for existing environmental problems, but it would not encourage auditing over the long run.[255] The En Star Program would provide such direct incentives. Yet even with such a program in place, the inadequacies of current privileges and agency policies are still likely to deter industry from expanding or initiating long-term environmental auditing programs. Without additional protections, industry may continue to fear that self-investigation, other than audits performed under a CAAP-type agreement, will increase, not reduce, the risk of incurring environmental liabilities.

To assuage such fears, one potential alternative is a limited, statutory privilege protecting the legal conclusions of environmental audit reports. This privilege would be similar to the statutory

253. Possible environmental audit provisions of the En Star protocol might well include vastly different approaches to the disclosure of audit reports. The entire audit report might be considered confidential, and the corporation might merely be required to certify that all violations have been corrected. On the other hand, EPA might seek access to the full report. Another approach might involve requiring a corporation to disclose the recommendations contained in the audit report, identify which recommendations the company will adopt or will not adopt, and describe the reasons for the corporation's choices. One would expect En Star facilities to have a special relationship with EPA pursuant to which they could negotiate provisions which should help preserve the confidentiality of audit information.

254. *See supra* Part III.A.

255. Indeed, any hint that another CAAP program might be implemented in years hence would undermine the deterrent effects of environmental enforcement. Like any promise of future amnesty, it would moot the threat of current enforcement penalties by suggesting that industry can pollute at will and yet still be subject to lesser environmental penalties at some future date.

self-evaluation privilege for medical personnel established by states following *Bredice v. Doctor's Hospital*.[256]

Support for such a policy has been growing in recent years. Draft language proposed, but later rejected, for the 1990 Clean Air Act Amendments[257] shows that some members of Congress supported a limited privilege for environmental audit reports.[258] And in the Colorado and Arizona legislatures recently, statutory privileges for environmental audit reports were only narrowly defeated.[259]

1. Significant Features of an Environmental Audit Privilege

In constructing a statutory privilege for environmental audits, an examination of Colorado's proposed legislation provides valuable lessons. Like the post-*Bredice* statutory privileges for hospital staff critical self-analysis, Colorado's proposed legislation would have created a privilege under the rules of evidence. It read as follows: "Any reports or other materials prepared by any entity, for the purpose of voluntary self-evaluation concerning compliance with environmental laws and regulations, [will be] inadmissible as evidence in any legal action or administrative proceeding and not subject to discovery procedures."[260]

Like the other privileges discussed in Part III above, the proposed statute would have protected these voluntary self-critical reports only if the privilege were not waived.[261] Also like those privileges, the statute would have disqualified claims of privilege if, after an *in camera* examination, a court were to determine that the entity had not made reasonable efforts to achieve compliance,

256. 50 F.R.D. 249 (D.D.C. 1970); *see supra* Part III.C.

257. 42 U.S.C.A. §§ 7401–7671q (West Supp. 1992).

258. *See, e.g.*, STATEMENT OF SENATE MANAGERS ON CLEAN AIR ACT AMENDMENTS OF 1990, 136 CONG. REC. S16,933, 951 (Oct. 27, 1990) (proposing that "the Administrator [of EPA] 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"); JOINT EXPLANATORY STATEMENT OF COMMITTEE ON CONFERENCE, 136 CONG. REC. H13,197, 201 (Oct. 26, 1990).

259. Arizona S.B. 1446, 39th Leg., 1st Reg. Sess. (confidentiality of environmental audits bill) (introduced Feb. 7, 1989, defeated in legislature); Colorado H.B. 90-1204, 57th Gen. Assembly, 2nd Reg. Sess. (limited environmental self-evaluation privilege bill) (as amended on second reading, Feb. 23, 1990) (passed by General Assembly, then tabled indefinitely by sponsors upon threat of veto by Governor).

260. Colorado H.B. 90-1204, *supra* note 259 (bill summary).

261. *Id.*

that the privilege had been asserted fraudulently, or that extreme injustice would result.[262] Thus, the proposed auditing privilege was intended to achieve two objectives: (1) to encourage corporations to undertake the candid and thorough self-analysis that is in the public interest, and (2) to preserve the possibility of enforcement or other legal action against parties who act in bad faith.

The scope of such a statutory privilege should be limited. It should enable enforcement agencies to retain ongoing access to the underlying facts that provide the essence of and context for the audit. To protect underlying facts from disclosure would severely impair government enforcement and run counter to important policy values.[263] At the same time, the privilege should protect from disclosure the elements of the assessment and evaluative process.[264] By protecting the evaluative portions of the auditing process, government can provide the necessary incentives for companies to initiate or expand their auditing programs.

The proposed Colorado statute recognized this problem and thus would have protected only the evaluative elements of an audit report. The facts contained in an audit would have remained discoverable by enforcers.[265] For example, regulators would have been able to subpoena witnesses, discover documents, rely on documents or reports required by law, and conduct independent investigations.[266] Thus, under the proposed privilege, the enforcers would have retained access to all the underlying facts, including those demonstrating environmental exposure and regulatory violations. The privilege would not have provided immunity from prosecution for everything contained in a document; it merely would have provided assurance that documenting results would not increase the risk of prosecution and penalty. The proposed privilege would not have prevented legitimate prosecutions, any more than the attorney-client privilege prevents prosecutors from

262. *Id.*

263. Otherwise, a corporation could block investigation merely by including all incriminating factual material in an audit report. Thus, the audit would become an instrument of obstruction and self-dealing, rather than a tool of environmental protection.

264. Frost & Siegel, *supra* note 20, at 1213 ("Thus, a consultant's report and an attorney's analysis of the potential liability for an unpermitted discharge could be protected, while the *fact* of the unpermitted discharge could not.") (emphasis in original).

265. *See* Colorado H.B. 90-1204, *supra* note 259. Existing common law privileges might still shield underlying questions of fact from discovery to a limited extent.

266. *See id.*

inquiring about the facts underlying an admittedly inadmissible privileged communication.[267]

2. *Effects of Proposed Privilege*

A limited statutory privilege for environmental audit reports would allow a corporation to evaluate whether its current operations comply with environmental laws and to determine the necessary actions to attain compliance and clean up past contamination. Under current law, the good-faith auditor fears that its inquiry actually will worsen matters for the corporation. In contrast, under the proposed privilege, the auditor would know that internal self-investigation will put the corporation at no greater risk than if it continued to ignore its environmental problems. In fact, in almost every situation such ignorance would be more dangerous for the corporation than self-investigation. The chief exception to this would be when a company performs an audit revealing violations and does nothing to remedy them.[268] As penalties for environmental violations become harsher, corporations typically would choose to investigate and remedy instead of remaining consciously ignorant, as long as there were no risk of adverse use of the audit by agencies or other parties.

Moreover, the privilege would neither deter compliance nor hamper enforcement. A corporation would lose the privilege if it did not reasonably pursue good-faith compliance efforts.[269] A prosecutor still would be able to pursue enforcement, based upon evidence developed by the government; the privilege merely would deny the prosecutor the option of using the audit as the basis for proving a higher level of culpability, such as for knowing or willful violations, than would have been possible had an audit not been performed. In short, the privilege would protect the kind of behavior the law should most want to encourage. Under the limits proposed above, a privilege for compliance evaluations would

267. Frost & Siegel, *supra* note 20, at 1213 ("A company cannot prevent disclosure of facts indicating environmental violations merely by funneling that information through counsel; thus, the facts in an otherwise privileged environmental audit are likely to be discoverable.").

268. *Cf. Companies Must Have Plan*, *supra* note 15, at 1684 (suggesting that "a company should not institute an environmental audit program unless the board of directors is committed to fix problems that are detected").

269. *See* Colorado H.B. 90-1204, *supra* note 259.

markedly increase industry's incentives to discover and correct environmental violations.

There are a number of possible objections to a self-evaluative privilege. However, most of these are dispelled when limits are placed on the scope of protection. First, would the privilege impede enforcement? Although it is clearly possible, even in the face of statutory protection, that environmental enforcers would demand access to audit information, both DOJ and EPA already have insisted that they do not routinely seek access to audit reports,[270] and DOJ has issued guidelines stating that good faith auditors typically will not be prosecuted.[271] Thus, the exclusion of good-faith auditing evaluations would not materially impair enforcement. Colorado's proposed statutory privilege specifically defined circumstances in which the enforcement agency might properly seek access to the report, so that "bad-faith" violators could not shield themselves behind the statute.[272] The availability of *in camera* review reinforces this provision.[273]

Answering this first objection, however, raises a second objection: because enforcement agencies rarely use documents internally generated by companies, there would be little benefit to adopting a privilege.[274] But the concern with an "open door" policy on audits is not that access to audit reports frequently is sought. The problem is the perception among potential auditors that enforcers might at their discretion seek access to any individual audit report.[275] Without some additional assurance that auditing will not increase the risk of enforcement and the severity of penalties, current policies will fail to induce critical self-evaluation in the form of environmental auditing. A limited privilege, on the other hand, would increase industry's confidence that there is no additional risk from internal investigation. Consequently, a privilege would encourage corporations to initiate or expand auditing programs.

Finally, a state statute would be susceptible to criticism on the grounds that this complex issue of law and public policy cannot properly be addressed by piecemeal state-by-state legislation. Relying upon state legislatures to provide an appropriate statutory privilege would result in an inconsistent net of protections that would confuse, not protect, national corporations. Such legislation also could become a heated political and emotional issue, as states seek to broaden (or narrow) protections in an effort to attract (or dissuade) new industrial investment.

Furthermore, a state statutory privilege for audits, while offering some assurance against discovery and adverse use by state environmental agencies, would likely be inapplicable in investigations or enforcement proceedings by the federal government in federal courts under federal law. For these reasons, the regulated community must look to federal legislation to establish an environmental auditing privilege. This would ensure a uniform regulatory scheme, providing fair and even nation-wide enforcement policies and practices.

In sum, the objection that a limited privilege for environmental audits will create a loophole in enforcement and undermine deterrence is unfounded. The Colorado proposal demonstrated the necessary exceptions to the privilege; under that proposal, enforcement would be unimpeded when there is bad faith, fraud, extreme injustice, or a corporation's failure to act diligently to correct the violations an audit reveals.[276] These are the situations in which EPA and DOJ suggest they will be likely to use audit documents.[277] Thus, adopting the limited privilege would not require EPA and DOJ to change their stated policies. Instead, it would add legal certainty to their currently nonbinding assertions, thereby removing the largest remaining deterrent to environmental auditing and encouraging the discovery and remediation of environmental hazards.

270. *See* EPA Auditing Policy Statement, 51 Fed. Reg. at 25,004, discussed *supra* Part III.D; DOJ GUIDANCE, *supra* note 22, at 2–3, discussed *supra* Part III.E.

271. *DOJ Plans to Issue*, *supra* note 16, at 484.

272. *See* Colorado H.B. 90-1204, *supra* note 259 (stating that audit report would be available to enforcement agency if there is lack of reasonable compliance with statute or regulation, fraud, or extreme injustice).

273. *In camera* review may make prosecutions slightly more expensive, but this is likely to be only a trivial marginal cost, especially given that enforcement authorities insist they will use audits infrequently. *See DOJ Plans to Issue*, *supra* note 16, at 484.

274. *Id.*

275. *See supra* Parts III.D, III.E (discussing industry fears regarding adverse government use of audit reports).

276. *See* Colorado H.B. 90-1204, *supra* note 259.

277. EPA Auditing Policy Statement, 51 Fed. Reg. at 25,007; DOJ GUIDANCE, *supra* note 22, at 8–9.

D. Interim Revisions to EPA Policy Statement on Environmental Auditing

To implement the full range of proposals described above—preparing CAAP policies specific to different types of potential violations and violators, designing an En Star program, and pursuing legislative adoption of an environmental auditing privilege—would take years. However, efforts to uncover environmental hazards should be encouraged immediately. EPA can accommodate this need by revising its environmental auditing policy.

As discussed in Part III.D above, EPA currently promises only that it will not "routinely seek" access to environmental audit reports.[278] Thus, EPA's current policy leaves potential auditors uncertain whether initiating or expanding auditing will increase their risk of liability.[279] To redress the uncertainty, EPA should revise its Environmental Auditing Policy Statement in the following ways.[280] First, it should recognize the policy reasons for not seeking audit reports. In view of the complexity of complying with current environmental standards, EPA's Policy Statement should note the importance of encouraging self-motivated auditing programs. It should acknowledge that the benefits of environmental auditing go far beyond ensuring compliance.

Second, it should empower good faith auditing programs to shield against civil enforcement actions. The Policy Statement should note that EPA will not initiate civil or administrative enforcement actions for compliance problems identified during the audit that are timely and appropriately reported and resolved.

Third, it should express a presumption against the criminal prosecution of companies that have implemented good faith audit programs. The Policy Statement should note that with respect to matters identified in a voluntary audit, criminal penalties are appropriate only in extreme cases. Criminal penalties should not be imposed where a compliance problem identified by the audit was not resolved in a timely and appropriate manner, so long as it was not dealt with in bad faith.

278. EPA Auditing Policy Statement, 51 Fed. Reg. at 25,004.

279. *See supra* Part III.D.

280. For a more detailed description of these and other suggestions for amending EPA's auditing policy, see Moore & Dabroski, *supra* note 25.

Fourth, it should respect the confidentiality of appropriately prepared and marked auditing documents. Documents marked "Confidential" or "Attorney-Client Privileged" or "Self-Evaluation Privileged" should not be inspected or seized unless the government has reason to believe that a crime has been committed and that the documents provide evidence of the crime.

Fifth, it should provide substantial incentives for voluntary disclosure. Voluntary disclosure should be encouraged by providing dramatic penalty incentives and promising to forbear criminal prosecutions. Where disclosure is not mandated by law, however, companies should not be subjected to higher penalties if they choose not to disclose.

Finally, it should expand penalty mitigation options. EPA should credit regulated entities for disclosing violations, or engaging in Supplemental Enforcement Projects.[281] The circumstances of the violation and the actions taken by the company to remedy the problem and prevent reoccurrence should be taken into consideration.

A revised Policy Statement that included these specific statements would eliminate many corporate fears and uncertainties currently deterring auditing. It would provide concrete rules regarding the use of administrative civil and criminal sanctions on which the potential auditor could rely. Because the threat of prison terms for environmental crimes looms particularly large for corporate decisionmakers,[282] an amended Policy Statement would spur corporations to adopt comprehensive auditing programs. This would offer real incentives similar to those discussed in the CAAP above;[283] it would encourage but would not require a corporation to audit and disclose the results.

281. EPA's Office on Enforcement may authorize the mitigation of enforcement penalties in five categories of Supplemental Enforcement Projects: pollution prevention projects, pollution reduction projects, health remediation project, environmental auditing projects, and enforcement-related public awareness projects. An audit project may be considered for penalty mitigation if it is designed to correct existing management or environmental practices that contribute to recurring or potential violations. This policy does not recognize audit programs that merely represent good business practice. *See* Memorandum from James M. Strock, Assistant Administrator, EPA Office of Enforcement, to Regional Administrators, et al. (Feb. 12, 1991) (on file with the *Harvard Environmental Law Review*).

282. *See supra* Part II.

283. *See supra* Part IV.A.

V. Conclusion

Environmental auditing is a relatively new phenomenon, but it has become the source of intense interest for industry. Auditing helps corporations identify environmental violations and achieve compliance with environmental laws. The growing threat of environmental enforcement, with heightened penalties for violators, is creating an enormous impetus for corporations to comply. Under current law, however, corporations cannot be sure that if they perform audits, they will not be providing the government with conclusive adverse evidence of environmental violations "on a silver platter." Thus, the company that makes a good-faith effort to identify and correct its environmental violations may put itself at greater risk than the company that deliberately avoids self-criticism.

Current law only provides industry with certain limited assurances. The attorney-client privilege and the attorney work product doctrine together protect communications of facts and legal evaluations made in preparation for litigation. However, they leave open the possibility that routine evaluations of a facility's compliance efforts will not be protected. The self-critical analysis privilege, available in some contexts, thus far has been rejected in the context of environmental audits. Finally, EPA and the Department of Justice have attempted to reassure corporations that good-faith auditors will not face harsher penalties or greater risks of prosecution than corporations that fail to audit. However, there are substantial loopholes in these government assurances. Under pressure to punish environmental criminals, enforcers may be unable to resist using audit results, even though they recognize that doing so may contravene public policy.

For these reasons, a federal program consisting of a Compliance Audit Amnesty Program, an Environmental Star Program, and a limited statutory privilege for the evaluative portions of environmental audits are necessary. The CAAP program would create a powerful short-term incentive for industry to investigate existing violations, pay reduced penalties, and repair any harm, in order to avoid the risk of larger future penalties. The En Star Program would provide a long-term incentive for individual companies to improve their auditing and compliance policies, in return for less frequent government monitoring. The statutory privilege would provide a long-term guarantee, thereby removing the remaining disincentives to auditing. Until these policies are in place, a revised Auditing Policy Statement from EPA would help allay corporate fears of prosecutions stemming from the initiation or expansion of internal environmental investigations.

In combination, these policies would provide industry with the assurances it needs to initiate or expand self-investigation, discovery, and correction of environmental violations. The policies would immediately improve the knowledge of and response to existing environmental hazards, without undermining enforcement against and deterrence of environmental violations. Environmental dangers can best be removed by providing this set of increased incentives for their prompt discovery and correction.