

# Promoting Corporate Self-Compliance: An Examination of the Debate Over Legal Protection for Environmental Audits

*Michael Ray Harris\**

## CONTENTS

Introduction .....	664
I. Environmental Auditing .....	668
A. Types of Environmental Audits .....	670
B. Fundamentals of Environmental Auditing .....	673
C. Benefits of Environmental Auditing .....	679
II. Legal Protection for Environmental Audits .....	683
A. The Debate Over Legal Protection for Environmental Audits .....	683
B. What Sources Are Available for the Protection of Environmental Audits? .....	684
1. The Attorney-Client Privilege .....	684
2. The Work Product Doctrine .....	689
3. The Self-Evaluative Privilege .....	690
a. Development of the Privilege .....	690
b. Judicial Expansion of the Privilege to Environmental Audits .....	692
c. Legislative and Administrative Expansion of the Privilege to Environmental Audits .....	698
d. Expansion of the Privilege to Environmental Audits: Government and Citizen Perspectives .....	703
i. The Government Regulator/Prosecutor View .....	703
ii. The Citizens' View: Remembering the "Other" Party .....	706

---

\* Associate, Law Offices of Charles Stevens Crandall, San Diego, California. J.D. 1995, Boalt Hall School of Law, University of California at Berkeley; Master of Studies in Law (MSL), *magna cum laude*, 1992, Vermont Law School; B.A., 1991, Pitzer College. Honors Law Clerk, United States Department of Justice, Environment and Natural Resources Division, Environmental Enforcement Section, Summer 1994. Special thanks to Selena Harris, Frances Chang and John Meaney for their invaluable support and input.

III. Reconciling the Debate: Suggestions to Implement an Equitable Environmental Auditing Policy .....	711
A. Provide Reasonable Assurances to the Business Community .....	715
B. Protect Public Access to Auditing Results and Environmental Management Information .....	717
C. Promote Environmental Auditing and Management Among Small Businesses .....	719
Conclusion .....	720

## INTRODUCTION

After twenty-five years of command and control environmental regulation in the United States,<sup>1</sup> many in business, government and the environmental movement feel that it is time to turn toward new, more innovative means of environmental protection.<sup>2</sup> Traditional environmental regulation has proven inadequate in resolving our country's environmental problems.<sup>3</sup> Despite the enormous economic expenditures on environmental compliance and enforcement over the past twenty-five years,<sup>4</sup> American businesses have failed to fully achieve many of the standards set by Congress, Environmental Protection Agency (EPA) and the states to protect our land, air and

1. See President Bill Clinton & Vice President Al Gore, *Reinventing Environmental Regulation*, reprinted in INSIDE E.P.A. WKLY. REP., Mar. 17, 1995, at S-1, S-1 (dating the beginning of the modern era of environmental protection as Earth Day, 1970).

2. See *id.* at S-3 to S-4 (discussing principles for reinventing environmental protection); Barton H. Thompson, Jr., *Foreword: The Search for Regulatory Alternatives*, 15 STAN. ENVTL. L.J. viii, ix-xi (1996); see also *Agency Group Reviews Ways to Improve Permitting Process, Prevent Pollution*, 26 Env't Rep. (BNA) No. 6, at 312 (June 9, 1995) [hereinafter *Agency Group*] (discussing an EPA paper which advocates relying less on command and control regulatory tactics and achieving greater environmental protection in the permitting process). Despite the ongoing debate over the relative merits of competing policy instruments for controlling pollution (effluent charges, emission offsets, permit schemes, etc.), command and control enforcement remains the regulatory scheme of choice. See Stephen H. Linder, *Better Regulatory Compliance Through Environmental Auditing: A Reform Whose Time Has Passed*, 5 J. POL'Y ANALYSIS & MGMT. 590, 590 (1986).

3. See Thompson, *supra* note 2, at viii.

4. See Daryl Ditz et al., *Environmental Accounting: An Overview*, in GREEN LEDGERS: CASE STUDIES IN CORPORATE ENVIRONMENTAL ACCOUNTING 1, 8 (Daryl Ditz et al. eds., 1995) [hereinafter *GREEN LEDGERS*] (stating that environmental costs are often as much as twenty percent of a business' total production costs); Thomas L. Jones, *An Overlooked Opportunity for Pollution Prevention Case Study: Union Carbide Taft Plant, Hahnville, Louisiana*, 14 WASTE MGMT. 203, 203 (1994) ("Pollution abatement costs equal nearly two percent of our Gross National Product."). The Clean Water Act provides an example of the cost of environmental regulation. The National Forum on Nonpoint Source Pollution found that in the past twenty years "the federal government has spent more than \$50 billion to construct and upgrade municipal sewage treatment plants. From 1972 through 1987, private industry's capital costs for water pollution abatement were \$74.7 billion." NATIONAL FORUM ON NONPOINT SOURCE POLLUTION, WATER: TAKING A NEW TACK ON NONPOINT SOURCE POLLUTION 9 (1995).

water.<sup>5</sup> Simultaneously, corporations are increasingly frustrated by stringent government regulations and the effect of environmental costs on their ability to compete in an expanding global market.<sup>6</sup>

Command and control regulation, like many enforcement schemes, requires significant economic resources and enforcement personnel.<sup>7</sup> Practice, however, shows that the government is unable to fund environmental programs at levels sufficient for vigorous enforcement of the law by regulators and prosecutors.<sup>8</sup> At the same time, many environmentalists feel that environmental issues and corporate profits have been at odds, and priority is given to profits.<sup>9</sup> This creates a distrust of corporations and instills the belief that firms simply wish to evade environmental mandates.<sup>10</sup> These problems associated with command and control environmental regulation suggest that new approaches to an environmental management system are necessary.

In the search for an alternative to command and control regulation that more adequately addresses environmental and economic concerns, many American corporations have adopted environmental

---

5. See Thompson, *supra* note 2, at viii (stating that despite considerable progress on several environmental fronts, "we still have not met even our most basic goals for air and water pollution in many parts of the country, and there has been no real success on a host of other environmental issues"). It should be noted, however, that the stated goals of environmental statutes such as the Clean Water Act are quite ambitious. See, e.g., Federal Water Pollution Control Act, 33 U.S.C. § 1251(a)(1) (1994) (stating that a national goal is to eliminate the discharge of pollutants into navigable waters by 1985).

6. See BEYOND COMPLIANCE: A NEW INDUSTRY VIEW OF THE ENVIRONMENT 1, 5-6 (Bruce Smart ed., 1992) [hereinafter, BEYOND COMPLIANCE] (discussing corporations as inherently reactive entities limited in part by resources, prescriptive regulations, and competitive markets).

7. See Clinton & Gore, *supra* note 1, at S-2 (stating that the prescriptive regulations of the past twenty-five years "can be inflexible, resulting in costly actions that defy common sense by requiring greater costs for smaller returns").

8. *Taking Stock of Environmental Problems: Hearings Before the Senate Comm. on Env't and Pub. Works*, 103d Cong., 182-83 (1993) (testimony of Whitney Tilt, Director, Conservation Programs, National Fish and Wildlife Federation).

9. See John Borland, *Two Green Threads*, CAL. J., Jan. 1996, at 6, 6. Courts have recognized the tension between corporations' profits and environmental regulations. See, e.g., *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987) (involving a nuisance suit to prevent defendant paper company from discharging dioxin into Lake Chaplain); *Lead Indus. Ass'n v. EPA*, 647 F.2d 1130 (D.C. Cir. 1980) (industry challenging EPA's national ambient air quality standard for lead as too stringent); *International Harvester Co. v. Ruckelshaus*, 478 F.2d 615 (D.C. Cir. 1973) (automobile industry challenging exhaust emission standards for hydrocarbons and carbon monoxide).

10. See TEDD SAUNDERS & LORETTA MCGOVERN, *THE BOTTOM LINE OF GREEN IS BLACK: STRATEGIES FOR CREATING PROFITABLE AND ENVIRONMENTALLY SOUND BUSINESSES* 222 (1993) (discussing environmental groups' suspicions of industry); see also *Agency Group*, *supra* note 2, at 312. Lance Miller, Executive Director of EPA Permits Improvement Team, stated at a June 2, 1995 meeting that "[t]here's been a tremendous mistrust between the public, the permittee and the regulator." *Id.*

self-compliance programs.<sup>11</sup> These self-compliance programs reflect a change in the way some businesses approach environmental compliance. Self-regulatory programs include assessing a corporation's pollution control costs.<sup>12</sup> This can lead to corporations including environmental considerations in their decisionmaking processes, such as product design, marketing, purchasing, product stewardship, employee relations, and executive compensation.<sup>13</sup> This new regulatory approach that benefits both businesses and the environment offers a new model for future environmental regulation.

The environmental audit is one self-compliance method that corporations frequently adopt. An audit methodically evaluates a firm's compliance with environmental regulations, helping management identify and correct environmental problems.<sup>14</sup> Perhaps most importantly, environmental auditing can provide an economic benefit to the corporation by identifying cost effective ways to reduce and eliminate hazardous wastes, toxins and pollutants.<sup>15</sup>

Despite auditing's potential as an alternative to command and control regulation, businesses, government officials, and the public remain wary of environmental audits. Businesses argue that current EPA policy reduces incentives for stringent environmental auditing programs.<sup>16</sup> Specifically, businesses want assurance that regulators will not use their self-compliance efforts against them to assess administrative and civil penalties or to establish criminal liability when corporations voluntarily disclose violations and take steps to correct non-compliance.<sup>17</sup> Corporations suggest that the legal tool for providing this assurance is the self-evaluative privilege (SEP). The SEP is a judicially crafted privilege originally designed to shield from discovery routine hospital evaluations, but has been expanded to cover other types of internal investigatory reports, such as accounting records and

---

11. Terrell E. Hunt & Timothy A. Wilkins, *Environmental Audits and Enforcement Policy*, 16 HARV. ENVTL. L. REV. 365, 365 (1992); Walter J. Huelsman, *The Auditor's Perspective*, in THE MCGRAW-HILL ENVIRONMENTAL AUDITING HANDBOOK 3-3, 3-8 (L. Lee Harrison ed., 1984) [hereinafter AUDITING HANDBOOK].

12. See Huelsman, *supra* note 11, at 3-6 (stating that an auditor can look at pollution control costs, which are a managerial concern).

13. Ditz et al., *supra* note 4, at 1.

14. See Cheryl Hogue, *Audit Legislation Gains in States, But Some Predict Slowdown In Future*, 26 ENV'T REP. (BNA) No. 18, at 882 (Sept. 1, 1995).

15. See Ditz et al., *supra* note 4, at 21-28 (discussing the uses of environmental cost information).

16. See *States, Industry, Environmental Groups Call For Changes In Interim Audit Policy*, 26 ENV'T REP. (BNA) No. 15, at 690 (Aug. 11, 1995) [hereinafter *States, Industry*] (discussing industry concerns with EPA's audit policy).

17. *Attorneys Debate Merits of Audit Bill, Interim EPA Policy on Voluntary Disclosure*, 26 ENV'T REP. (BNA) No. 15, 690, 691 (Aug. 11, 1995) [hereinafter *Attorneys Debate*]; see also Hunt & Wilkins, *supra* note 11, at 373-75 (discussing corporations' concerns that audits may be used against them).

academic peer reviews.<sup>18</sup> Business advocates are urging courts to apply the SEP to environmental audits in order to exclude them as evidence in environmental cases.<sup>19</sup> Courts are reluctant to do this, so SEP advocates are turning to EPA, Congress, and the states to enact legislative or administrative privileges to protect environmental audits from disclosure.

The federal and state governments have also reacted to environmental audits with caution. EPA originally recognized the benefits of auditing in its 1986 Environmental Auditing Policy Statement.<sup>20</sup> After an eighteen-month debate, EPA recently published a new policy that attempts to encourage self-regulatory behavior by reducing overall penalties and ensuring an audit's confidentiality when a corporation meets certain auditing criteria.<sup>21</sup> Many state and federal regulators, however, find protecting environmental audits undesirable.<sup>22</sup> In their view, auditing's benefits to corporations, such as greater productivity or profitability, provide sufficient incentives for corporations to pursue voluntary self-compliance programs. Furthermore, regulators fear that the SEP will remove a valuable prosecution tool.<sup>23</sup>

In addition to corporations and the government, there is also the citizen. The citizen's right of access to information is often forgotten in the debate over environmental audits, yet it is embedded in this debate.<sup>24</sup> Local citizen groups have fought extensively for greater access to information about corporate environmental compliance, and these groups are reluctant to concede to businesses any additional control over information on corporate compliance with environmental regulations. Citizen groups view businesses' desire for self-regulation as a means to avoid environmental disclosure, and feel that providing business with more secrecy for environmental audits is like the "fox guarding the hen house."<sup>25</sup>

---

18. See *infra* part II.B.3.a.

19. Robert J. Bush, *Stimulating Corporate Self Regulations—The Corporate Self-Evaluative Privilege: Paradigmatic Preferentialism or Pragmatic Panacea*, 87 Nw. U. L. REV. 597, 614-15 (1993).

20. 51 Fed. Reg. 25,004 (1986).

21. Incentives For Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations, 60 Fed. Reg. 66,706 (1995).

22. *Id.* at 66,710; *Audit Privilege Opposed By District Attorneys, Environmentalists* 23 PESTICIDE & TOXIC CHEM. NEWS 56, 56 (1995) [hereinafter *Audit Privilege*].

23. See Restatement of Policies Related to Environmental Auditing, 59 Fed. Reg. 38,455, 38,459 (1994).

24. See also *States, Industry supra* note 16, at 690 (discussing Public Citizen Litigation Group's position that audit information be available to the public).

25. U.S. Envtl. Protection Agency, Environmental Auditing Focus Group Meeting, in San Francisco, Cal. 22 (Jan. 20, 1995) [hereinafter *Focus Group*] (transcript on file with author) (statement of Christopher Dolan, Trial Lawyers for Public Justice); *Audit Privilege, supra* note 22, at 56 (quoting Christopher Dolan of the Trial Lawyers for Public Jus-

This paper examines the debate over legal protection for environmental auditing and suggests that environmental regulations encourage a limited amount of corporate self-regulation. Environmentalists must remain watchful, but too many pro-environmental commentators focus only on the drawbacks of providing legal protection for environmental audits, arguing that this will give businesses greater control over U.S. environmental policy.<sup>26</sup> This paper views environmental auditing as a potentially powerful tool for environmental protection that can take advantage of corporations' desire for self-compliance programs without sacrificing control in regulating businesses' negative environmental impacts.

Part I outlines the fundamental elements and benefits of auditing. Part II goes on to discuss, from corporate, government, and citizen perspectives, whether legal protection is needed to promote auditing and what forms of legal protections for environmental audits currently exist. Finally, part III recommends components of an administrative or legislative program to protect environmental audits, and suggests providing reasonable assurances to the business community through a certification system, greater public access to auditing results and environmental management information, and programs and technical tools to develop environmental auditing and management practices among small businesses.<sup>27</sup>

## I

### ENVIRONMENTAL AUDITING

Auditing is often defined as merely a tool for evaluating a firm's current and past compliance with environmental regulations. This simplistic definition is, to a great extent, responsible for the heated debate over legal protection or privilege for environmental audits. Because a firm can perform an audit to determine its compliance with the law, but is then permitted to hide the audit's results from discovery under the blanket of a legal privilege, legal protection for audits can hamper enforcement and public access to information. However, auditing also offers a more flexible alternative to traditional regulation. Legal protection for audits can encourage businesses to perform

---

tice, who stated, "[the] privilege industry is asking for could become a dumping ground for corporations' dirty secrets").

26. For papers that argue the evidentiary privilege should not be applied to environmental audits, see for example Mia Anna Mazza, *The New Evidentiary Privilege for Environmental Audit Reports: Making the Worst of a Bad Situation*, 23 *ECOLOGY L.Q.* 79 (1996); Craig N. Johnston, *An Essay on the Environmental Audit Privileges: The Right Problem, The Wrong Solution*, 25 *ENVTL. L.* 335 (1995).

27. When referring to "business" in this paper, I generally mean large manufacturing or retail firms. For the most part it is these large firms, as compared to small and medium firms, that perform environmental audits.

audits to prevent non-compliance with environmental regulations. This section of the paper examines different types of environmental audits in order to provide insight into the benefits and necessity of encouraging auditing programs.

As defined by the EPA,<sup>28</sup> and adopted by numerous industries,<sup>29</sup> an environmental audit is "a systematic, documented, periodic and objective review by regulated entities of facility operations and practices related to meeting environmental requirements."<sup>30</sup> Some suggest that this definition is a broad framework that can include inspections, assessments, surveys, and evaluations,<sup>31</sup> but it provides little guidance to an environmental manager or attorney for developing an environmental auditing program.

The difficulty in defining an environmental audit may reflect environmental auditing's rapid development in a diverse range of businesses for varying uses.<sup>32</sup> During the last decade, environmental

---

28. The difficulty of defining environmental auditing led one group of experts in the area to state that "[d]efining 'environmental audits' is a bit like being caught in quicksand—the harder you work at it, the more difficult it becomes." ENVIRONMENTAL AUDITS 8 (Lawrence B. Cahill ed., 4th ed. 1985).

29. Hunt & Wilkins, *supra* note 11, at 365.

30. Environmental Auditing Policy Statement, 51 Fed. Reg. 25,004, 25,006 (1986) (footnote omitted). The 1995 Final Policy Statement adopts this definition. Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations, 60 Fed. Reg. 66,706, 66710 (1995).

Many variations on the EPA definition exist in the literature. Some focus heavily on the audit's legal impact. See, e.g., Linder, *supra* note 2, at 590 ("An environmental audit is a systematic review and appraisal of a firm's compliance with federal and state environmental regulations."). Others, such as those adopted by international and foreign organizations, focus more broadly on the need to promote better environmental practices. See Fred Pearce, *Corporate Shades of Green*, NEW SCIENTIST, Oct. 3, 1992, at 21, 21. The Confederation of British Industry defines environmental audits as "the systematic examination of the interactions between any business operation and its surroundings. This includes emissions to air, land and water; legal constraints; the effects on the neighbouring community, landscape and ecology; and the public's perception of the operating company in the local area." *Id.* The ICC defined environmental auditing as:

A management tool comprising a systematic, documented, periodic and objective evaluation of how well environmental organization, management and equipment are performing with the aim of helping safeguard the environment by

(i) facilitating management control of environmental practices;

(ii) assessing compliance with company policies, which would include meeting regulatory requirements.

INTERNATIONAL CHAMBER OF COMMERCE, ENVIRONMENTAL AUDITING 6 (1989).

For a discussion of how the focus on increased self regulation to protect the environment in Europe and around the world provides added pressure on American companies in light of the growing global market, see *infra* text accompanying notes 332-34.

31. 17 L.R. JONES & JOHN H. BALDWIN, CORPORATE ENVIRONMENTAL POLICY AND GOVERNMENT REGULATION 63 (Samuel B. Bacharach ed., 1994).

32. Not only has it been difficult to standardize an auditing procedure, it has even been difficult to standardize the terminology. Donald P. Duffy & Juliana E. Potter, *Environmental Auditing: A Profession Comes of Age*, 26 ENV'T SCI. & TECH. 1706, 1706 (1992). Thus, early environmental audits were called by many names, including reviews, surveillance, surveys, assessments, appraisals, evaluations, and audits. *Id.* In addition, each firm's

auditing has grown from an essentially transactional tool into a multifaceted business policy. Historically, businesses performed environmental audits as prospective property purchasers or investors in order to avoid environmental liabilities that could attach to property, particularly under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA).<sup>33</sup> As business activities generated greater environmental liabilities, these transactional assessments began to be employed in different contexts, like the associate audit,<sup>34</sup> the pre-acquisition audit,<sup>35</sup> and the pre-sale audit.<sup>36</sup> Only recently have businesses expanded auditing to specific operations in manufacturing or processing to evaluate their current and future compliance with the full panoply of environmental laws.

### A. Types of Environmental Audits

A company can adopt different types of environmental compliance programs in relation to the company's complexity and potential environmental liabilities. A company that wants to avoid incurring environmental liabilities can use a single audit to detect any current environmental compliance problems.<sup>37</sup> This type of basic audit, an environmental compliance audit,<sup>38</sup> is best understood as a snapshot of a

---

particular type and size of business, management structure, and business philosophy affects how it defines and implements an environmental audit. See *id.* at 1707; JONES & BALDWIN, *supra* note 31, at 46.

33. Carol M. Boman, *The Due Diligence Dilemma: How Much Is Enough?*, in ENVIRONMENTAL ASPECTS OF REAL ESTATE TRANSACTIONS (James B. Witkin ed., 1995) 175, 176 (stating that potential buyers hoped to avoid liability based on the "innocent purchaser" defense). These type of "site assessments," or "transactional audits," remain in frequent use today. *Id.*; see G.V. Basham III., *Environmental Audits: A Shield, a Sword or a Trojan Horse?*, 46 MINING ENGINEERING, 230, 230 (1994). The continuing importance of these types of audits was affirmed in *United States v. Fleet Factors Corp.*, 901 F.2d 1550, 1558-59 (11th Cir. 1990).

34. JONES & BALDWIN, *supra* note 31, at 52. This type of audit "analyzes the environmental programs of a subsidiary, supplier, or subcontractor." *Id.* See also George S. Kosko & J.P. Causey Jr., *Characteristics of an Effective Environmental Audit Program*, TAPPI J., Apr. 1992, at 148, 149 (stating that a systematic assessment of the outside disposal firm's permit and compliance status should be undertaken).

35. Rebecca M. Spearot, *The Environmental Audit: A Proactive Approach to Environmental Management*, METAL FINISHING, Nov. 1991, at 24, 24; JONES & BALDWIN, *supra* note 31, at 52. A pre-acquisition audit assesses a facility or company prior to its acquisition to identify actual or potential problems which will be taken into account during final acquisition negotiations. *Id.*

36. JONES & BALDWIN, *supra* note 31, at 52. The pre-sale audit is performed by the company owner prior to sale "to remedy environmental problems (to improve salability) and to establish a baseline against which future issues of liability can be assessed." *Id.* Jones and Baldwin discuss a number of additional types of audits, including corporate audits, management audits, issues audits, emerging issues audits, operations audits, technical audits, compliance audits, loss control audits, and site audits. *Id.* at 50-52.

37. See Huelsman, *supra* note 11, at 3-8.

38. *Id.* Huelsman suggests there are two other types of audits. One is the procedural compliance audit. *Id.* at 3-9. This is undertaken to determine "whether all procedural



company's current and past compliance with applicable environmental laws and regulations.<sup>39</sup> An environmental compliance audit often reflects a company's desire to avoid liability by addressing its most immediate and pressing environmental problems.<sup>40</sup> An environmental compliance audit may result from prodding by industry peer groups, trade associations, or corporate shareholders.<sup>41</sup> In other instances, concern over a particular company process,<sup>42</sup> a new law or regulation,<sup>43</sup> or a recent violation may require an audit to help legal counsel formulate a strategy to implement, negotiate or defend a corporation's position.<sup>44</sup> In all cases, the compliance audit is less comprehensive and consumes fewer resources than a permanent environmental auditing and management program.<sup>45</sup>

For companies with more complex business activity, a proactive management tool can identify, assess and address a wider range of environmental concerns.<sup>46</sup> A comprehensive environmental auditing program begins with a system of policies and procedures for full compliance with environmental laws.<sup>47</sup> With this system in place, management can proceed beyond mere concern for specific laws and the most

---

requirements [of the law] are being met." *Id.* Such an audit would include permit requirements, conditions of any consent decrees or settlements, and any administrative orders. *See id.* For the purposes of this paper, Huelsman's environmental compliance audit and procedural compliance audits will both be referred to as environmental compliance audits. In both cases they are used solely to determine *past and present* compliance with the law. Huelsman's third type of audit, substantive environmental compliance audit, is designed to be part of a "systematic approach to managing environmental issues." *Id.* It is a more proactive method of environmental auditing. *See id.* The third approach is similar to the comprehensive, ongoing environmental management that this paper discusses below. *See infra* text accompanying notes 46-59.

39. Huelsman, *supra* note 11, at 3-8.

40. John T. Funkhouser & J. Ladd Greeno, *The Growth of Environmental Auditing*, in AUDITING HANDBOOK *supra* note 11, 1-23, 1-24; *see* Kosko & Causey, *supra* note 34, at 149.

41. *See* Brian Martinson, *How to Set Up an Environmental Audit Program*, HYDRO-CARBON PROCESSING, Sept. 1993, at 55, 56.

42. *See* JONES & BALDWIN, *supra* note 31, at 51 (stating that an operations audit assesses the environmental effects of a company's specific operations, such as electroplating, refining, and chemical production). For example, a steel manufacturer may have concern over the efficiency of its quenching process. *See* William H. Michels, *Pollution-Prevention Analysis and the Quenching of Steels*, JOM, May 1994, at 43 (discussing a pollution-prevention analysis technique that can be applied to a quenching process).

43. *See* Huelsman, *supra* note 11, at 3-8; *see also* Mary B. Van Wormer, *Use Air Quality Auditing As An Environmental Management Tool*, CHEMICAL ENGINEERING PROCESS, Nov. 1991, at 62 (discussing the use of environmental auditing to reveal issues that can improve compliance with the provisions of the 1990 Clean Air Act Amendments).

44. *See* Angus Macbeth & Jeffrey G. Miller, *What an Environmental Audit Can Help You Avoid: The Case History of Kepone*, in AUDITING HANDBOOK *supra* note 11, 1-9, 1-20.

45. *See* JONES & BALDWIN, *supra* note 31, at 51.

46. *See* Spearot, *supra* note 35, at 24 (arguing that progressive companies that are proactive are not only in compliance, but seek ways to comply with proposed regulations).

47. Funkhouser & Greeno, *supra* note 40, at 1-24 to 1-25.

significant environmental hazards to a full management system for compliance.<sup>48</sup> In essence, in a more elaborate environmental audit program, the actual audit is only one, albeit a significant, component of the corporation's environmental program.<sup>49</sup>

A successful corporate environmental management program includes clear environmental policies and procedures, education, and training. Environmental policies and procedures must be clearly defined, communicated, supported by management,<sup>50</sup> and integrated into the daily operation of the company.<sup>51</sup> Employees should be educated and trained in key areas like current environmental issues, the company's current compliance with environmental regulations, and its goals. In addition, long-term planning should be in place to identify emerging issues and to allocate adequate corporate resources.<sup>52</sup> Finally, a more comprehensive approach might link the company's environmental performance, as identified by audit results, to the company's incentive-compensation system.<sup>53</sup>

The environmental management program must also be formalized at all levels of corporate management, including headquarters,

---

48. *Id.* at 1-25. The authors describe three phases in the growth of environmental auditing: the environmental compliance audit; the development of a management system for environmental compliance; and audits for detecting potential hazards that are not yet regulated. *Id.* at 1-24 to 1-25. While still a minority, an ever increasing number of firms have reached this third phase.

Consider that it has only been since the 1980s that courts first recognized CERCLA's retroactive liability scheme. *See, e.g.,* United States v. Northeastern Pharmaceutical and Chemical Oil, 810 F.2d 726, 733-34 (8th Cir. 1986) (upholding the district court's 1984 decision which applied CERCLA retroactively); United States v. Monsanto Co., 858 F.2d 160, 173-74 (4th Cir. 1988) (affirming the district court's holding that CERCLA can be applied retroactively). A great deal of liability could have been avoided in the twenty-five years since the passage of CERCLA if firms in the 1960s and 70s had used management practices that sought to avoid future environmental liabilities. Today there remain a number of unregulated activities that are potentially the subject of Congressional or agency action in the future. A firm that is involved in the third phase of environmental auditing seeks to avoid prospective liability by dealing with problems before they are regulated. *See infra* note 109.

49. Ladd Greeno, *Environmental, Health, and Safety Performance*, in THE CONFERENCE BOARD REPORT NO. 982: CORPORATE STEWARDSHIP OF THE ENVIRONMENT 12, 14 (Barbara H. Peters & James L. Peters eds., 1991); *see* H. Landis Gabel & Bernard Sinclair-Desgagne, *Managerial Incentives and Environmental Compliance*, 24 J. ENVTL. ECON. & MGMT. 229, 232 (1993). An environmental management program is often integrated into the company's "total quality management" program. Martinson, *supra* note 41, at 60; William P. Gullledge, *Environmental Auditing: A Useful Management Tool or an Enforcement Time Bomb?*, ASTM STANDARDIZATION NEWS, May 1994, at 42, 42; *see also* Duffy & Potter, *supra* note 32 at 1707 (discussing variations of auditing programs).

50. Greeno, *supra* note 49, at 14.

51. *See id.* at 15.

52. *Id.*

53. Gabel & Sinclair-Desgagne, *supra* note 49, at 232; *see also* A Survey of Industry and the Environment, THE ECONOMIST, Sept. 8, 1990, at 1, 23 (stating that encouraging environmental innovation may require economic incentives rather than regulation).

division, and plant levels.<sup>54</sup> Functional activities, such as air pollution, hazardous waste, and health and safety management must also be integrated at all three management levels.<sup>55</sup> The overall program then ensures compliance with the law, providing operational confidence that the company can avoid significant environmental incidents and identify unanticipated hazards that may result in future liability.<sup>56</sup>

With this approach, the environmental audit remains an essential component of the environmental management program, but its role is transformed into a tool to "verify the existence and use of adequate [management] systems . . . competently . . . applied."<sup>57</sup> Thus, regular auditing reassures firms that they are adequately addressing applicable environmental regulations,<sup>58</sup> that the environmental management system is competently engaged, and that all plant managers, environmental coordinators, and others are aware of the need for environmental compliance and fulfill their responsibilities accordingly.<sup>59</sup>

In the past decade, many large firms have incorporated environmental audits into some form of an environmental management program. While many smaller firms may continue to use environmental compliance audits only when needed, and many companies of all sizes perform special transactional audits from time to time, for the remainder of this paper, the term "environmental audit" refers to that used in a comprehensive environmental management program.

### *B. Fundamentals of Environmental Auditing*

While environmental audits have different objectives and may differ among business contexts,<sup>60</sup> audits often follow common procedures.<sup>61</sup> Cooperation between business, government (both the United States and abroad) and standard-setting organizations has resulted in the increased standardization of environmental audits.<sup>62</sup> While

---

54. See Funkhouser & Greeno, *supra* note 40, at 1-25.

55. *Id.*

56. *Id.* at 1-24 to 1-25.

57. ENVIRONMENTAL AUDITS, *supra* note 28, at 8.

58. See *id.*

59. See Martinson, *supra* note 41, at 56; see also Duffy & Potter, *supra* note 32, at 1706 (stating that a mature environmental audit program seeks to evaluate the effectiveness of an environmental management program and assess the particular risks associated with site activities); ENVIRONMENTAL AUDITS, *supra* note 28, at 8-9 (arguing that an audit program verifies that "environmental management systems do, in fact, exist and are in use").

60. JONES & BALDWIN, *supra* note 31, at 47-48.

61. *Id.* at 48.

62. Many of these standards are available in draft or final form. The most identifiable standards for environmental auditing in the United States are those of the American Society on Testing and Materials (ASTM). See Janis A. Morelli, *Performing Environmental Audits: An Engineer's Guide*, CHEMICAL ENGINEERING, Feb. 1994, at 104, 105-06; U.S. Envtl. Protection Agency, Auditing Standards and Processes, Breakout Group B, in Washington, D.C. 12 (July 28, 1994) [hereinafter Breakout Group B] (transcript on file with

designed to encompass almost any type and size of business, these environmental audit standards are flexible enough to allow for variations among businesses.<sup>63</sup> EPA is currently involved in two major non-regulatory projects to develop voluntary standards for auditing and environmental management.<sup>64</sup> This section briefly reviews the elements of auditing most often associated with standardization. The goal of standardized procedures is to provide a firm's management, environmental compliance officers, and legal counsel with the information necessary to develop an effective environmental auditing program.

First, an environmental audit must be supported by a firm's top management staff.<sup>65</sup> To be effective, management must make a commitment to provide adequate resources, staff, and appropriate audit-

---

author) (statement of Frank Priznar, Environmental Auditor, ASTM). Two ASTM standards are being revised. One addresses guidelines for environmental audits, including legal and technical objectives. Gulledge, *supra* note 49, at 43. The second is a guideline for assessing the effectiveness of an organization's environmental management program. *Id.*

Business and the EPA have also joined forces with the International Standards Organization in the development of ISO 14000, a voluntary international standard focusing on corporate environmental management. *Advisory Group to Offer Changes to Draft ISO Management Standard*, 18 Int'l Env't Rep. (BNA) No. 18, at 12 (1995) [hereinafter *Advisory Group*]; Ridgway M. Hall Jr. & Kristine A. Tockman, *International Corporate Environmental Compliance and Auditing Programs*, 25 Env'tl. L. Rep. (Env'tl. L. Inst.) 10,395, 10,400 (1995). "The standards will help companies develop methods to achieve their environmental goals and to determine whether their management systems are effective in preventing or detecting environmental violations." Hall & Tockman, *supra* at 10,400-01. ISO 14000 includes auditing standards to evaluate the environmental management system. *Id.*

63. See Breakout Group B, *supra* note 62, at 8 (stating that one of the ASTM environmental auditing standards focuses on explaining generally accepted practices in environmental auditing, but does not describe how to perform an audit) (statement of Frank Priznar, Environmental Auditor, ASTM).

64. Restatement of Policies Related to Environmental Auditing, 59 Fed. Reg. 38455, 38456 (1994). The first is to develop environmental auditing standards with ISO. *Id.* The second project is with the National Sanitation Foundation (NSF) of Ann Arbor, Michigan to develop environmental auditing standards compatible with and to augment the ISO standards. *Id.*

65. Duffy & Potter, *supra* note 32, at 1707; see ENVIRONMENTAL AUDITS, *supra* note 28, at 37 (emphasizing the importance of the top management's role in developing and communicating a policy that "supports the concept of an audit program"). Kosko and Causey suggest that the commitment be established through a written document stating management's support and expectations for the program. Kosko & Causey, *supra* note 34, at 149. A well developed document would lay out the objectives management hopes will be achieved, how often the audits will be conducted, what laws and regulations will be covered, and how information can be kept confidential. See ENVIRONMENTAL AUDITS, *supra* note 28, at 34, 37 (discussing decisions to be made when planning an audit program). Without this written support, plant personnel will tend to perceive the program as only another management directive and a hindrance to daily operations. Kosko & Causey, *supra* note 34, at 149. The support of all employees of the firm, from management to line or plant personnel, is essential if the environmental management program is to succeed. See *id.* (stating that cooperation from plant personnel is required to administer necessary changes).

ing tools.<sup>66</sup> Because audits are designed to ensure compliance with environmental laws and regulations, the program will succeed only if management assists in correcting compliance problems.<sup>67</sup> Management must also be willing to modify company operations and reporting procedures where the audit suggests that change is needed.<sup>68</sup>

Second, an environmental auditing program requires well-documented guidelines for the auditing team, usually in the form of an auditing manual.<sup>69</sup> A manual can facilitate the development of consistent, efficient, and thorough audits.<sup>70</sup> If well prepared, it will contain applicable regulations and permit requirements,<sup>71</sup> as well as the firm's internal policies and procedures.<sup>72</sup> The manual must describe how to conduct employee interviews and review sites, provide audit report outlines, and recommend a procedure for reporting the results.<sup>73</sup> In addition, an audit manual should contain a pre-visit questionnaire that consists of issue-oriented questions and a checklist of needed items.<sup>74</sup> Finally, a significant portion of the manual must be an actual working document for the auditors,<sup>75</sup> and this can be achieved by an audit checklist for each compliance or production area.<sup>76</sup>

Third, an auditing team must be selected.<sup>77</sup> To be effective, the team members must possess enough technical knowledge to enable them accurately to interpret process information, emission data, effluent records, manifests, pollution control equipment,<sup>78</sup> and legal requirements.<sup>79</sup> It is particularly important that the team be objective and include individuals independent from a company's management

---

66. Martinson, *supra* note 41, at 58.

67. Kosko & Causey, *supra* note 34, at 149.

68. *See id.*

69. *Id.* at 149-50; Martinson, *supra* note 41, at 58.

70. *See* ENVIRONMENTAL AUDITS, *supra* note 28, at 37.

71. Kosko & Causey, *supra* note 34, at 149-50.

72. ENVIRONMENTAL AUDITS, *supra* note 28, at 39.

73. *Id.*

74. *Id.* at 45.

75. *Id.*

76. *See id.* at 45-46. Checklists should pose several different questions relating to "(1) compliance with federal and state regulatory requirements (the 'paper' audit), (2) effective organizational controls (the 'management' audit), and (3) proper on-site and off-site unit operations (the 'technical' audit)." *Id.* at 45. All three areas should be reviewed to determine whether "(1) specific regulatory requirements are known and complied with, (2) an organization is in place which can monitor compliance, respond to upsets or emergencies, and anticipate regulatory changes, and (3) compliance procedures are carried out by unit operators." *Id.* For an example of an audit checklist, see C. Eley, *Compliance Audit Checklist For Hazardous Chemicals*, HYDROCARBON PROCESSING, Aug. 1992, at 97, 97-104.

77. *See* Kosko & Causey, *supra* note 34, at 150.

78. *Id.*

79. *See* Morelli, *supra* note 62, at 105.

staff.<sup>80</sup> To this end, a company may occasionally hire an independent consulting firm for the audit. This usually reflects the firm's time constraints, its inability to remain objective, and its lack of adequate internal resources, knowledge about federal and state requirements, and formal training in auditing procedures.<sup>81</sup> Where litigation requires the audit, a firm should allow its counsel to select the audit team for confidentiality purposes.<sup>82</sup>

Ideally, the audit team will include individuals from both inside and outside the corporation.<sup>83</sup> This allows the team to be objective yet maintain in-house expertise for the technical processes involved in the audit.<sup>84</sup> An audit team should have at least three members: an environmental attorney, an environmental consultant, and an environmental, safety and health expert. Rounding out the team with supervisors and other corporate personnel who can review the process and explain the process operations is also important.<sup>85</sup>

Fourth, several pre-audit activities must occur.<sup>86</sup> Without sufficient planning, an environmental audit can yield poor results.<sup>87</sup> Prior to auditing, the team should submit pre-visit questionnaires to facility employees, review the relevant regulations, define the scope of the audit and the team members' responsibilities, develop an agenda, and review the protocol in the audit manual.<sup>88</sup> These activities direct the team and provide it with as much information as possible about the company.<sup>89</sup> For example, the pre-audit questionnaire can familiarize the team with the company's environmentally related activities and operations.<sup>90</sup> Likewise, developing an agenda helps the auditors, plant managers, and staff understand their roles in the audit and the topics that they will discuss.<sup>91</sup>

The above pre-audit activities are followed by a fifth step, the on-site audit.<sup>92</sup> While most audits reflect the specific needs of an individual corporation, most audits will also include three primary functions.<sup>93</sup> First, upon entering the facility, the audit team should review

---

80. See *id.*; Huelsman, *supra* note 11, at 3-6.

81. Huelsman, *supra* note 11, at 3-6.

82. See *infra* part II for a discussion of legal protections for audits during civil and criminal environmental enforcement actions.

83. Morelli, *supra* note 62, at 105.

84. *Id.*

85. *Id.*

86. See Martinson, *supra* note 41, at 56. For a discussion of the pre-audit activities, see ENVIRONMENTAL AUDITS, *supra* note 28, at 58-69.

87. Martinson, *supra* note 41, at 56.

88. ENVIRONMENTAL AUDITS, *supra* note 28, at 58.

89. See *id.* at 58-69 (describing and discussing the purposes of pre-audit activities).

90. *Id.* at 58.

91. See *id.* at 61.

92. *Id.* at 58.

93. *Id.* at 69.

relevant records and documentation kept at the site,<sup>94</sup> including permits, daily operator logs, equipment records, emission reports, correspondence files, and other documents specific to the facility's operations.<sup>95</sup> Second, the team should interview facility staff.<sup>96</sup> Interviews can be the single most important part of the audit because they provide auditors with first hand knowledge of the facility's daily problems. Third, the audit team should physically inspect the facilities.<sup>97</sup>

Finally, the sixth step in the auditing process involves post-audit activities.<sup>98</sup> If the audit is performed according to carefully planned procedures and in a competent manner, the result will be a two-part written report,<sup>99</sup> and this aspect of the audit presents the most critical legal issues. During civil or administrative enforcement, a citizen suit, or a criminal action, it is often the contents of this report that are sought during discovery.<sup>100</sup>

After completing the audit, the team issues the first portion of the report, the objective analysis.<sup>101</sup> This portion is descriptive and not judgmental,<sup>102</sup> and, like the auditing process, it will vary somewhat from company to company.<sup>103</sup> Generally, though, it should contain several components: 1) an executive summary outlining the facility's environmental management practices and a detailed list of problem areas;<sup>104</sup> 2) a statement of the audit's scope;<sup>105</sup> 3) "a formal statement of the company's current compliance with legal or corporate standards";<sup>106</sup> 4) an evaluation of regulated processes and major activi-

---

94. *Id.* at 70.

95. For examples of documentation to be reviewed during an audit, see *id.* at 71-74.

96. *Id.* at 75. These interviews should include the plant manager, environmental coordinator, and those with environmental responsibilities. Martinson, *supra* note 41, at 56.

97. See ENVIRONMENTAL AUDITS, *supra* note 28, at 77. For a list of the key inspection items associated with typical plant facilities, see *id.* at 78-105.

98. *Id.* at 106. For a discussion of the follow-up activities which include a detailed report by the audit team and a follow-up action plan, see *id.* at 107-115.

99. See JONES & BALDWIN, *supra* note 31, at 58; Maryanne DiBerto, *Reporting Environmental Audit Findings*, in AUDITING HANDBOOK *supra* note 11, 3-121, 3-124.

100. See COALITION FOR IMPROVED ENVIRONMENTAL AUDITS, CIEA WHITE PAPER SUPPORTING A QUALIFIED SELF-EVALUATION PRIVILEGE FOR INTERNAL ENVIRONMENTAL AUDITS 1 (1994) [hereinafter WHITE PAPER]; Gullledge, *supra* note 49, at 43 (stating that a primary issue of environmental audits "is the possible use by regulators of information obtained in an audit against a regulated entity").

101. In most instances a written draft of the audit report will be issued by the audit team within two to three weeks of the audit. DiBerto, *supra* note 99, at 3-123 to 3-124.

102. Huelsman, *supra* note 11, at 3-24.

103. James T. O'Rourke, *The Engineer's Perspective*, in AUDITING HANDBOOK *supra* note 11, 3-35, 3-46.

104. *Id.*; Spearot, *supra* note 35, at 26.

105. Spearot, *supra* note 35, at 26.

106. JONES & BALDWIN, *supra* note 31, at 58.

ties;<sup>107</sup> 5) a list of all permits, recent citations, penalties, and notices of violations;<sup>108</sup> and 6) the auditing team's observations on the possibility of future compliance problems.<sup>109</sup>

The second portion of the report is a subjective analysis and takes far longer to develop.<sup>110</sup> After the objective analysis is copied and distributed to senior and local managers,<sup>111</sup> these individuals recommend future actions and suggest changes in environmental policies and procedures.<sup>112</sup> This process should culminate in the creation of a formal response, such as a corrective action plan,<sup>113</sup> to ensure that

---

107. Spearot, *supra* note 35, at 26; Huelsman, *supra* note 11, at 3-24. Related to this, the report should include on-site treatment facilities such as discharge points, landfills, underground injection wells, stacks and vents, and surface water runoff control. Huelsman, *supra* note 11, at 3-25. The report should also detail off-site disposal practices, including identification of transportation handlers, disposal contractors and treatment operators. *Id.*

108. Spearot, *supra* note 35, at 26; Huelsman, *supra* note 11, at 3-24 to 3-25.

109. See Huelsman, *supra* note 11, at 3-26. Because the regulatory climate presents a host of uncertainty as to technological, legislative, interpretive, institutional and legal issues, it is not always clear which direction the law may turn. *Id.*; see *supra* note 48. It is therefore important that corporations take advantage of auditing to identify factors that could have a significant effect on them in the future. Huelsman, *supra* note 11, at 3-26. Huelsman lists the following examples of such factors:

- Circumstances that could pose an unreasonable risk to the public health or environment
- Situations that could result in unacceptable interruptions to operations
- Situations that would shorten the useful life of the facility or the production of particular products at that location
- Problems for which remedial or control technology is not available
- Problems for which technology exists but at a cost that would jeopardize the financial viability of the operation or product competitiveness
- Prevailing attitudes that pose a potential for punitive administrative penalties and actions
- Innovative technology that could provide beneficial breakthroughs, even if commercially unproven for specific applications
- Alternative manufacturing methods that could yield fewer or smaller quantities of objectionable wastes

*Id.*

110. See DiBerto, *supra* note 99, at 3-124 fig.1.

111. Other recipients may include the environmental staff, plant engineers, manufacturing personnel and the auditing team. *Id.* at 3-127. Under some circumstances, distribution may need to be more limited. For example, if the audit was done for a snapshot of current compliance for purposes of receiving legal advice, the document should be distributed strictly among the audit team, counsel, and key employees to maintain its confidentiality. Morelli, *supra* note 62, at 109-10. However, where the audit is undertaken as part of a comprehensive, ongoing environmental program, it is likely to be distributed more widely in an attempt to obtain more comments and promote greater awareness among employees.

112. See JONES & BALDWIN, *supra* note 31, at 58 (stating that the second part of the audit report should state future actions to be taken "to more fully comply with legal or company standards or to create or capture new business opportunities"); see also ENVIRONMENTAL AUDITS, *supra* note 28, at 107 (stating that an audit report may include recommendations for follow-up action and changes in environmental management policies and procedures).

113. See JONES & BALDWIN, *supra* note 31, at 58; DiBerto, *supra* note 99, at 3-127. Again, if there is a need to keep the document confidential, the corrective action plan should be distributed to a limited number of persons. See *infra* part II.B.1.



formal measures exist to address each of the audit findings and recommendations.<sup>114</sup> The corrective action plan should be a subjective, prospective critique of a company's environmental affairs.

### *C. Benefits of Environmental Auditing*

One of the central values of an environmental management program is the legal and economic benefit it provides to a corporation.<sup>115</sup> Although environmental auditing programs can be expensive to administer,<sup>116</sup> they are a proactive tool that can prevent and reduce fines and penalties assessed by regulatory agencies for noncompliance.<sup>117</sup> An audit program can also benefit a corporation financially because substantial savings can be realized by changing business policies.<sup>118</sup>

From a legal and compliance standpoint, the primary benefit of an environmental auditing program is to give firms enough information to determine whether they are working within applicable environmental regulations.<sup>119</sup> Cooperation between the firm's attorney, management, and engineers or production personnel in interpreting and responding to the environmental audit will result in an accurate evaluation of the firm's current legal position and will address ways to

---

114. See ENVIRONMENTAL AUDITS, *supra* note 28, at 115.

115. EPA's 1986 environmental audit policy statement clearly recognizes the benefits of auditing. For example, EPA stated that "[e]ffective environmental auditing can lead to higher levels of overall compliance and reduced risk to human health and the environment." Environmental Auditing Policy Statement, 51 Fed. Reg. 25,004, 25,004 (1986). The agency further stated that:

Auditing serves as a quality assurance check to help improve the effectiveness of basic environmental management by verifying that management practices are in place, functioning and adequate. . . . Environmental auditing has developed for sound business reasons, particularly as a means of helping regulated entities manage pollution control affirmatively over time instead of reacting to crises. Auditing can result in improved facility environmental performance, help communicate effective solutions to common environmental problems, focus facility managers' attention on current and upcoming regulatory requirements . . . [and] result in better-integrated management of environmental hazards, since auditors frequently identify environmental liabilities which go beyond regulatory compliance.

*Id.* at 25,006.

116. JONES & BALDWIN, *supra* note 31, at 58-59.

117. See David A. Herbert, *Give Commitment, Audits Top Priority in Safety, Environmental Matters*, PLANT ENGINEERING, May 20, 1993, at 168, 168; Martinson, *supra* note 41, at 55; ENVIRONMENTAL AUDITS, *supra* note 28, at 9.

118. Kosko & Causey, *supra* note 34, at 149 (stating that an advanced audit can lead to savings by making the corporation more efficient and providing information for long-range planning).

119. Morelli, *supra* note 62, at 111. An environmental audit program that is properly designed, staffed and implemented will result in:

(1) an accurate understanding of the current environmental status of a facility, (2) the identification of potential areas of noncompliance, (3) recommendations to control or eliminate noncompliance, and (4) increased confidence that the environmental concerns of the company are being addressed [by the firm].

Spearot, *supra* note 35, at 26.

prevent future noncompliance.<sup>120</sup> With both civil and criminal liabilities for noncompliance on the rise,<sup>121</sup> an environmental auditing program can avoid and reduce a firm's environmental liability by providing it with critical information about its environmental compliance.<sup>122</sup>

In addition to these legal benefits, an environmental management program can also yield economic benefits. In today's regulatory climate, corporations in America spend more than 65 billion dollars annually in compliance costs.<sup>123</sup> Because the law requires corporations to achieve and maintain compliance, these costs are seldom discretionary. Progressive companies, however, view compliance costs as investments that can generate higher returns for each dollar spent.<sup>124</sup> These benefits can be seen in cost reductions and higher profits, improved attractiveness to investors, and favorable publicity.

The environmental audit can and should be used as a tool to quantify and analyze a firm's operating costs<sup>125</sup> and impact on the environment.<sup>126</sup> In this way, cost reductions and higher profits can result from a program originally designed to reduce non-compliance with environmental laws.<sup>127</sup> Environmental auditing presents an unparalleled opportunity to gather information and to appraise a company's

---

120. See ENVIRONMENTAL AUDITS, *supra* note 28, at 9-10 (stating that the benefits of environmental audits include better compliance and fewer surprises).

121. See Hunt & Wilkins, *supra* note 11, at 365.

122. See Basham, *supra* note 33, at 231.

123. CATHERINE MORRISON, THE CONFERENCE BOARD REPORT NO. 961: MANAGING ENVTL. AFFAIRS: CORP. PRACTICES IN THE U.S., CANADA AND EUROPE, at 1, 14 (1991); *Poor E-Accounting Leads to Lower Stock Prices, Profits*, ENV'T TODAY, Nov.-Dec. 1995, at 14, 14 (improper environmental management costs industry billions of dollars); Dan Chilcutt, *Making Sense of Environmental Compliance*, RISK MGMT., Nov. 1995, at 41, 41 (U.S. firms spend tens of billions of dollars each year on regulatory compliance). In fact, spending on pollution abatement and control by U.S. manufacturers is running at 0.9% of total sales and is on the rise. Ditz et al., *supra* note 4, at 6-7.

124. See, e.g., Ditz et al., *supra* note 4, at 37-44 (discussing how businesses can act on environmental cost information).

125. See Huelsman, *supra* note 11, at 3-6 (stating that an auditor can address the magnitude of pollution control costs).

126. See JONES & BALDWIN, *supra* note 31, at 45 (quoting *Environmental Auditing*, 11 INDUSTRY & ENV'T 1, 2 (1988)).

127. For a detailed analysis of how American firms have translated compliance into profit, see GREEN LEDGERS, *supra* note 4; SAUNDERS & MCGOVERN, *supra* note 10; BEYOND COMPLIANCE *supra* note 6.

A study by Stephen E. Erfle and Michael J. Fratantuono, economics professors at Dickinson College in Pennsylvania, revealed a significant bottom line payoff accruing to those companies with top-rated environmental records compared to those with the worst records. JOEL MAKOWER, THE E FACTOR 65-66 (1993). The study indicates a 2.2% higher return on assets, a 4.5% higher return on equity, a 3.9% higher return on investment, a 4.4% higher earnings-to-assets ratio, a 13.3% higher sales-to-assets ratio, a 9.3% higher sales growth, a 1.9% higher asset growth, and a 16.7% higher operating income growth. *Id.* at 66.

expenditures for both production and pollution prevention.<sup>128</sup> A company can review the efficiency of its inputs and the cost of handling the waste and by-products associated with its production process.<sup>129</sup> The ideal result is to save money by making plant operations more efficient and provide for better long-range planning to determine when equipment expenditures, plant upgrading, or plant expenditures will be necessary.<sup>130</sup> Ultimately, environmental auditing should touch all aspects of production, marketing, and product use and disposal.<sup>131</sup> An environmental auditing program can achieve cost savings through firm-wide changes that influence product design, production processes, selection of raw materials or technologies, pollution prevention investments, incorporation of recycling into business activities, and more efficient and less risky means of waste disposal.<sup>132</sup>

A sound environmental management program can also be important in attracting and maintaining corporate investors.<sup>133</sup> Due to the potentially high costs of civil penalties, citizen suits, and hazardous waste cleanup under CERCLA and the Resource Conservation Recovery Act (RCRA), investors increasingly scrutinize a firm's environ-

---

128. See Ditz et al., *supra* note 4, at 6-8, 21-22 (discussing the benefits of accounting for environmental costs); Huelsman, *supra* note 11, at 3-6.

129. See Ditz et al., *supra* note 4, at 21-28 (discussing business uses of environmental cost information).

130. Kosko & Causey, *supra* note 34, at 149.

131. Ditz et al., *supra* note 4, at 21.

132. See MAKOWER, *supra* note 127, at 42-48 (discussing measuring environmental costs of a facility's operations through life-cycle assessments, and arguing that analysis of environmental costs can reduce waste and maximize resource use); see also BEYOND COMPLIANCE, *supra* note 6, at 3 (stating that preventing waste at the source can save money in materials and in end-of-the-pipe remediation). The 3M Corporation's Pollution Prevention Pays (3P) program is often cited as an example of an environmental management program that has resulted in reduced costs and substantial net savings for the company. See, e.g., *id.* at 12-17. The 3P program shows that environmental management can turn compliance into profit while helping the firm stay ahead of the competition. The 3P program focuses on: 1) preventing pollution at the facility; 2) recovering and recycling manufacturing byproducts for internal reuse or external sale; 3) using state-of-the-art treatment of hazardous wastes that could not be prevented or recycled; and, 4) disposing of treatment residues through appropriate methods. *Id.* at 12. Since their conception in 1975, savings from all 3P projects has reached more than \$530 million. *Id.* at 14. By reducing waste in the first instance, the company saved money in facilities that under the law would need costly pollution prevention equipment. See *id.* In addition, it achieved reduced manufacturing and pollution control operating costs, and "retained sales from products that might have been taken off the market as environmentally unacceptable." *Id.* Other companies have emulated 3M's 3P program. *Id.* at 17.

133. Investors can be placed into two categories. First, socially minded investors will want assurances from the company that the management is committed to action that will reduce and control pollution. E. BRUCE HARRISON, GOING GREEN: HOW TO COMMUNICATE YOUR COMPANY'S ENVIRONMENTAL COMMITMENT 107-08 (1993). Profit minded investors, aware of the potential costs of pollution, will want to know what management is doing to minimize problems. See *id.* at 108.

mental compliance record;<sup>134</sup> for example, a growing number of investment funds will only invest in corporations with good environmental records.<sup>135</sup> Sound environmental management can also curtail shareholder resolutions and derivative actions brought to pressure management into considering the environmental impacts of business decisions.<sup>136</sup>

Finally, environmental management can foster favorable publicity. Traditionally, the notion of a partnership between business and the environment has been greeted with suspicion by the public.<sup>137</sup> In recent years, however, grassroots environmental organizations have tried to gain more control over local environmental issues by participating in community business activities.<sup>138</sup> Local environmental groups have entered into voluntary agreements with firms and gained more control over environmental decisionmaking and access to information in areas such as emissions, toxic substances, and environmental emergency preparedness.<sup>139</sup> Corporations benefit from these agreements to the extent that they promote greater cooperation with the community, innovative decisionmaking, increased profitability, and better employee morale.<sup>140</sup> Thus, corporations can gain support for confronting their environmental problems by working with local communities.<sup>141</sup> A company that becomes known for its effective environmental management and positive compliance history is more likely to establish favorable publicity than a corporation that neglects

---

134. See Peter S. Menell, *Legal Advising on Corporate Structure in the New Era of Environmental Liability*, 1990 COLUM. BUS. L. REV. 399, 401 n.11 (1990) (discussing pressure from investors for companies to consider environmental impacts when making business decisions).

135. *Id.*; see also *Increased Interest by Investors in Environmentally Sensitive Firms Cited*, BNA Mgmt. Briefing, Dec. 15, 1993, available in LEXIS, BNA Library, BNAMB File (stating that investments into investment instruments that screen for environmental, social, and ethical concerns total \$625 billion, and that "[i]nvestors have placed \$2.8 billion in socially responsible [mutual] funds").

136. See Howard Fine, *Stockholder Proposals "Greening" Companies*, ORANGE COUNTY BUS. J., July 2, 1990, at 6, 6 (describing the increasing use of shareholder resolutions to make management consider environmental issues); Barnaby J. Feder, *New Battles Over Disclosure*, N.Y. TIMES, June 24, 1990, at F10 (describing a shareholder suit against a company for failing to adequately disclose environmental costs).

137. SAUNDERS & MCGOVERN, *supra* note 10, at 222; see *Agency Group*, *supra* note 2, at 312 (citing the mistrust between the public, business, and regulators).

138. Telephone Interview with Paula Forbis, Staff Attorney, Environmental Health Coalition, (July 3, 1996) [hereinafter Forbis Interview]; see SANFORD J. LEWIS ET AL., *THE GOOD NEIGHBOR HANDBOOK: A COMMUNITY-BASED STRATEGY FOR SUSTAINABLE INDUSTRY* Intro-1, Intro-2, Intro-8, 2-1 to 2-54 (1st ed. 1992) (discussing examples of grassroots organizations pushing for "breakthroughs" at specific company plants).

139. LEWIS ET AL., *supra* note 138, at Intro-2, Intro-8. For a discussion of a cooperative relationship between community and industry interests, see *id.* at 3-3 to 3-10.

140. *Id.* at 6-4.

141. See Basham, *supra* note 33, at 231 (stating that environmental auditing could help foster a better relationship with regulators and the public).

or avoids its environmental responsibilities.<sup>142</sup> Communities are less willing to support and develop a positive relationship with businesses that insist on shielding the results of environmental audits from the public.<sup>143</sup>

## II

### LEGAL PROTECTION FOR ENVIRONMENTAL AUDITS

#### A. *The Debate Over Legal Protection for Environmental Audits*

The development of the environmental audit sparked the debate over its legal ramifications. In response to immediate concerns about the legality of environmental auditing, EPA promulgated an auditing policy in 1986.<sup>144</sup> However, corporations view this policy as a Hobson's choice. On one hand, auditing is a valuable tool to avoid non-compliance with environmental laws. On the other hand, the information revealed by an audit creates a risk of legal liability. If the audit reveals violations of the law, not only must the firm report the violations and subject itself to penalties, but regulators may potentially use the audit itself to establish the requisite knowledge for a criminal action against a corporation's executive officers.<sup>145</sup>

From the corporate perspective, EPA's policy is a significant barrier to environmental auditing. Large corporations argue that the potential for liability has made their auditing less candid because it must be performed with a greater eye toward confidentiality.<sup>146</sup> This usually requires an attorney's involvement at every stage, resulting in a

---

142. *Id.*; LEWIS ET AL., *supra* note 138, at 6-4.

143. *See infra* part II.B.3.d.ii.

144. For a discussion of EPA's Policy, *see infra* text accompanying notes 260-75.

145. *See* U.S. Env'tl. Protection Agency, Auditing Public Meeting, Day 1 (Morning), in Washington, D.C. 18 (July 27, 1994) [hereinafter Day 1 (Morning)] (transcript on file with author) (statement of Frank Friedman, Senior Vice President, Elf Atochem Co.); U.S. Env'tl. Protection Agency, Auditing Public Meeting, Day 2 (Morning), in Washington, D.C. 23 (July 28, 1994) [hereinafter Day 2 (Morning)] (transcript on file with author) (statement of Paul Wallach, attorney, Hale & Dorr) (stating that it makes absolutely no sense to expose the responsible company that conducts audits to increased civil or criminal liability); WHITE PAPER, *supra* note 100, at 1 (stating that while environmental management programs are key tools for effective compliance, the risk that audits might be discovered by enforcement authorities and used against the company or individuals is a substantial deterrent to effective environmental auditing). Although EPA recently revised its auditing policy, the possible use in a criminal action has not been removed. *See* Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations, 60 Fed. Reg. 66,706, 66,707 (1995) (stating that EPA's policy of not recommending criminal prosecution only applies to good actors).

146. *See* Day 1 (Morning), *supra* note 145, at 135 (statement of James O'Reilly, Corporation Counsel, Proctor & Gamble, Chairman of the Coalition for Improved Environmental Audits) (stating that today's audit report is likely to be written in overly cautious "lawyer's speech" to shade its meaning behind legalisms and will not candidly state any problems, thus reducing the value of the document).

waste of time and money.<sup>147</sup> Smaller businesses are often driven away from auditing altogether by the high cost and lack of legal protection for auditing.<sup>148</sup> In an effort to avoid incurring legal liability, businesses have tried various methods to protect their audit reports from discovery by government officials and citizens seeking to enforce environmental laws.

### *B. What Sources Are Available for the Protection of Environmental Audits?*

Corporations have turned to established evidentiary privileges in order to secure protection for their environmental audits.<sup>149</sup> The attorney-client privilege, the work-product privilege, and the self-evaluative privilege (SEP) are three mechanisms frequently used to shield environmental audits from discovery, and in some circumstances they achieve limited success.<sup>150</sup> In general, however, these judicially crafted privileges are not satisfactory; courts usually refuse to apply these privileges in government enforcement actions. As a result, there is a strong movement among businesses confronted with enforcement actions for creating either a clear EPA policy, or state or federal legislation that provides, at a minimum, qualified protection for environmental audits.<sup>151</sup>

#### *1. The Attorney-Client Privilege*

In certain circumstances, the attorney-client privilege can protect a company's environmental audit from discovery. The theory behind this evidentiary privilege "is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice."<sup>152</sup> As stated by the Seventh and Ninth Circuits, the attorney-

---

147. *Id.* at 70 (statement of Frank Friedman, Senior Vice President, Elf Atochem Co.) (stating that lawyers' involvement is time consuming and slows down the compliance process).

148. *See, e.g.*, U.S. Env'tl. Protection Agency, Auditing Public Meeting, Day 1 (Afternoon), in Washington, D.C. 4-8 (July 27, 1994) [hereinafter Day 1 (Afternoon)] (transcript on file with author) (statement of Blake Jeffrey, Director of Environmental Affairs, Indiana Manufacturers' Association) (stating that a survey of members of the Indiana Manufacturers' Association, of which small businesses comprise 80%, indicates that 42% had never done an audit, 66% percent cited fear of enforcement action as a reason for not auditing, and 81% said they would be more likely to conduct an audit if the law was changed to provide protection for environmental auditing reports).

149. *See* Michael H. Levin, et al., *Discovery and Disclosure: How to Protect Your Environmental Audit Report*, 24 Env't Rep. (BNA) No. 24, 1606, 1607 (Jan. 7, 1994).

150. *See infra* parts II.B.1, II.B.2, and II.B.3.

151. *See generally*, WHITE PAPER, *supra* note 100; U.S. Env'tl. Protection Agency, Auditing Public Meeting, in Washington, D.C. (July 27 & 28, 1994); *States, Industry, supra* note 16, at 689-90.

152. *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

client privilege applies when the following elements exist: (1) where legal advice of any kind is sought (2) from a professional legal advisor in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal advisor, (8) unless the protection is waived.<sup>153</sup>

*Upjohn Co. v. United States* is the leading case providing the contours of the attorney-client privilege as applied to corporations.<sup>154</sup> In *Upjohn*, petitioner pharmaceutical company conducted an internal investigation for what was believed to be a subsidiary's "questionable payments" to, or for the benefit of, government officials to secure business.<sup>155</sup> The Internal Revenue Service learned of these payments and issued a summons to Upjohn requesting questionnaires which had been filled out by foreign managers as part of the company's internal investigation of the payments.<sup>156</sup> The United States Supreme Court held the attorney-client privilege applied to these questionnaires.<sup>157</sup> The Court rejected the "control group" test,<sup>158</sup> which defines those authorized to speak for the corporate client as any "employee . . . whatever rank he may be, [who] is in a position to control or even to take a substantial part in a decision about any action [in which the corporation may seek] the advice of an attorney . . . ."<sup>159</sup> The Court believed the control group test would hinder the very purpose of the attorney-client privilege by limiting an attorney's ability to communicate with lower level employees.<sup>160</sup> The Court refused to establish

---

153. *United States v. White*, 950 F.2d 426, 430 (7th Cir. 1990); *Admiral Ins. v. United States Dist. Court*, 881 F.2d 1486, 1492 (9th Cir. 1989). It must be noted, however, that the underlying facts are not privileged. Levin, *supra* note 149, at 1607. This should not pose a problem, however, because under many federal laws, disclosure of violation is already required. See *infra* note 314 and accompanying text.

154. 449 U.S. 383 (1981). For a discussion of the attorney-client privilege for corporations, see JOHN W. GERGAZ, *ATTORNEY-CORPORATE CLIENT PRIVILEGE* (1987).

155. 449 U.S. at 386.

156. *Id.* at 387-88.

157. *Id.* at 397. The problem arises because in the context of a corporation, the client is an artificial creature of the law and not an individual. *Id.* at 389-90. The issue, of course, is who is authorized to engage in communications with an attorney on its behalf for the purpose of securing legal advice. See *id.* at 390.

158. *Id.* at 397.

159. *Id.* at 390 (quoting *Philadelphia v. Westinghouse Elec. Corp.*, 210 F. Supp. 483, 485 (E.D. Pa. 1962), petition for mandamus and prohibition denied *sub nom.* General Elec. Co. v. Kirkpatrick, 312 F.2d 742 (3rd Cir. 1962)).

160. The Court found the control group test to hamper the purposes of the attorney-client privilege in two ways. First, the privilege exists not only to give legal advice to those who can act on it, but also to give information to the lawyer to enable her to give informed advice. *Id.* at 390. In the case of a corporate client, it is often employees beyond the control group who possess the information needed by the attorney. *Id.* at 391. Second, the attorney's advice will also frequently be more significant to non-control group employees, and the control group test makes it difficult to convey the legal advice to those employees who will put into effect the client corporation's policy. *Id.* at 392.

black-letter rules for applying the privilege, arguing that a case-by-case approach is more consistent with the Federal Rules of Evidence.<sup>161</sup> However, the Court looked beyond the exact title of an employee in determining the applicability of the privilege.<sup>162</sup> Courts should look at the relationship between the employee making the communication and the central legal focus of the attorney's communication.<sup>163</sup> If the communication is related to the legal issue, it should fall within the privilege, but if the communication is with an employee who is not involved in the legal issue, no privilege should apply.<sup>164</sup>

The attorney-client privilege and *Upjohn* appear to provide support for shielding environmental audits from discovery. Under *Upjohn*, an attorney can use the audit as a confidential communication to provide legal advice about a client's compliance with environmental laws. Moreover, it is often employees working on the front lines, such as in the production process, who can identify current compliance problems and implement corrective action plans. *Upjohn* protects communications between an attorney and those employees involved in preparing the audit.

That said, a closer analysis of *Upjohn* reveals two significant obstacles to applying the attorney-client privilege to environmental audits. First, to successfully assert the attorney-client privilege requires a demonstration that the *primary or dominant* purpose of the communication is to receive an opinion of law, legal services, or assistance in a legal proceeding.<sup>165</sup> Most environmental audits, however, contain

---

161. *Id.* at 396-97; see also John E. Sexton, *A Post-Upjohn Consideration of the Corporate Attorney-Client Privilege*, 57 N.Y.U. L. REV. 443, 487 (1987) (stating that the *Upjohn* Court did not enunciate rules to govern the application of the attorney-client privilege).

162. *Upjohn*, 449 U.S. at 394-95.

163. See *id.* at 394-95; Levin, *supra* note 149 at 1607. Some of the guidelines that Professor Gergacz suggests can be discerned from *Upjohn* are:

1. The Communications were made by corporate employees to corporate counsel upon order of superiors in order for the corporation to secure legal advice from counsel.
2. The information needed by corporate counsel in order to formulate legal advice was not available to upper-level management.
3. The information communicated concerned matters within the scope of the employees' corporate duties.
4. The employees were aware that the reason for communication with counsel was so the corporation could obtain legal advice.
5. The communications were ordered to be kept confidential and they remained confidential.

GERGACZ, *supra* note 154, at 3-62 to 3-67.

164. *Id.*

165. *Id.* at 3-65; *United States v. Chevron, U.S.A.*, No 88-6681, 1989 WL 121616, at \*6 (E.D. Pa. Oct. 16, 1989); see also, *Status Time Corp. v. Sharp Elec. Corp.*, 95 F.R.D. 27, 31 (S.D.N.Y. 1982) ("If documents containing considerable technical factual information are nonetheless primarily concerned with asking for or granting legal advice, as opposed to giving business or technical advice, they are privileged."); *Eutectic Corp. v. Metco Inc.*, 61 F.R.D. 35, 38-39 (E.D.N.Y. 1973) (stating that where the demonstrated purpose of the



both legal and non-legal information or advice.<sup>166</sup> An environmental audit may be performed in the normal course of business to ascertain cost-effective methods of environmental compliance and to help an attorney evaluate a company's compliance with environmental regulations. Courts also recognize that an attorney may be acting as a business advisor rather than as a legal counselor when she suggests areas where a company should focus its compliance efforts.<sup>167</sup> Thus, where a corporation has multiple motives in preparing an audit and reviewing it with an attorney, or where an attorney offers both legal and business advice, characterizing an audit as a legal or business document is difficult.

The original purpose of the audit can be the test for determining whether the attorney-client privilege should apply to a given case.<sup>168</sup> Some environmental audits are clearly undertaken to assist an attorney in representing a corporation in a civil or criminal enforcement action, or to provide a legal opinion about the corporation's compliance record. These audits are classified as legal advice and should be protected from discovery by the attorney-client privilege.<sup>169</sup> Other environmental audits are prepared in the normal course of an environmental management program. In this case, no privilege should attach, even where the audit is later transferred to legal counsel for advice or for defending the corporation,<sup>170</sup> because the primary purpose of these types of audits is to assess compliance within a corporation's daily operations, usually with an eye toward reducing regulatory costs.

For example, in *United States v. Chevron, U.S.A.*,<sup>171</sup> the district court found that the mere presence of an attorney or communication with one were insufficient grounds for using the attorney-client privi-

---

communication is to facilitate the rendering of legal services to the client, the privilege will apply).

166. See *supra* parts I.A. and I.B.

167. See *Chevron, U.S.A.*, 1989 WL 121616, at \*6 (holding that an audit report is not privileged merely because an attorney was part of the audit team that prepared the report to assess the company's state of compliance).

168. Such a test has been applied to cases involving the discoverability of accident reports. See, e.g., *Holm v. Superior Ct.*, 267 P.2d 1025 (Cal. 1954). Former Justice Traynor of the California Supreme Court announced a useful alternative to this test where a report is prepared for multiple purposes: "If the purposes other than that of communicating facts to the attorney are so minor that the client would not create reports if no communication were contemplated, the existence of such purposes should not defeat the privilege. . . . If, on the other hand, reasons unrelated to the seeking of legal advice or service would cause the client to create reports, they should not be privileged." *Id.* at 1031 (Traynor, J., concurring and dissenting).

169. See GERGACZ, *supra* note 154, at 3-29 to 3-30 (stating that "pure" legal communications are those where the documents or reports are prepared for legal advice).

170. *Id.*; *Chevron, U.S.A.*, 1989 WL 121616, at \*6 (stating that a "communication's primary purpose must be to gain or provide legal assistance").

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

lege to protect an environmental audit from discovery.<sup>172</sup> The court found that the primary purpose of Chevron's environmental audit was not related to providing legal assistance;<sup>173</sup> rather, the purpose of Chevron's audit was to assess compliance with environmental laws and to determine any appropriate adjustments in its environmental management procedures.<sup>174</sup>

The second problem posed by *Upjohn* for applying the attorney-client privilege to environmental audits is that the privilege is waived unless a communication remains confidential.<sup>175</sup> This presents a problem because many auditing programs may rely upon outside consultants to help perform part or all of an environmental audit.<sup>176</sup> To protect privileged communications, an attorney must show that: (1) the audit reflects communications between a corporation and an attorney that did not lose their privileged status by being disclosed to a consultant; or (2) the audit reflects confidential communications between a corporation and a consultant, acting as an agent for an attorney; or (3) the audit contains confidential communications between a consultant, acting as an agent for a corporation, and an attorney.<sup>177</sup> One recent case suggests that courts will strictly construe these three exceptions in environmental audit cases.

In *In re Grand Jury Matter*,<sup>178</sup> the court refused to quash a grand jury subpoena involving documents prepared by an environmental consulting firm that the government sought in a criminal investigation. The court found that the documents were not created for the purpose of assisting the company's law firm in giving legal advice.<sup>179</sup> In part, the court relied on the fact that the consultants' billing documents showed no charges for time spent consulting or meeting with the law firm hired by the company.<sup>180</sup> Also, the consultants attended meetings with state regulators without the law firm. After reviewing the documents *in camera*, the court found that the documents were "clearly the work-product of the expert consultant prepared in the

---

172. *Id.* at \*6 (stating that an attorney must be acting fully in her role as a legal counselor, rather than a business advisor).

173. *Id.*; cf. *Olen Properties Corp. v. Sheldahl, Inc.*, No. CV 91-6446-WDK (Mcx), 1994 WL 212135 (C.D. Cal.) (finding that the defendant successfully established that its environmental audits were prepared for securing a legal opinion).

174. *Chevron, U.S.A.*, 1989 WL 121616, at \*6.

175. See Sexton, *supra* note 161, at 487 (stating that one of the rules flowing from *Upjohn* is that the "communication must be made in confidence"); *United States v. White*, 950 F.2d 426, 430 (7th Cir. 1990); *Admiral Ins. v. United States Dist. Court*, 881 F.2d 1486, 1492 (9th Cir. 1989).

176. See Morelli, *supra* note 62, at 105 (arguing that an ideal audit team will include individuals from both inside and outside the corporation).

177. See *In re Grand Jury Matter*, 147 F.R.D. 82, 84-86 (E.D. Pa. 1992).

178. 147 F.R.D. 82 (E.D. Pa. 1992).

179. *Id.* at 85.

180. *Id.* at 86.

course of carrying out its contract to prepare a waste management plan"; therefore, the documents were not privileged.<sup>181</sup>

The preceding discussion illustrates that courts have not yet accepted the attorney-client privilege as a mechanism for protecting environmental audits from discovery, and it is unlikely that a court will apply this privilege when a corporation regularly conducts audits for management purposes, rather than as a basis for legal advice.

## 2. *The Work-Product Doctrine*

The work-product doctrine is another evidentiary privilege that may protect an environmental audit from discovery.<sup>182</sup> The doctrine was defined in *Hickman v. Taylor*,<sup>183</sup> and is designed to give an attorney a certain degree of privacy in order to encourage careful and thorough preparation of her client's case, without the fear that an opponent will ascertain her strategy.<sup>184</sup> Under the work-product doctrine, materials collected and prepared by an attorney in "anticipation of litigation" are, with certain exceptions, shielded from disclosure.<sup>185</sup> While the work-product doctrine originally covered only an attorney's work, it has been expanded to include work performed by others under the control and direction of an attorney.<sup>186</sup> This is important for highly technical documents, like environmental audits, that can be essential to litigation strategy but require expert preparation.

The work product doctrine also casts a much wider net than the attorney-client privilege in terms of what materials are subject to protection.<sup>187</sup> It extends beyond oral and written communication to written memoranda, photographs, diagrams, drawings, and computer-generated data.<sup>188</sup> In addition, the requirement that litigation be anticipated is not limited to judicial proceedings, but can extend to any adversarial proceeding, such as administrative proceedings where parties may cross-examine witnesses and impeach their opponent's proof.<sup>189</sup> Although "the 'litigation' need not have been actually commenced, it must be more than a remote prospect."<sup>190</sup> Where litigation

---

181. *Id.*

182. See Levin, *supra* note 149, at 1608-09; Thomas L. Weisenbeck & Rita Elena M. Casavechia, *Guidelines for Prosecution of Environmental Violations: The Tension Between Self-Reporting and Self-Auditing*, 22 Env't Rep. (BNA) No. 46, at 2,483 (Mar. 6, 1992).

183. 329 U.S. 495, 510-11 (1947).

184. See Levin, *supra* note 149, at 1608.

185. See *Hickman*, 329 U.S. at 511.

186. Bush, *supra* note 19, at 631-32.

187. See Levin, *supra* note 149, at 1608.

188. *Id.*

189. *Id.*

190. *Id.*

is fairly obvious, probable, or imminent, courts will allow for protection under the doctrine.<sup>191</sup>

While the work-product doctrine is somewhat more expansive than the attorney-client privilege, the doctrine does not cover matters prepared in the "ordinary course of business,"<sup>192</sup> so environmental audits are protected only if the attorney demonstrates that anticipated or actual litigation was the impetus for the audit.<sup>193</sup> As with the attorney-client privilege, it is difficult to apply the work-product doctrine where many ongoing environmental auditing programs are part of the corporation's routine operations.<sup>194</sup> Under these circumstances, there is no justification for protecting the audit from discovery.<sup>195</sup>

### 3. *The Self-Evaluative Privilege*

The newest mechanism invoked for protecting environmental audits from disclosure is the self-evaluative privilege (SEP). The primary advantage of the SEP is that it does not rely upon an attorney's services to qualify a document for protection. The SEP protects from discovery documents and communications that arise from a client's own efforts to analyze its compliance with the law.<sup>196</sup> Also, the SEP recognizes and supports what many courts and commentators believe to be an important public policy of encouraging self-regulatory behavior by corporations, as reflected by the extension of evidentiary privileges to corporations.

#### a. *Development of the Privilege*

The SEP was first recognized in *Bredice v. Doctor's Hospital, Inc.*<sup>197</sup> *Bredice* involved a medical malpractice suit involving the

---

191. *Id.*

192. *Id.*

193. *Id.* As discussed above, an environmental audit can be undertaken in preparation of litigation. This can occur, for example, where a spill or leak has occurred and the corporation anticipates enforcement action. WHITE PAPER, *supra* note 100, at 9. It can also occur where the corporation is seeking to mitigate its liability by addressing the problem. See *supra* part I.A.

It has been suggested that a corporation can help establish a work-product privilege claim by clearly marking every page as "privileged and confidential" or "material prepared in anticipation of litigation" coupled with having the audit undertaken at the written request of the attorney. Levin, *supra* note 149, at 1608-09. However, it is unlikely that a court will be fooled by such tactics if in fact the audit was performed for purposes other than developing a litigation strategy for an actual or anticipated case. See WHITE PAPER, *supra* note 100, at 9; *United States v. Chevron, U.S.A., No. 88-6681*, 1989 WL 121616, at \*6 (E.D. Pa. Oct. 16, 1989) (stating that a "communication's primary purpose must be to gain or provide legal assistance").

194. WHITE PAPER, *supra* note 100, at 8-9.

195. *Id.* at 9.

196. See Levin, *supra* note 149, at 1609.

197. 50 F.R.D. 249 (D.D.C. 1970), *aff'd without opinion* 479 F.2d 920 (D.C. Cir. 1973).

death of Frank J. Bredice.<sup>198</sup> Plaintiff, administratrix of the deceased's estate, sought discovery of minutes and reports of a hospital peer review board that periodically assessed hospital procedures and staff performance.<sup>199</sup> The court found that these documents were privileged because of an "overwhelming public interest" in maintaining their confidentiality.<sup>200</sup> The court believed that "candid and conscious" evaluations of hospital practice are the *sine qua non* of adequate hospital care.<sup>201</sup> The court felt that a public policy that supports this type of self-evaluation would improve the quality of health care available in the future,<sup>202</sup> while critical reviews of hospital procedures and staff would be chilled without a privilege for protecting such documents from discovery in medical malpractice suits.<sup>203</sup>

Since *Bredice*, the SEP has been accepted by many state legislatures, and statutory protection for hospital committee reports is becoming commonplace.<sup>204</sup> Following *Bredice*, courts have also extended the SEP to other types of internal investigatory reports, such as accounting records, academic peer reviews, and product safety assessments.<sup>205</sup> The use of the SEP in environmental cases, however, has proven very controversial, and courts have been extremely reluctant to extend the privilege to environmental audits. As a result, many businesses are pushing to craft an environmental SEP through legislation or administrative regulations.

---

198. *Bredice*, 50 F.R.D. at 249.

199. *Id.* at 249-50. The board was acting pursuant to the requirements of the Joint Commissions on Accreditation of Hospitals. *Id.* at 250. The Commission has stated that the "sole objective" of these peer review boards is the improvement in care and treatment rendered by the hospital. *Id.* In many ways, the review is similar to an internal audit, for it is designed to "review and [analyze the] clinical work done in the hospital on at least a monthly basis." *Id.* (quoting Standards for Hospital Accreditation, Bulletin of the Joint Commission on Accreditation of Hospitals, No. 3 (Aug. 1953)).

200. *Id.* at 250-51 ("Confidentiality is essential to effective functioning of these staff meetings; and these meetings are essential to the continued improvement in the care and treatment of patients.").

201. *Id.* at 250.

202. *Id.*; Bush, *supra* note 19, at 604.

203. Bush, *supra* note 19, at 604.

204. A Lexis search reveals that Arizona, Arkansas, California, Florida, Illinois, Indiana, Kansas, Maryland, Missouri, Ohio, Pennsylvania, Rhode Island, Vermont and West Virginia all have statutory protection for medical peer review reports. Search of LEXIS, States Library, ALLCDE File (Sep. 24, 1996).

205. See, e.g., *Banks v. Lockheed-Georgia Co.*, 53 F.R.D. 283 (N.D. Ga. 1971) (confidential assessments of equal employment practices); *Keyes v. Lenoir Rhyne College*, 552 F.2d 579 (4th Cir. 1977) (faculty evaluation records); *Lloyd v. Cessna Aircraft Co.*, 74 F.R.D. 518 (E.D. Tenn. 1977) (product safety assessments); *Bradley v. Melroe Co.*, 141 F.R.D. 1 (D.D.C. 1992) (product safety assessments).

*b. Judicial Expansion of the SEP to Environmental Audits*

Courts have generally refused to expand the SEP to environmental audits, and such an expansion is mired in the complexities of evidentiary privilege law. Those in favor of expanding the SEP to environmental audits argue that the rationale behind both traditional evidentiary privileges and the policies underlying the SEP invite legal protection for environmental audits. In support of this position, proponents cite U.S. Supreme Court decisions that encourage corporate self-regulatory behavior and invoke the reasoning of *Bredice* and its progeny, which consider the scope of the SEP.<sup>206</sup>

The United States Supreme Court has generally recognized the need to encourage corporate self-regulatory behavior. In *Upjohn Co. v. United States*,<sup>207</sup> the Court noted that increased protection for communications between corporate clients and their attorneys will result in the socially beneficial outcome of increased compliance with the law.<sup>208</sup> Similarly, in *Hickman v. Taylor*,<sup>209</sup> the Court acknowledged that the work-product doctrine further enhances voluntary corporate compliance by maximizing a corporation's production of information that serves as the basis of legal advice.<sup>210</sup> Thus, supporters of an expanded SEP argue that *Upjohn* and *Hickman* allow courts to invoke evidentiary privileges in order to promote and protect corporate self-regulatory behavior. In cases where the attorney-client privilege or the work-product doctrine do not apply, commentators claim that the SEP and its recent case law support expansion of the privilege to protect environmental auditing.<sup>211</sup>

Supporters of an expanded SEP cite *Bredice* and its progeny to bolster their contention that the SEP should be expanded into other self-regulatory areas.<sup>212</sup> This line of cases has developed three criteria

---

206. For a detailed discussion of *Bredice*, see *supra* text accompanying notes 197-204.

207. 449 U.S. 383 (1981). For discussion of *Upjohn*, see *supra* part II.B.1.

208. *Upjohn*, 449 U.S. at 392-93; Sexton, *supra* note 161, at 468. In *Upjohn* the Court recognized that a narrow view of the attorney-client privilege hampers the ability of corporate counsel in making sound advice to their clients and threatens to limit the corporation's efforts to ensure the company's compliance with the law. *Upjohn*, 449 U.S. at 392. This "voluntary compliance" model assumes that once attorneys inform corporate decisionmakers of the demands of the law or of their violations of the law, the decisionmakers will conform the corporation's behavior to the law.

209. 329 U.S. 495 (1947). For a discussion of *Hickman*, see *supra* part II.B.2.

210. *Hickman*, 329 U.S. at 510-11 (stating that in performing legal work, "it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion"; otherwise, "[i]nefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice"); see also Ronald J. Allen et al., *A Positive Theory of the Attorney-Client Privilege and Work-Product Doctrine*, 19 J. LEGAL STUD. 359, 388 (1990).

211. See Bush, *supra* note 19, at 600-01.

212. See, e.g., Bush, *supra* note 19, at 614-15 (arguing that SEP precedent supports extension of the privilege to a corporation's self-regulatory activities).

or elements for determining when the SEP is applicable,<sup>213</sup> but it is arguable whether these cases suggest that the SEP should be expanded into all areas of corporate self-regulation. Supporters of an expanded SEP argue that courts should not take it upon themselves to “weigh anew the competing equities” of the SEP in each new area in which advocates seek to apply the privilege.<sup>214</sup> Rather, they argue that courts should determine whether the elements of the privilege are satisfied by the facts of a given case.<sup>215</sup> If the material meets the requirements of *Bredice*’s three elements, then the privilege should apply and discovery of the information should be prohibited.<sup>216</sup> Following *Bredice*, where a document, such as an audit, (1) is the product of an internal self-analysis, (2) promotes the public interest such as environmental compliance, and (3) is likely to be more candid if the document is privileged, then it should be protected from discovery.<sup>217</sup> Under this black letter approach, the SEP will be applied more consistently because, presumably, all socially beneficial self-regulatory behavior is protected.<sup>218</sup>

While the SEP is appealing to those seeking immediate protection for environmental audits, supporters of an expanded SEP read too much into traditional evidentiary privilege law. Case law, the Federal Rules of Civil Procedure and the Federal Rules of Evidence require courts to balance the need for the free flow of information in the judicial forum against the necessity of private communications in each new area in which a privilege is encouraged. Instead of courts determining whether the elements of the privilege are satisfied by the facts of a given case, which often would result in an expanded use of the SEP, it is more appropriate for courts to balance competing public interests in each new area of self-regulatory behavior. *Upjohn* and *Hickman* do not authorize extending privileges merely for the sake of promoting self-regulatory behavior. Rather, *Upjohn* and *Hickman* stand for the proposition that courts must weigh the public interest in the disclosure of evidence with the need for confidentiality so that the

---

213. Note, *The Privilege of Critical Self-Analysis* 96 HARV. L. REV. 1083, 1086 (1983).

214. *Id.* at 1097; Bush, *supra* note 19, at 607-08.

215. Note, *supra* note 213, at 1098.

216. Bush, *supra* note 19, at 608 n.79.

217. See Note, *supra* note 213, at 1086; *Dowling v. American Hawaii Cruises*, 971 F.2d 423, 425-26 (9th Cir. 1992). It is recognized, however, that even where these elements are met, the privilege can be overcome by a “showing of extraordinary circumstances or special need.” See, e.g., *Bredice v. Doctors Hospital, Inc.*, 50 F.R.D. 249, 250-51 (D.D.C. 1970) (stating that because of the public interest in maintaining the minutes of medical staff meetings as confidential, these will not be subject to discovery if there is no “evidence of extraordinary circumstances”); *Reichhold Chems., Inc., v. Textron, Inc.*, 157 F.R.D. 522, 526-27 (N.D. Fla. 1994) (describing the privilege as a “qualified privilege, which can be overcome by a showing of extraordinary circumstances or special need”).

218. Bush, *supra* note 19, at 608.

application of the privilege obeys the spirit of the statutory frameworks that have traditionally governed the use of privileges to protect documents from discovery.<sup>219</sup>

The Federal Rules of Civil Procedure recognize the existence of evidentiary privileges to shield some communications and documentation from discovery,<sup>220</sup> and Federal Rule of Evidence 501 properly governs the development of privileges in federal court.<sup>221</sup> Evidentiary privileges are based on "the interest[s] of the public and the resisting party in preserving privacy in the matter sought to be discovered."<sup>222</sup> However, the development of a new privilege or the expansion of an existing privilege to cover new forms of evidence encounters strong scrutiny by the courts<sup>223</sup> because of the long-standing rule that the public "has a right to every man's evidence."<sup>224</sup> As a result, courts must consider these two competing considerations.<sup>225</sup>

The United States Supreme Court has shown support for considering the public interest before applying the SEP to a new area of self-regulatory behavior. For example, the Court refused to apply the SEP to cases brought under Title VII of the Civil Rights Act of 1964 (Title VII). In *University of Penn. v. Equal Employment Opportunity Commission*<sup>226</sup>, the Court rejected the application of the SEP in an em-

219. See *Upjohn Co. v. United States*, 449 U.S. 383, 396-97 (1981); *Hickman v. Taylor*, 329 U.S. 495, 510-12 (1947).

220. Federal Civil Procedure Rule 26(b)(1) reads in part: "Parties may obtain discovery regarding any matter, *not privileged*, which is relevant to the subject matter involved in the pending action . . ." (emphasis added). FED. R. CIV. P. 26(b)(1).

While Rule 26 recognizes the existence of evidentiary privileges, the term "privilege" refers to privileges as they arise under the laws of evidence. Since privileges under the Federal Rules of Evidence apply to "all stages of all actions, cases, and proceedings[.]" the Federal Rules of Evidence determine which evidence is privileged during discovery. FED. R. EVID. 1101(c); *United States v. Dexter Corp.*, 132 F.R.D. 8, 9 (D. Conn. 1990).

221. Note, *supra* note 213, at 1084. Federal Rule of Evidence 501 states:

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof *shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience*. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege . . . shall be determined in accordance with State law.

FED. R. EVID. 501 (emphasis added).

222. FLEMING JAMES, JR. & GEOFFREY C. HAZARD, JR., *CIVIL PROCEDURE*, §5.9, at 249 (1985). "Some privileges are entrenched in the Constitution, particularly the Fifth Amendment, and others are . . . entrenched by tradition, particularly the attorney-client privilege." *Id.* The debate over legal protection for environmental audits suggests that "[i]n any given jurisdiction at any given time the question of whether certain private documents or communications might be privileged may be open to new arguments." See *id.*

223. *United States v. Nixon*, 418 U.S. 683, 710 & n.18 (1974) (privileges "are not lightly created nor expansively construed, for they are in derogation of the search for truth").

224. *United States v. Bryan*, 339 U.S. 323, 331 (1950); Note, *supra* note 213, at 1083-84.

225. See JAMES & HAZARD, *supra* note 222, §5.9, at 248.

226. 493 U.S. 182 (1990).



ployment discrimination case under Title VII. In the course of investigating the denial of tenure to a female, Asian-American professor, the Equal Employment Opportunity Commission sought tenure review files from the University. In refusing to allow the University of Pennsylvania to claim an SEP, the Court stressed the extent to which Congress had established an "integrated, multi-step enforcement procedure" . . . to detect and remedy instances of discrimination."<sup>227</sup> Not only did the Court consider the importance of the public interest in disclosing information, but the Court also deferred to Congress' deliberations in this area. The Court noted that Congress had already considered the competing public interest concerns, yet it had not provided for the privilege itself; as such, the Court was reluctant to second-guess Congress' intentions by extending the privilege to Title VII employment discrimination cases.<sup>228</sup>

Similarly, courts also balance various public interests for and against disclosure when considering whether the SEP should be applied to environmental audits.<sup>229</sup> In all but one case,<sup>230</sup> courts have refused to extend the SEP to environmental auditing. Courts have found that public disclosure outweighs the need for confidentiality because Congress' environmental laws contain a strong enforcement scheme. *U.S. v. Dexter Corp.*,<sup>231</sup> one of the first cases to consider whether the SEP should be applied to environmental audits, refused to extend the SEP to environmental auditing, reasoning that because the SEP is "rooted in promotion of the public interest, a court should take cognizance, in an action brought by the United States to enforce duly enacted [environmental] laws, of Congress's role in declaring what is in the public interest."<sup>232</sup> The court stated that it was following a line of cases that refuse to apply the SEP where the public interest would be upset by denying the government discovery of documents in an enforcement action.<sup>233</sup>

---

227. *Id.* at 190 (quoting *EEOC v. Shell Oil Co.*, 466 U.S. 54, 62 (1984)).

228. *Id.* at 189-90.

229. See *Reichhold-Chems., Inc. v. Textron, Inc.*, 157 F.R.D. 522, 526 (N.D. Fla. 1994); *Koppers Co. v. Aetna Cas. & Sur. Co.*, 847 F. Supp. 360, 364-65 (W.D. Pa. 1994); *CPC Int'l, Inc. v. Hartford Accident and Indem. Co.*, 620 A.2d 462, 467 (N.J. Sup. Ct. Law Div. 1992); *United States v. Dexter Corp.*, 132 F.R.D. 8, 9-10 (D. Conn. 1990).

230. *Reichhold Chems., Inc. v. Textron, Inc.* 157 F.R.D. 522 (N.D. Fla. 1994).

231. 132 F.R.D. 8 (D. Conn. 1990).

232. *Id.* at 9.

233. *Id.* The court cited the following cases: *Federal Trade Comm'n v. TRW, Inc.*, 628 F.2d 207, 210 (D.C. Cir. 1980); *Emerson Elec. Co. v. Schlesinger*, 609 F.2d 898 (8th Cir. 1979) (refusing to grant SEP in part because the documents would be disclosed only to federal agencies and not third parties); *United States v. Noall*, 587 F.2d 123 (2d Cir. 1978) (granting IRS summons requiring executive vice president of corporation to appear and provide all internal credit reports and related work papers on grounds that Congress decided public policy); *Reynolds Metals Co. v. Rumsfeld*, 564 F.2d 663 (4th Cir. 1977).

In *Koppers Co. v. Aetna Casualty and Surety Co.*,<sup>234</sup> the federal district court took the public interest balancing test one step further. The court confronted the "Hobson's choice" argument advanced by those who support applying the SEP to environmental audits.<sup>235</sup> *Koppers* involved private litigants, rather than government regulators, who sought discovery of environmental audits. The court rejected the notion that a corporation faces a Hobson's choice between "due diligence" or "self-incrimination" if it chooses to perform an environmental audit. Instead, it found that "in the tightly-regulated environmental context . . . strict attention to environmental affairs" is required, and doubted that "potential polluters will violate regulations requiring environmental diligence for fear of these documents being used against them tomorrow."<sup>236</sup> The court also found that the public interest in disclosing the information contained in an environmental audit can outweigh the need for confidentiality.<sup>237</sup>

A New Jersey superior court offered several reasons for balancing various public interests prior to extending the SEP to new areas of corporate self-regulation in *CPC International, Inc. v. Hartford Accident and Indemnity Co.*<sup>238</sup> In that case, the court distinguished an earlier state court case that applied the SEP to shield corporate accident reports from discovery in a tort case.<sup>239</sup> The court stated that "this case involves pollution, not personal injury" and as such, "the emphasis must be on the existence of strong environmental legislation as evidence of the compelling interest the public has in its regulation."<sup>240</sup> Thus, the court agreed with *Dexter Corp.*: where the legislature has so pervasively occupied a particular field, like environmental law, there is no room for a court to second guess Congress or a state legislature's understanding of the public interest by applying a privilege that could deter enforcement, either by the government or private citizens.<sup>241</sup>

---

234. 847 F. Supp. 360 (W.D. Pa. 1994).

235. *Id.* at 364; see *supra* part II.A.

236. *Koppers*, 847 F. Supp. at 364.

237. *Id.* at 364-65 (quoting *CPC Int'l, Inc. v. Harford Accident and Indem. Co.*, 620 A.2d 462, 467 (N.J. Super. Ct. Law Div. 1992)).

238. 620 A.2d 462 (N.J. Super. Ct. Law Div. 1992). Interestingly, *CPC Int'l* not only undertook a balance of the various public interests, but found the three-prong SEP test to require it. *Id.* at 467. The court found that the second prong of the test was designed to require the court to balance the public need for confidentiality with the public need for disclosure. *Id.* The court seems correct on this point, and thus the argument made to the contrary, see *supra* notes 214-16, is even more erroneous.

239. *CPC Int'l*, 620 A.2d at 467 ("The strong public interest in environmental regulation adequately distinguishes the facts of this case from *Wylie*.").

240. *Id.*

241. *Id.*; see also *United States v. Dexter Corp.*, 132 F.R.D. 8, 9 (D.Conn 1990) ("For as Justice Holmes noted, '[t]he [l]egislature has the power to decide what policy of law shall be, and if it has intimated its will, however indirectly, that will should be recognized and

The most recent case concerning the SEP and environmental audits, *Reichhold Chemicals, Inc. v. Textron, Inc.*,<sup>242</sup> adds a new twist to the analysis. *Reichhold* involved a CERCLA cost recovery action where the defendant sought discovery of several environmental reports.<sup>243</sup> Although the court suggested that there are sound policy arguments for adopting a general SEP,<sup>244</sup> the court then proceeded to balance the various public interests presented by the case.<sup>245</sup> The court noted the "strong public interest in promoting the voluntary identification and remediation of industrial pollution," and concluded that the "self-evaluative privilege promotes the interests of justice and should be applied in appropriate environmental cases."<sup>246</sup>

Although *Reichhold* differs from the other cases in that it applies the SEP to environmental audits, the decision is limited and is not as notable as some might suggest. First, the court recognized that in a government enforcement action, the public interest may require disclosure.<sup>247</sup> Second, the court applied the SEP only to "retrospective analyses of past conduct, practices, and occurrences, and the resulting environmental consequences."<sup>248</sup> The court made a vital distinction between pre-incident and post-incident analyses, and this distinction severely limits the application of *Reichhold* in most cases involving on-going environmental auditing programs.

While environmental compliance audits can review past conduct, practices or occurrences, today's environmental management programs are largely prospective.<sup>249</sup> Firms are much more likely to implement environmental auditing as part of a proactive management system. While these audits might include analysis of past conduct, practices, and occurrences, it is unlikely that the *Reichhold* court would apply the SEP to any report that is forward-looking. To the

---

obeyed.'") (quoting Federal Trade Comm'n v. Jantzen, Inc., 386 U.S. 228, 233 (1967)) (alterations in original).

242. 157 F.R.D. 522 (N.D. Fla. 1994).

243. *Id.* at 524.

244. *Id.* at 526.

245. *Id.* at 526-27.

246. *Id.* at 526.

247. *Id.* at 526-27. The court recognizes that one of the limitations placed on the SEP by prior courts has been to restrict its use to cases involving private parties. *See id.* at 526. The court does not challenge this limitation. *See id.* "The public interest in allowing individuals and corporations to candidly assess their compliance with environmental regulations 'promotes sufficiently important interests to outweigh' the interest of opposing private litigants in discovering [these reports]." *Id.* (emphasis added). While this might be good news for the government, it fails to take into consideration the interests of citizen groups and the advantages of open access. *See infra* section II.B.3.d.ii.

248. *Reichhold Chems.*, 157 F.R.D. at 527. The court suggested that in this way the SEP is analogous to and based on Rule 407 of the Federal Rules of Evidence, which excludes evidence of subsequent remedial measures. *Id.* at 524.

249. Kosko & Causey, *supra* note 34, at 149.

contrary, the court "readily agreed" with *Koppers* that "evaluations of the potential environmental risks of a proposed course of action, made in advance of the decision to adopt a course of action, are not protected from discovery."<sup>250</sup>

Despite the cries of victory from those who support expanding the SEP to environmental audits, even after *Reichhold* most environmental management programs remain unprotected by the courts. Because courts are guided by the need to balance the public interest prior to expanding a privilege into new areas, it is unlikely that the SEP will shield environmental audits from discovery in the future. As long as environmental laws and public policies reflect the need for stringent enforcement, protection for environmental audits must come from the legislative or executive branches of the government. Business advocates have realized this, and their recent efforts target state and federal legislative and administrative forums.

c. *Legislative and Administrative Expansion of the SEP to Environmental Audits*

Like the courts, state legislatures and administrative agencies have also considered whether the SEP should be expanded to environmental audits. EPA issued a Final Policy Statement on December 22, 1995, which was designed to provide incentives and guidelines for corporate compliance programs,<sup>251</sup> and at least seventeen states al-

---

250. *Reichhold Chems.*, 157 F.R.D. at 527.

251. Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations, 60 Fed. Reg. 66706 (1995). In addition to its revised environmental audit policy, EPA recently launched three distinct but overlapping programs designed to integrate American business into pollution prevention. The most widely publicized of the programs, Project XL, allows individual firms, state governments, and communities more flexibility in complying with environmental laws. See *Project XL Launched with Announcement by President of First Eight Participants*, 26 Env't Rep. (BNA) No. 27, at 1180 (Nov. 10, 1995). In this way, companies are given "the freedom to meet tough pollution standards in ways that make sense to them instead of following a government rule book." *Id.* (quoting President Clinton at a Nov. 3, 1995 announcement for Project XL). A second program is the Common Sense Initiative (CSI). This program is intended to reverse the agency's pollutant-by-pollutant approach of the past by identifying industry-by-industry opportunities for "greater reductions in pollution through flexible, innovative environmental protection strategies." *Browner Unveils Sectors To Participate in Industry-Specific Regulatory Approach*, Nat'l Env't Daily (BNA), July 21, 1994, available in LEXIS, BNA Library, BNANED File (quoting an EPA statement). Although the project initially will cover only six industries (automobile manufacturing, computers and electronics, iron and steel, metal finishing and plating, petroleum refining, and printing), EPA intends to expand the program to other industries if successful. *Id.* While the CSI will continue strong enforcement of environmental laws, its most important feature is the use of pollution prevention as a guiding principle in the regulatory system. The third program carries the CSI one step further. The Sustainable Industry Project, announced on July 27, 1994, seeks to integrate pollution prevention into the "basic, profit oriented activities" of several industries, focusing on so-called drivers (incentives) and barriers (obstacles) industries face in improving environmental performance. *Report by EPA Describes Policy Options for Integrating Pol-*

ready have statutory protection for audits: Arkansas, Colorado, Idaho, Illinois, Indiana, Kansas, Kentucky, Michigan, Minnesota, Mississippi, New Hampshire, Oregon, South Dakota, Texas, Utah, Virginia, and Wyoming.<sup>252</sup>

In response to most courts' refusal to expand the SEP to environmental audits, several states are trying to legislate a privilege. Many proposals are modeled on Oregon Bill 912, which was enacted by the Oregon Legislature in July, 1994.<sup>253</sup> The Oregon statute protects environmental audits in any state civil or criminal action.<sup>254</sup> In order to retain this protection, a company must promptly initiate and pursue with "reasonable diligence" corrective actions to remedy any environmental violations revealed by the audit.<sup>255</sup> In this sense, the Oregon statute uses a carrot-and-stick approach to ensure that self-compliance with environmental laws is vigorously pursued by industry.<sup>256</sup>

The Oregon statute also contains provisions that allow adverse parties access to privileged documents under certain limited circumstances.<sup>257</sup> The most notable circumstance is in the context of an environmental criminal action. If a report contains relevant evidence and if a prosecutor can demonstrate to the court that (1) there is a compelling need for the information, (2) the information is not otherwise available, and (3) the state is unable to obtain the substantial equivalent of the information without incurring unreasonable cost and delay, then the audits are discoverable.<sup>258</sup> Additional qualifications

---

*lution Control, Profits*, Nat'l Env't Daily (BNA) (Aug. 2, 1994), available in LEXIS, BNA Library, BNANED File. According to the President's Council on Sustainable Development, sustainable development must involve "maintaining economic growth while producing the absolute minimum of new pollution, repairing the environmental damages of the past, using far fewer non-renewable resources, producing much less waste, and extending the opportunity to live in a pleasant and healthy environment for the whole population." *Id.*

252. Hogue, *supra* note 14, at 882; Cheryl Hogue, *Environmentalists Considering Challenges to State Delegation Because of Audit Laws*, Daily Env't Rep. (BNA), Mar. 26, 1996, available in LEXIS, ENVIRN Library, BNAED File. See, e.g., ARK. CODE ANN. §§ 8-1-301 to -312 (Michie 1996); COLO. REV. STAT. ANN. §§ 13-25-126.5, 13-90-107(j)(I)(A), 25-1-114.5 (West Supp. 1994); IDAHO CODE § 9-340 (Michie/Reed Elsevier Inc. 1996); ILL. ANN. STAT. ch. 65 § 5/11-74.6-10 (Smith-Hurd 1996); IND. CODE ANN. §§ 13-10-3-1 to -12 (Burns Supp. 1994); KAN. STAT. ANN. § 60-3332 (1995); KY. REV. STAT. ANN. § 224.01-040 (Michie/Bobbs-Merrill Supp. 1994); OR. REV. STAT. § 468.963 (1995); TEX. HEALTH & SAFETY CODE ANN. §§ 361.113 (West 1996); UTAH CODE ANN. § 19-7-103 (1996); VA. CODE ANN. § 10.1-1618 (Michie 1996); WYO. STAT. §§ 35-11-1105, 35-11-1106 (1995).

253. Thomas E. Lindley & Jerry B. Hodson, *Environmental Audit Privilege: Oregon's Experiment*, 24 Env't Rep. (BNA) No. 24, at 1222 (Oct. 29, 1993).

254. *Id.*

255. *Id.*

256. *Id.*

257. *Id.* Colorado's statutory privilege has similar exceptions. See Focus Group, *supra* note 25, at 59-60 (statement of Trish Bangert, Deputy Attorney General, State of Colorado) (discussing the qualifying factors of Colorado's audit protection statute).

258. Lindley & Hodson, *supra* note 253, at 1222.

include waiver provisions and *in camera* court review to determine if there was fraudulent assertion of the privilege or whether the content of the document satisfies the statutory definition of an environmental audit.<sup>259</sup>

On the administrative side, EPA has cautiously approached protection for environmental audits, and has encouraged states to do the same.<sup>260</sup> EPA undertook an extensive and lengthy reassessment of its 1986 Environmental Auditing Policy, which resulted in its Final Policy Statement of December 22, 1995.<sup>261</sup> While EPA is clearly reluctant to forego traditional command and control enforcement,<sup>262</sup> its recent policy initiatives demonstrate its resolve to explore new approaches to environmental protection.

The focal point of the 1995 Final Policy Statement is a commitment to "enhance [the] protection of human health and the environment by *encouraging* regulated entities to discover voluntarily, disclose, correct and prevent violations of federal environmental law."<sup>263</sup> To qualify for certain regulatory incentives under this policy, a corporation must meet nine conditions:

1. *Systematic Discovery*: violations must be discovered through an environmental audit or an objective, documented, systematic procedure or practice reflecting the regulated entity's due diligence in preventing, detecting and correcting violations;
2. *Voluntary Discovery*: the violation must be identified voluntarily and not otherwise required to be disclosed through legally required monitoring;
3. *Prompt Disclosure*: the violation must be reported within 10 days or less;

---

259. See OR. REV. STAT. § 468.963(3).

260. See Day 1 (Morning), *supra* note 145, at 8-10 (opening remarks of Steven Herman, Asst. Administrator, EPA) (stating that there are numerous options to discuss and consider with respect to environmental auditing); Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations, 60 Fed. Reg. 66,706, 66,710, 66,712 (1995) (discussing how EPA developed its auditing policy and stating that EPA will work with states in developing auditing policies).

Several states, ignoring EPA's call for caution, have already adopted approaches to encourage audits, such as providing for a qualified privilege. *State Environmental Audit Privilege Laws, Effect on Enforcement Undergoing EPA Review*, 25 Env't Rep. (BNA) No. 11, at 495 (July 15, 1994). For a list of states providing a qualified privilege, see note 252 and accompanying text. EPA (which is opposed to environmental auditing privilege laws) maintains that it is not bound by state privilege laws when enforcing violations of federal law. *EPA Review*, *supra* at 495.

261. Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations, 60 Fed. Reg. 66,706 (1995).

262. See Day 1 (Morning), *supra* note 145, at 3-13 (opening remarks of Steven Herman, Assistant Administrator, EPA).

263. Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations, 60 Fed. Reg. at 66,706 (emphasis added).

4. *Independent Discovery and Disclosure*: discovery and reporting of the violation must be initiated prior to commencement of an agency inspection or investigation or the issuance by an agency of an information request from the regulated entity, the issuance of a citizen suit notice, the filing of a third-party legal complaint, the reporting of the violation by a "whistleblower" employee, or the imminent discovery of the violation by an agency;
5. *Correction and Remedy*: the entity must not only correct the violation, but must also remedy any harm caused;
6. *Prevent Recurrence*: the entity must agree in writing to prevent recurring violations;
7. *No Repeat Violations*: the same or a closely-related violation must not have occurred within three years or be part of a pattern of violations which have occurred within the past five years;
8. *Other Violations Excluded*: the violation is not one which resulted in serious actual harm or presented imminent and substantial endangerment to human health, or violated the terms of a judicial or administrative order or consent agreement;
9. *Cooperation*: the entity must cooperate with EPA.<sup>264</sup>

If a corporation meets these nine conditions, EPA offers three types of incentives to encourage "self-policing." EPA will: (1) forgo seeking gravity-based penalties;<sup>265</sup> (2) never recommend a criminal prosecution for a violation as long as the violation does not demonstrate or involve "(i) a prevalent management philosophy or practice that concealed or condoned environmental violations; or (ii) high-level corporate officials' conscious involvement in, or willful blindness to, the violations,"<sup>266</sup> and (3) refrain from requesting or using an environmental audit to initiate a civil or criminal investigation.<sup>267</sup>

Although recent state auditing laws and EPA's Final Policy Statement provide guidance and encouragement to regulated entities, these

---

264. *Id.* at 66,711-12.

265. *Id.* at 66,711. The gravity penalty is designed to deter violations of environmental laws and is set to reflect the seriousness of the violation. *Policy on Civil Penalties and Framework for Statute-Specific Approaches to Penalty Assessments*, 14 Env'tl. L. Rep. (Env'tl. L. Inst.) at 30001 (Jan.-Dec. 1984). While the economic benefit penalty is to put the firm in a position equal to where it would have been if it complied with the law, the gravity penalty is meant to make the firm "economically worse off." *See id.* To determine the gravity penalty, EPA must quantify the gravity of the violation and rank the different violations according to the seriousness of the act. *Id.* at 30006.

EPA will also give a seventy-five percent reduction of gravity-based penalties to firms which satisfy all but the Systematic Discovery conditions of the policy. Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations, 60 Fed. Reg. at 66,711.

266. *Id.* at 66,711. However, the EPA retains the right to recommend criminal prosecution for the acts of individual managers or employees pursuant to existing policies. *Id.*

267. *Id.*

also ignite further controversy.<sup>268</sup> In addition to citizen groups' concern that laws which protect environmental audits from disclosure favor businesses,<sup>269</sup> there are two other problems with state auditing laws and EPA policy. First, the state laws use a subjective standard to determine whether business practices will be privileged. For example, under the Oregon statute, a corporation's environmental audit is privileged if the corporation uses "reasonable diligence" to correct discovered violations.<sup>270</sup> Thus, regulators will turn to the courts to develop standards to determine when "reasonable diligence," "due diligence," or "good faith" exist.<sup>271</sup>

Likewise, EPA's policy also uses a subjective standard, requiring violations to be "discovered through: (a) an environmental audit; or (b) an objective, documented, systematic procedure or practice reflecting the regulated entity's due diligence in preventing, detecting, and correcting violations."<sup>272</sup> In turn, "due diligence" encompasses a corporation's systematic efforts, according to the size and nature of its business, to prevent, detect and correct violations. These efforts may include: (1) compliance policies, standards, and procedures; (2) assigning overall responsibility for compliance policies, standards, and procedures; (3) mechanisms for ensuring compliance policies, standards, and procedures are followed; (4) efforts to communicate compliance policies, standards, and procedures to employees; (5) appropriate incentives to encourage employees to follow compliance policies, standards, and procedures; and (6) procedures for prompt correction of violations.<sup>273</sup> Thus, a key issue will involve a court's determination of whether a corporate program falls under this EPA policy.<sup>274</sup>

---

268. See, e.g., *States, Industry, supra* note 16, at 689 (discussing changes to EPA's interim audit policy proposed by state agencies, industry, and environmental groups).

269. See *infra* part II.B.3.d.ii.

270. OR. REV. STAT. § 468.963(3)(d) (1995).

271. Similarly, courts will have to decide the scope of any broad terms environmental statutes contain. The proposed California Assembly Bill 1729, which provides for an environmental auditing privilege, was criticized for containing such broad language that the privilege could encompass most routine or casual observations or comments. Letter from Larry Doyle, Chief Legislative Counsel, State Bar of California, to Bill Morrow, Assembly Member 3 (June 11, 1996) (on file with the author).

272. Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations, 60 Fed. Reg. 66,706, 66,711 (1995).

273. *Id.* at 66710-11.

274. See *Appeals Board Hears First Case Considering Audit Policy Principles*, Daily Env't News (BNA) No. 85, at AA-1 (May 2, 1996) (discussing *In the Matter of Harmon Electronics, Inc.*, E.A.B., RCRA No. 94-4, an appeal before the Environmental Appeals Board to determine whether EPA's audit policy principles apply to a civil penalty of \$586,716 for alleged hazardous waste disposal violations under the Resource Conservation and Recovery Act).



Second, while confronting the issue of environmental auditing and attempting to establish government support for it is commendable, state laws and EPA policy fail to recognize the opportunity for significant change in environmental regulations. For example, EPA still attempts to deal with environmental auditing within the confines of traditional command and control regulation. EPA's 1995 Final Policy Statement provides no independent regulatory scheme for environmental audits, and uses auditing merely as a mitigating factor during the penalty phase of a traditional enforcement action. A separate and wholly independent system of environmental regulation is required to deal with auditing issues. Congress, EPA and the states need to enact policies that provide an alternative regulatory system for corporations that adopt legitimate auditing and environmental management programs.<sup>275</sup> This alternative system needs to operate in conjunction with traditional command and control enforcement methods in order to prevent corporations from using environmental audits to shield themselves from prosecution.

*d. Expansion of the SEP to Environmental Audits: Government and Citizen Perspectives*

In addition to the corporate perspective, it is important to consider government and citizen viewpoints in order to understand fully the current debate over legal protection for environmental audits. As discussed above, businesses perceive audits as a Hobson's choice between aggressive internal investigations of environmental compliance, and proactive environmental management that is potentially self-incriminating.<sup>276</sup> On its face, this argument seems to fit very well within *Bredice's* rationale that confidential self-evaluations will result in better compliance; thus, environmental audits need protection to preserve "candid and conscious" evaluations. However, opponents of the SEP in law enforcement and public interest organizations suggest that the argument put forth by the business community does not truly represent the full scope of the public interest when it comes to environmental protection.

*i. The Government Regulator/Prosecutor View*

Governmental regulators and prosecutors vigorously oppose the use of the SEP to protect environmental audits from discovery in enforcement activities,<sup>277</sup> and they have successfully argued that envi-

---

275. For a discussion of alternative regulatory systems, see *infra* part III.

276. See *supra* part II.A.

277. That this opposition persists is evident in EPA's 1995 Final Policy Statement. Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations, 60 Fed. Reg. at 66,710 (1995); see also *Attorneys Debate*, *supra* note 17, at 690-91 (listing

ronmental audits are not legally protected.<sup>278</sup> By demonstrating that the protection of environmental audits is inconsistent with Congress' explicit declaration of a public policy favoring strict enforcement of environmental laws, as reflected in Congress' comprehensive environmental regulatory scheme, the government has frustrated virtually all efforts for a judicially crafted SEP in environmental enforcement actions.<sup>279</sup> As the debate over auditing has emerged in legislative and administrative fora, however, regulators have advanced several other formidable arguments against an environmental SEP.<sup>280</sup>

Government officials assert that there are already sufficient regulatory and private incentives to ensure that the current trend in environmental auditing and management will not be deterred without the SEP.<sup>281</sup> Corporations have an incentive to carry out proactive environmental management programs to avoid agency investigations, "citations for violations, enforcement actions, civil penalties, and corrective orders."<sup>282</sup> Current EPA and Department of Justice enforcement policies favorably treat corporate offenders who implement compliance programs and adhere to environmental auditing and voluntary disclosure.<sup>283</sup> Furthermore, with federal and state criminal en-

---

reasons for the EPA's opposition to the SEP). Instead, EPA has focused its efforts on an incentive policy that will treat favorably firms that initiate internal programs that adhere to procedures of environmental auditing and voluntary disclosure. For a detailed discussion of this policy, see *supra* part II.B.3.c.

278. See, e.g., *United States v. Dexter Corp.*, 132 F.R.D. 8 (D. Conn. 1990).

279. See, e.g., *id.* (rejecting the SEP for environmental audits because "the application of the [SEP] in this action would effectively impede the Administrator's ability to enforce the Clean Water Act, and would be contrary to stated public policy"). Courts have accepted this argument in cases between private litigants. See, e.g., *Koppers Co. v. Aetna Cas. and Sur. Co.*, 847 F.Supp. at 360; *CPC Int'l*, 620 A.2d 462, 467 (stating that the "public need for disclosure of documents relating to environmental pollution and the circumstances of such pollution outweighs the public's need for confidentiality"). But see *Reichhold Chems., Inc. v. Textron, Inc.*, 157 F.R.D. 522 (N.D. Fla. 1994) (holding that "[a]s applied to the facts of this case . . . [t]he public interest in allowing individuals and corporations to candidly assess their compliance with environmental regulations 'promotes sufficiently important interests to outweigh' the interest of opposing *private litigants* in discovering this highly prejudicial . . . evidence") (emphasis added). *Reichhold* is discussed, and distinguished as being an oddity, see *supra* text accompanying notes 242-50.

280. See *Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations*, 60 Fed. Reg. at 66,710.

281. See *id.* (stating that surveys show environmental auditing has expanded without a privilege as an incentive).

282. Michael Baram, *The New Environment for Protecting Corporate Information*, 25 Env't Rep. (BNA) No. 12, at 547 (July 22, 1994).

283. Kenneth D. Woodrow, *The Proposed Federal Environmental Sentencing Guidelines: A Model for Corporate Environmental Compliance Programs*, 25 Env't Rep. (BNA) No. 7, at 326 (June 17, 1994); see *Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations*, 60 Fed. Reg. at 66,707-08 (providing incentives for regulated entities that voluntarily discover, disclose, and correct violations).

vironmental investigations on the rise,<sup>284</sup> environmental management will reduce a corporation's risk of criminal prosecution.<sup>285</sup>

Aside from regulatory incentives, corporations also have numerous private incentives to engage in environmental auditing, namely the potential economic benefits of environmental auditing.<sup>286</sup> Companies are also motivated by concerns over attracting and retaining customers, winning public trust, encouraging the confidence of investors and lenders, and addressing other matters for healthy corporate growth and competitive advantage.<sup>287</sup>

---

284. Hunt & Wilkins, *supra* note 11, at 365.

285. Both EPA and Department of Justice (DOJ) policy provide that environmental auditing and voluntary disclosure are mitigating factors in a corporation's favor in criminal cases. Woodrow, *supra* note 283, at 326. The DOJ issued its policy concerning voluntary self-compliance and criminal environmental enforcement in July 1991. 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 THE VIOLATOR (1991). It states in relevant part:

It is the policy of the Department of Justice 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.* The policy stops short, however, of specifying the minimum components of a compliance program that would qualify a corporation for leniency in bringing a criminal action. Woodrow, *supra* note 283, at 326. Instead, it lists examples of a successful compliance program, including:

- An institutional policy to comply with environmental laws;
- Implementation of safeguards beyond those required by existing law;
- Regular internal and external audits of compliance;
- Procedures to safeguard integrity of audits;
- Multimedia evaluation of compliance;
- Timely implementation of auditors' recommendations;
- Dedication of adequate company resources;
- Effective system of disciplining employees participating in unlawful activities; and
- Corporate policy of rewarding employees' contribution to environmental compliance.

*Id.*

The EPA policy on criminal referrals and environmental auditing was issued in January, 1994, when the Director of Criminal Enforcement set forth the following in a guidance document:

Corporate culpability may be indicated when a company performs an environmental compliance or management audit, and then knowingly fails to promptly remedy the non-compliance and correct any harm done. On the other hand, EPA policy strongly encourages self-monitoring, self-disclosure, and self-correction. When self-auditing has been conducted . . . and full, complete disclosure has occurred, the company's constructive activities should be considered as mitigating factors in EPA's exercise of investigative discretion. Therefore, a violation that is voluntarily revealed and fully and promptly remedied as part of a corporation's systematic and comprehensive self-evaluation program generally will not be a candidate for the expenditure of scarce criminal resources.

Restatement of Policies Related to Environmental Accounting, 59 Fed. Reg. 38,455, 38459 (1994) (quoting DIRECTOR OF CRIMINAL ENFORCEMENT, U.S. ENVTL. PROTECTION AGENCY, THE EXERCISE OF INVESTIGATIVE DISCRETION (Jan. 12, 1994)). EPA has clarified its position on prosecutorial discretion in its 1995 policy. See *supra* part II.B.3.c.

286. For a discussion of auditing's benefits, see *supra* part I.C.

287. Baram, *supra* note 282, at 548.

Other officials, particularly state and local prosecutors, believe that the SEP is unnecessary because administrative and prosecutorial discretion can provide adequate assurance that a voluntary audit will not be used as an enforcement weapon against a corporation.<sup>288</sup> Closely related to this is the prosecutor's fear that an SEP or administrative or statutory protections for environmental audits will lead to case gridlock;<sup>289</sup> instead of promoting environmental compliance, an SEP could merely result in swamping regulators with motions to quash subpoenas, suppress evidence, and compel discovery.<sup>290</sup> Furthermore, there is no national standard for environmental audits.<sup>291</sup> Thus, the *in camera* proceedings needed to resolve such discovery disputes would "result in a series of time-consuming, expensive mini-trials."<sup>292</sup> Overall, government officials feel that regulatory and financial incentives, coupled with prosecutorial discretion, are sufficient safeguards to assure businesses that their environmental audits will not be used against them abusively.

ii. *The Citizens' View: Remembering the "Other" Party*

Pro-business advocates of the SEP usually emphasize the potential problems with current government enforcement policies and practices. What seems to be missing from much of the debate, however, is the SEP's potential effect on public participation in environmental matters. From the standpoint of an affected citizen, such as a neighbor, employee or concerned individual, the contents of an audit are crucial for promoting open access to information that may affect the community.<sup>293</sup> Even more importantly, today many citizen groups seek greater access to information not merely to file a citizen or toxic tort suit,<sup>294</sup> but to participate in creating a healthy community and

---

288. See Focus Group, *supra* note 25, at 38-39 (statement of Dick Nixon, California District Attorney's Association); *DOJ Plans to Issue Policy Statement on Use of Corporate Environmental Audits*, 22 Env't Rep. (BNA) No. 8, at 484 (June 21, 1991) ("We've never hung anyone on a good-faith audit") (quoting Barry Hartman, deputy assistant attorney general of DOJ's Environment and Natural Resources Division at the 84th annual meeting of the Air and Waste Management Association).

289. See Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations, 60 Fed. Reg. 66,706, 66,710 (1995) (stating that an audit privilege will breed litigation as parties argue over what documents fall within the privilege).

290. Day 1 (Afternoon), *supra* note 148, at 34 (statement of David Ronald, Criminal Unit Chief, Arizona Office of the Attorney General).

291. Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations, 60 Fed. Reg. at 66,710.

292. *Id.*

293. See Focus Group, *supra* note 25, at 20-24 (statement of Christopher Dolan, Trial Lawyers for Public Justice).

294. Interview with Paul Wolfteich, U.S. Trial Attorney, U.S. Department of Justice, in Washington, D.C. (Aug. 1994).

workplace.<sup>295</sup> Open access to information reinforces citizen participation in environmental issues and politics,<sup>296</sup> and helps place additional pressure upon a corporation to advance self-compliance programs.<sup>297</sup> Citizen groups do not deny that some changes in traditional command and control enforcement are warranted.<sup>298</sup> Thus, under the leadership of the Clinton Administration, many grassroots environmental organizations are experimenting with new innovations in environmental regulation, including "partnerships."<sup>299</sup> Partnerships are collaborations between businesses, environmentalists, government officials and communities to solve local problems.<sup>300</sup> Environmental groups hope that the joint decisionmaking process in partnerships can bridge differences, find common ground, and identify new solutions to environmental problems.<sup>301</sup>

Nevertheless, partnerships are just one part of the continuing desire of citizen groups for more participation in corporate environmental policy. Over the past twenty years, environmentalists have successfully lobbied for several disclosure provisions in federal<sup>302</sup> and

---

295. Forbis Interview, *supra* note 138; see LEWIS, *supra* note 138, at Intro-1, 3-1 to 3-15, 6-5 (discussing the need for a cooperative relationship between communities and business to promote sustainable industries).

296. Forbis Interview, *supra* note 138; see also Day 1 (Morning), *supra* note 145, at 84 (statement of Sanford Lewis, Director, The Good Neighbor Project for Sustainable Industries) (discussing the need for open access to help neighborhood groups concerned with environmental justice). In the words of Paula Carrell of the Sierra Club, "[the SEP] is not a good way to build a positive relationship with people who live around [the] plant . . . [because] [t]he public is not a big fan of secrecy." Hogue, *supra* note 14, at 882.

297. See Focus Group, *supra* note 25, at 20-24 (statement of Christopher Dolan, Trial Lawyers for Public Justice).

298. See Thompson, *supra* note 2, at ix.

299. *Id.* at xii. For an overview of partnerships, see FREDERICK J. LONG & MATTHEW B. ARNOLD, *THE POWER OF ENVIRONMENTAL PARTNERSHIPS* (1995).

300. See Thompson, *supra* note 2, at xii.

301. Partnerships, however, are often criticized due to the overwhelming advantage in resources and expertise corporate partners maintain over local citizen groups. *Id.* at xiv; Forbis Interview, *supra* note 138. Citizen participants hoping for positive gains through the process are also often criticized by their peers for "selling out" to business and lambasted for giving up the fight. Thompson, *supra* note 2, at xiv.

302. The most important statute in this regard is the Emergency Planning and Community Right to Know Act (EPCRA), 42 U.S.C. §§ 11011-50 (1994). This act requires businesses using or producing any of the 300 chemicals on the Toxic Release Inventory to notify the EPA and to state official(s) designated by the Governor of its presence in any of the companies' "qualified" facilities. *Id.* at § 11023. The company is under a continuing duty to submit and update information on the quantity and location of chemicals at these facilities. *Id.* In addition, it must make an immediate report of any "releases." *Id.* at § 11004. All information is available to the public through the national Toxic Release Inventory or the local emergency planning commission. *Id.* at 11044; see John W. Bagby et al., *How Green Was My Balance Sheet: Corporate Liability and Environmental Disclosure*, 14 VA. ENVTL. L.J. 225, 247 (1995). For a twenty-year review of EPCRA, see Sidney M. Wolf, *Fear and Loathing About the Public Right to Know: The Surprising Success of the Emergency Planning and Community Right To Know Act*, 11 J. OF LAND USE AND ENVTL. L. 217 (1996).

state<sup>303</sup> laws. At the local level, environmental groups have successfully entered into "Good Neighbor Agreements" with local businesses.<sup>304</sup> These agreements allow citizens to participate in a firm's environmental inspections, assessments, planning and decisionmaking.<sup>305</sup> Currently, local advocates are striving to negotiate with businesses for resource and expertise sharing to allow more equality in the arrangement.<sup>306</sup> Overall, the success of these negotiations over the past two decades has allowed greater public participation in local environmental issues and has played a significant role in supporting individuals' and communities' right to self-determination.<sup>307</sup>

Unfortunately, while already faced with a lack of resources and expertise, citizen groups now fear that the SEP will reverse recent advances. Citizen groups monitoring the debate over the SEP claim to have identified an ulterior motive by business: to provide protection from disclosing environmental activities to the public and to prevent using audits as evidence in both citizen suits and in common law suits.<sup>308</sup> There is evidence that businesses would like protection for environmental audits to extend to third-party discovery. The testi-

---

In addition to EPCRA, many environmental statutes have specific disclosure requirements. See Resource Conservation and Recovery Act, 42 U.S.C. §§ 6921(b)(3)(B), 6922(a)(5) (1994) (requiring record keeping, manifests, and a reporting system that will trace hazardous waste from the "cradle to the grave"); Toxic Substances Control Act, 15 U.S.C. §§ 2601-2692 (1994) (requiring a company to report any "significant adverse reactions to health and the environment caused by a chemical substance" and requiring compliance audits); the Comprehensive Environmental Response and Compensation and Liability Act, 42 U.S.C. §§ 9601-75 (1994) (requiring public access to Records of Decision); and the National Environmental Policy Act, 42 U.S.C. §§ 4321-4370d (1994) (requiring public disclosure of all adverse impacts of a major federal project that will effect human health or the environment). Finally, the Securities and Exchange Commission also requires disclosure of a wide range of environmental liabilities that affect investor and lender confidence. E. Donald Elliott et al., *A Practical Guide to Writing Environmental Disclosures*, 25 *Env'tl. L. Rep. (Env'tl. L. Inst.)* at 10,238-40 (1995).

303. See, e.g., CAL. HEALTH & SAFETY CODE §§ 25249.5-.13 (West 1992 & Supp. 1995). For an analysis of the warning requirements of California's Safe Drinking Water and Toxic Enforcement Act (Proposition 65), see Clifford Rechtschaffen, *The Warning Game: Evaluating Warnings Under California's Proposition 65*, 23 *ECOLOGY L.Q.* 303 (1996).

304. LEWIS, *supra* note 138, at Intro-8, 2-1 to 2-54 (discussing successful citizen group-business arrangements).

305. See *id.* at 3-5 to 3-9, App. A (a model citizen-business contract).

306. Forbis Interview, *supra* note 138.

307. *Id.*; see also UNEQUAL PROTECTION: ENVIRONMENTAL JUSTICE AND COMMUNITIES OF COLOR, xvii (Robert D. Bullard ed., 1994) (stating that environmental justice grassroots leaders "are demanding a shared role in the decisionmaking processes that affect their communities").

308. See Day 1 (Morning), *supra* note 145, at 92 (statement of Sanford Lewis, Director, The Good Neighborhood Project for Sustainable Industries); Focus Group, *supra* note 25, at 20-24 (statement of Christopher Dolan, Trial Lawyers for Public Justice); see also *States, Industry*, *supra* note 16, at 690 (quoting a Public Citizen Litigation Group attorney who argued that the public emergency personnel will be in the dark about local pollution concerns if audits are not public).

mony of individuals supporting the privilege at EPA's public meetings in Washington, D.C., and San Francisco, California, emphasized the view that the SEP should cover both government and third party discovery requests.<sup>309</sup> For example, one attorney at a prominent Washington, D.C. firm that represents several businesses<sup>310</sup> stated that even with current EPA and DOJ policy, there is still a strong possibility of legal actions through citizen suits and toxic tort actions.<sup>311</sup> In an effort to avoid this, business lobbyists drafted model legislation, stating that "when a company engages in a good-faith voluntary audit and discloses the information obtained in that audit—that information cannot be used in a subsequent criminal, civil, administrative, or citizen suit prosecution under the federal environmental laws."<sup>312</sup>

The nature of the legal protections businesses seek also casts some doubt on whether environmental audits are likely to be used in a government or citizen enforcement action. Most environmental enforcement actions hinge on proving that a defendant corporation violated an effluent standard, and, except for a criminal or toxic tort action, a showing of intent or knowledge is not required. Since evidentiary privileges, like the SEP, do not protect the underlying facts from discovery,<sup>313</sup> a firm cannot invoke the SEP to avoid discovery of the fact of an environmental violation that is documented by an audit. Furthermore, even without a formal discovery request, disclosing violations is required under many environmental statutes.<sup>314</sup> As a result,

---

309. See Focus Group, *supra* note 25, at 11-12 (statement of Scott Leheka, ARCO) (stating that companies fear the use of the subjective portion of the audit by *aggressive adversaries* operating on twenty/twenty hindsight); Day 2 (Morning), *supra* note 145, at 77 (statement of Barry Hartman, attorney, Kirkpatrick & Lockhart).

310. Day 2 (Morning), *supra* note 145, at 71 (statement of Barry Hartman, attorney, Kirkpatrick & Lockhart).

311. *Id.* at 72-73; see also Hogue, *supra* note 14, at 883 (stating that the perception within industry is that a lack of the privilege will allow third party litigants to use environmental audit data for toxic torts and other lawsuits).

312. Day 2 (Morning), *supra* note 145, at 77; see also Coalition for Improved Environmental Audits, Uniform State Environmental, Safety and Health Audit Privilege Act § 1(c) 1994 (draft) (stating that with certain exceptions, an audit shall be privileged and not admissible as evidence in any civil, criminal or administrative proceeding) (on file with author).

313. See Basham, *supra* note 33, at 232-33. However, EPA argues that a privilege would "invite" defendants to claim as "'audit' material almost any evidence the government needed to establish a violation." Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations, 60 Fed. Reg. 66,706, 66,710 (1995). EPA claims that under much state and federal legislation under consideration, even factual information would "arguably" be protected. *Id.*

314. See, e.g., National Emission Standards for Hazardous Air Pollutants for Source Categories 40 C.F.R. § 63.10 (1995) (Clean Air Act's recordkeeping and reporting requirements); EPA Administered Permit Programs: The National Pollutant Discharge Elimination System, 40 C.F.R. § 122 (1995) (Clean Water Act's regulations that include recording and reporting of monitoring results); Solid Wastes, 40 C.F.R. pts. 262-67 (1995) (RCRA's standards for generators and transporters of hazardous wastes, and owners and operators

an SEP may only protect the subjective portions of an audit, such as the corrective action plan, that comment on and provide suggestions for compliance by corporate personnel.<sup>315</sup> Since all material facts surrounding a violation must be available to the government, and environmental laws do not require a showing of intent, there is little reason to use the subjective portion of the audit in a normal citizen enforcement action.<sup>316</sup>

Still, corporations, particularly uncooperative ones, feel that the corrective action plan is a potential weapon in the hands of citizen groups that can be used to establish intent in a civil toxic tort or a criminal *qui tam* action.<sup>317</sup> Even so, applying the SEP to shield corrective action plans would be inconsistent with the "trend toward public access to information regarding impacts of business on the

---

hazardous waste treatment, storage, and disposal facilities); Reporting and Recordkeeping Requirements, 40 C.F.R. pt. 704 (1996) (Toxic Substances Control Act); and, under the terms of a consent order or settlement agreement, a firm can be required to monitor its activities for environmental compliance. See, e.g., *United States v. Wheeling-Pittsburgh Steel Corp.*, No. C2-88-598, 1991 WL 157355 (S.D. Ohio 1991) (drafting a Consent Decree that requires compliance with an NPDES permit).

315. See *supra* notes 110-14 and accompanying text for a discussion of the corrective action plan.

316. In fact, a study by the National Association of Attorneys General, sponsored by the EPA to determine whether or not audits were being used in enforcement cases, could discover only two situations in which they were used. Day 1 (Morning), *supra* note 145, at 103 (statement of David Ronald, Criminal Unit Chief, Environmental Enforcement Section, Arizona Office of the Attorney General); see also Day 1 (Afternoon), *supra* note 148, at 28 (statement of David Gallogly, attorney, Pennsylvania Department of Environmental Resources) (stating that a survey of 100 attorneys in the Pennsylvania Department of Environmental Resources identified only one action in which an audit was used as the basis for civil penalties). Both of these surveys identified the same case, that of WMX, Inc. in Pennsylvania. The other case was that involving Coors Co. in Colorado. Interestingly, both cases would not have been covered by any of the model statutes or state laws currently in effect.

Likewise, there has been no reported instance of an environmental audit being offered into evidence in a private civil action. See Hogue, *supra* note 14, at 883.

317. A growing trend in environmental law is the use of the *qui tam* provisions of the False Claims Act of 1863 (FCA) to force corporations to abide by environmental reporting requirements. *Reverse False Claim Charge May Proceed Against Alleged Polluter, Court Decided*, 10 Toxic L. Rep. (BNA) No. 39, at 1114 (Mar. 6, 1996) (discussing *Pickens v. Kanawha River Towing*, No. C-1-93-790 (S.D. Ohio Jan. 23, 1996)) [hereinafter *Charge May Proceed*]. The FCA can be used by environmental plaintiffs in two ways. First, if "a defendant is under contract to the United States, . . . the allegation is that by submitting an invoice for its services, the contractor impliedly certified that it complied with the contract's requirement to obey environmental laws." *Id.* (citing 31 U.S.C. § 3729(a)(1)). "If there is no contract but the defendant fails to file a mandatory report . . . the allegation is that the contractor is defrauding the government by improperly avoiding the monetary penalty for polluting." *Id.* (citing 31 U.S.C. § 3729 (a)(7)). The latter is a reverse false claim. *Id.* Although few environmental FCA cases have been brought to date, it is clearly a growing trend. *Charge May Proceed, supra* at 1115 (noting that there are only a handful of rulings, including *United States ex rel. Stevens v. McGinnis*, 1994 WL 799421 (S.D. Ohio 1994) and *United States ex rel. Fallon v. Accudyne Corp.*, 880 F. Supp. 636 (W.D. Wis. 1995)). If successful, the FCA will be a potent weapon for environmental plaintiffs.



community.”<sup>318</sup> Thus, citizen groups have rightfully called to task business advocates wishing to reduce a firm’s accountability to the public. Still, citizen groups need to support and recognize that environmental auditing might provide an opportunity for increased participation in the environmental affairs of local firms and for increased cooperation between business, citizens, and the government.

### III

#### RECONCILING THE DEBATE: SUGGESTIONS TO IMPLEMENT AN EQUITABLE ENVIRONMENTAL AUDITING POLICY

This section offers proposals for the treatment and protection of environmental audits, arguing for a policy that protects audits in certain limited circumstances in order to encourage corporations to monitor their own compliance with environmental laws. These proposals do not suggest, however, that the effectiveness of traditional command and control regulation be sacrificed. Rather, the goal of these proposals is to foster new innovations in environmental protection by attempting to integrate environmental enforcement principles, corporate incentives, and citizen participation.

Environmental auditing has emerged as a potential tool to control both staggering compliance costs and environmentally detrimental corporate activities. Auditing and other corporate self-regulatory programs represent a new approach to environmental regulation for those industries willing to pursue more open business practices. Despite the refusal of most courts to extend the SEP to environmental audits and EPA’s cautious approach, there are reasons to provide some limited legal protections against discovery of environmental audits.

There are two arguments that support a limited legal protection for environmental auditing. First, American businesses often argue that years of command and control regulation, increased public scrutiny due to environmental reporting requirements, liability under CERCLA, and intense pressure to conform to international standards have fostered a commitment among some firms toward voluntary environmental compliance.<sup>319</sup> Second, having identified the limitations of traditional command and control environmental regulations,<sup>320</sup> it is

---

318. U.S. ENVTL. PROTECTION AGENCY, ENVIRONMENTAL AUDITING: FOCUS GROUP PAMPHLET, Jan. 19, 1995, at 4 (on file with author); see *Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations*, 60 Fed. Reg. 66,706, 66,710 (1995) (“American law reflects the high value that the public places on fair access to the facts.”).

319. See, e.g., WHITE PAPER, *supra* note 100, at 1.

320. See *supra* Introduction.

time to experiment with new regulatory approaches to environmental protection.

Businesses contend that while they can never be completely in compliance with the numerous environmental laws and regulations facing them,<sup>321</sup> it remains possible to pursue productivity and profits while reducing environmental degradation.<sup>322</sup> During the July 1994 hearing on environmental auditing before the EPA in Washington, D.C., most business advocates criticized the "eighty/twenty rule."<sup>323</sup> According to this rule, while twenty percent of American corporations fail to engage in environmental auditing, eighty percent have put such programs into place.<sup>324</sup> Although these numbers may be inflated, most commentators agree that environmental auditing is on the rise in America's largest businesses.<sup>325</sup> EPA has recognized this trend, identified its benefits, and made certain commitments to increase auditing and self-compliance in the future.<sup>326</sup>

Furthermore, empirical studies show an increased awareness by businesses of the need to factor environmental issues into everyday decisions. A 1974 study revealed that more companies prioritized profits over other business objectives.<sup>327</sup> At the same time, there was a significant concern about pollution control standards.<sup>328</sup> By 1990, this attitude among businesses changed dramatically. In a 1991 study, over seventy-seven percent of United States companies have formal systems in place that identify key environmental issues,<sup>329</sup> and seventy-six percent of United States companies believed environmental standards to be reasonable or technically feasible.<sup>330</sup> This changing attitude toward "greener" business appears to be a response to consumer demands for "green" products, lender demands for cleaner

---

321. Day 1 (Morning), *supra* note 145, at 20 (statement of Frank Friedman, Senior Vice President, Elf Atochem Co.); *see also* Day 1 (Afternoon), *supra* note 148, at 17-18 (statement of Cynthia Goldman, Colorado Association of Commerce and Industry) (citing a National Law Journal survey of 200 in-house environmental counsel in which two-thirds of the respondents stated that despite best efforts they were not in 100% compliance with the law).

322. *See generally*, BEYOND COMPLIANCE, *supra* note 6, (discussing steps companies have taken which are both beneficial to the environment and to their bottom line).

323. *See, e.g.*, Day 2 (Morning), *supra* note 145, at 44-45 (response of Carl Mattia, Vice President, Environmental Health & Safety, BF Goodrich).

324. *Id.*

325. Paula L. Green, *Audits Help Firms Gauge Environmental Impact*, J. COM. & COM. BULL., Dec. 28, 1992, at 1A; Kosko & Causey, *supra* note 34, at 148.

326. *See, e.g.*, Restatement of Policies Related to Environmental Auditing, 59 Fed. Reg. 38,455, 38,456 (1994).

327. HAROLD W. HENRY, POLLUTION CONTROL: CORPORATE RESPONSES 6-7 (1974).

328. *Id.* at 22.

329. MORRISON, *supra* note 123, at 15.

330. *Id.* at 11; *see also* GREEN LEDGERS, *supra* note 4, (discussion and study of corporate environmental activities).

investments, employee demands for cleaner workplaces, and regulator demands for cleaner operations.<sup>331</sup>

In addition, the global economy of the 1990s pressures American businesses to conform to international standards.<sup>332</sup> In the past decade, many European nations have taken strides in setting standards for environmental auditing and corporate environmental management programs.<sup>333</sup> For American businesses to compete in international markets, they will be forced to implement environmental auditing systems that meet international standards.<sup>334</sup> This point is very important: if a company wants to do business globally, its auditing practices must meet international standards in order to avoid rejection of its products or services.

The second argument for promoting environmental auditing recognizes that the United States' approach to environmental regulation is at a crossroads. There is immense pressure from American businesses for reform of government regulations. Under a Republican Congress in 1994 through 1996, many environmental regulations came under serious attack through repeals, budget cuts, and riders suspending enforcement.<sup>335</sup> Concurrently, the Clinton Administration took a moderate position and instituted new regulatory programs that

---

331. See HARRISON, *supra* note 133, at 3.

332. *Global Marketplace Could Force Adoption of International Standards*, *Scientist Says*, 24 *Env't Rep. (BNA)* No. 46, at 1977 (Mar. 18, 1994) [hereinafter *Global Marketplace*]; see Hall & Tockman, *supra* note 62, at 10,398.

333. See generally *Global Marketplace*, *supra* note 332, at 1977; Gerrit Wiesmann, *Europe Braces for 'Eco-Audit'*, *CHEMICAL WEEK*, Apr. 6, 1994, at 54, 54 (discussing Europe's implementation of the European EcoManagement and Audit Scheme (EMAS)).

334. See Breakout Group B, *supra* note 62, at 23 (statement of Kevin Kimmel, General Physics Corp.); *Growing List of Environmental Standards Poses Problems for Firms' Management Plans*, 17 *Int'l Env'tl. Rep. (BNA)* No. 12, at 517 (June 15, 1994). An alternative would be for EPA or American business organizations, such as ASTM or the Business Round Table, to adopt standards that reflect the most stringent aspects of the international standards.

Note, however, the possible future effect of recently enacted international trade treaties on the forcefulness of international standards. For example, the new trade rules established in the Uruguay Round of the General Agreement of Tariffs and Trade (GATT) allow one country to challenge another country's environmental laws on the ground that they are inconsistent with free trade. Patti Goldman, *Dolphins, Pesticide Bans, Gas Guzzlers, and Recycling Programs: International Trade Rules Will Determine Their Fate*, 3 *ENVTL. L. NEWS* 5, 5 (1994). Likewise, the North American Free Trade Agreement (NAFTA), seeks to replace individual national environmental standards with uniform international standards that are not unduly restrictive of trade. *Id.* at 8. It is yet to be seen whether these treaties will be used to lower the pressures of environmental standards or will be used to ensure that all countries conform to a standard that adequately reflects the stringency adopted in many European nations and the United States.

335. See, e.g., *House GOP Accused of 'Starving' Environmental Budgets*, *SAN DIEGO UNION-TRIB.*, Feb. 26, 1996, at A6; Joseph L. Sax, *Takings Legislation: Where It Stands and What Is Next*, 23 *ECOLOGY L.Q.* 509 (1996) (discussing recent developments in takings legislation).

involve increased cooperation between businesses and the government.<sup>336</sup>

To avoid retreating from the environmental victories of the past, environmentalists must be willing to explore opportunities to change the way environmental protection occurs in this country. While the environmental movement has relied heavily on the adversarial legal process, it is time to move beyond the courts. As David Brower suggests:

Somehow, we've got to build conscience back into the corporate structure. . . . Corporations have the organizational ability. They have the money. They have the political power. But they've got to realize that there will be no corporations, no stockholders, no profits, and no sex on a dead planet. The Fortune 500 must be brought into the restoration movement. Otherwise, it won't happen. Time is running out, fast.<sup>337</sup>

Thus, it is time to develop an environmental policy that encourages responsible business executives, managers, and workers to become involved in environmental protection without compromising the past successes of the environmental movement. If corporations are willing to adopt internal environmental policies and regulations, environmentalists should not be so quick to turn their backs to them. Environmentalists must strike a balance between supporting corporate self-regulation and maintaining stringent environmental laws.

Indeed, it may be time to realize that while some corporations will continue to avoid complying with environmental regulations, other corporations are eager to work with the government and citizen groups to develop new regulatory schemes.<sup>338</sup> As a result, enforcement should be accompanied by allowing good corporate citizens some responsibility for their own compliance.

In an effort to establish an environmental policy for the future that will incorporate business and government interests in the growing trend towards corporate self-compliance, the following sections offer three recommendations for an environmental auditing policy or statute: providing reasonable assurances to the business community

---

336. See *supra* note 251.

337. DAVID R. BROWER, LET THE MOUNTAINS TALK, LET THE RIVERS RUN 120 (1995). David Brower makes two additional observations that are highly relevant to the debate over environmental audits. First, he recognizes the important role lawyers have played in environmental protection. *Id.* at 189. At the same time, he also notes that the schizophrenic role many environmental lawyers play—often jumping from one side of an issue to another as their clients (or jobs) change. *Id.* Second, he suggests that MBAs, whom many environmentalists might consider hard choices for environmental recruitment, might truly want to help if given an opportunity. *Id.* at 191. We should ask how many young MBAs, accountants and engineers would engage in green business if only the opportunity to do so was built into the corporate structure.

338. See Linder, *supra* note 2, at 590.

through a certification program; protecting public access to information; and promoting environmental auditing and management among small businesses. These proposals are designed to take advantage of environmental auditing without compromising the strictness of command and control regulation.

*A. Provide Reasonable Assurances to the Business Community*

Audits are not normally necessary in environmental enforcement cases,<sup>339</sup> but the increased risk of criminal sanctions in recent years presents a serious predicament for businesses. While EPA should not promise that implementing an environmental auditing program will prevent future civil and criminal enforcement actions against a business, its auditing policy should encourage and take advantage of the corporate interest in self-compliance. Thus, the law should provide reasonable assurances to the business community through a well-defined corporate self-regulatory program.

An alternative to the existing legal protections for environmental audits<sup>340</sup> is a certification system for environmental auditing and management programs.<sup>341</sup> While current EPA policy retains the discretion of regulators and prosecutors to seek the disclosure of an audit in an enforcement action,<sup>342</sup> a certification system opens the door to flexibility, cooperation and participation because it would be based upon a mutual agreement between regulators and businesses. In exchange for certain regulatory benefits, EPA would use an alternative regulatory and penalty system for certified companies.

A successful certification program will require a company's environmental management program to meet standards and criteria set by EPA in order to receive protection for its audits.<sup>343</sup> EPA needs to turn its attention to developing specific, technical auditing guidelines

---

339. See *supra* note 316 and accompanying text.

340. As discussed, business advocates have sought the expansion of the SEP to environmental audits in the courts, state legislatures and Congress. See *supra* part II.B.3.b. EPA has also provided some limited protection for audits through an administrative policy. See *supra* part II.B.3.c.

341. See Day 1 (Afternoon), *supra* note 148, at 33 (statement of David Ronald, Criminal Unit Chief, Environmental Enforcement Section, Arizona Office of the Attorney General) (stating that one of the problems of an environmental auditing privilege is the lack of a certification requirement for auditors). Certification is a common approach in Europe. See Hall & Tockman, *supra* note 62, at 10,400; see also Day 1 (Morning), *supra* note 145, at 26-38 (statement of Cornelius Smith, Jr., Principal, ENVIRON Corp., Chair, U.S. Sub-Tag on Auditing) (discussing international voluntary environmental management standards).

342. Woodrow, *supra* note 283, at 326.

343. In addition, auditing policy could be linked with other innovative regulatory programs being pursued by EPA to provide assistance to businesses seeking to internalize environmental compliance. See *supra* part II.B.3.c. (discussing recent EPA policy initiatives).

to ensure that the certification process is objective.<sup>344</sup> Without such guidance, a certification program would suffer from public scrutiny and endless litigation as environmentalists, regulators, and industries argue over policy details, objectives, and standards.

A key requirement for certification must be an agreement that firms and regulators will cooperate with each other.<sup>345</sup> The focus should be on creating a team, rather than an adversarial approach to environmental regulation. Of course, careful attention must be given so that all players have an equal opportunity to participate.<sup>346</sup> The focus must remain on the content of the certification agreement and the penalties for its breach.

Upon establishing an environmental auditing program, a business would apply for certification; if certification is granted, the business is entitled to certain regulatory benefits, which could include:

1. A presumption against using an environmental audit in any enforcement action or civil suit, including exclusion of the audit from evidence;
2. A promise not to refer a case to the Department of Justice or State Attorney General for prosecution unless certification conditions are violated;
3. A commitment by EPA to a negotiated penalty process, reductions in overall fines, and elimination of the gravity penalty under certain conditions; and
4. A certification logo to apply to a business' products and/or for display at the business.

In addition to these benefits, both the government and the regulated party should commit to using an administrative process, rather than a civil suit or enforcement action, to determine the penalty in cases where compliance violations are discovered, and this could occur through a negotiated penalty process. This process requires the violating business to promise not to avoid liability for what it has done (i.e., economic benefit penalties), but, at the same time, regulators must negotiate adjustments to the corporation's punitive liabilities (i.e., the gravity penalty) based on the firm's past and current handling of environmental problems. To make sure that negotiations are quick and efficient, EPA or Congress should design detailed criteria for determining when a punitive penalty is required. For example, in many cases the result of the process should eliminate any gravity penalties, but continuing or recurring violations may require more detailed ne-

---

344. These requirements could reflect the elements of an effective environmental management program identified in *supra* part II or the ISO 14000 standards discussed *supra* note 62.

345. The need for a commitment by the firm to open disclosure of audits and the need for increased public participation is discussed *supra* at parts II.B.3.d.ii. and III.B.

346. Thompson, *supra* note 2, at xiv.

gotiations with EPA regarding the status of the corporation's auditing program. In some cases, problems with the firm's compliance program may be discovered, while in other cases a punitive penalty or decertification may be necessary.<sup>347</sup> Overall, the greatest value of a negotiated penalty process is the joint participation of businesses, regulators, and the public in correcting environmental problems, and the public's satisfaction in knowing that the firm has an effective self-regulatory system.

Once EPA or Congress develops these regulatory parameters, the states could elect to develop their own certification programs to implement EPA policy. This approach has the advantage of familiarity, because most federal environmental regulations operate in a similar manner, with federal and state regulators working together to implement environmental regulations.<sup>348</sup> If a company's environmental management system is certified by the state, the company would be assured that the audit will not be discoverable in an enforcement action.

A system of certification provides new incentives for corporations to develop self-compliance programs and to cooperate with regulators. In addition, the threat of using audits against the corporation would be greatly reduced. Because the presumption of protection could be overcome by a violation of certification conditions, the audit should be used against only the most recalcitrant corporations. And, because advocates of an expanded SEP proclaim that eighty percent of businesses are working towards effective environmental compliance, there should be little fear of entering into certification agreements.

### *B. Protect Public Access to Auditing Results and Environmental Management Information*

Protecting environmental audits from discovery in legal proceedings should not obstruct efforts by citizen groups to promote a cleaner and safer local environment. An auditing privilege can be fashioned to exclude audits only as admissible evidence in civil suits or governmental enforcement actions, but still allow audit results to be available to the public. Attempts by businesses to completely protect audits from public disclosure should be rejected by EPA, Congress, and the states.

---

347. Of course, EPA must provide a check on corporations' discretion to avoid cases of cheating. This could be accomplished by establishing new civil and criminal penalties for egregious violations of certification conditions.

348. See PETER S. MENELL & RICHARD B. STEWART, *ENVIRONMENTAL LAW AND POLICY*, 246-48 (1994) (discussing possible justifications for federalism in the context of environmental policy).

At issue here is the opportunity for better communication and cooperation between business, regulators, and the public.<sup>349</sup> Local citizens are concerned about pollution, worker safety and environmental justice issues, and they seek to hold businesses accountable for their environmental compliance.<sup>350</sup> These groups are looking for ways to combine their own expertise on local environmental matters with their existing right of access to information.<sup>351</sup> Access to company environmental audits and documents permits members of the public to negotiate recommendations for managing corporate environmental affairs that affect their communities.<sup>352</sup> Not only should any statute or policy protecting environmental audits from discovery prohibit protection where the audit is sought by the public, but, at a minimum, it should also require companies to make audit findings available to local communities.<sup>353</sup>

An even more progressive environmental auditing certification program would allow corporations to reach out to citizen groups and promote their participation.<sup>354</sup> Perhaps as our experience with a more flexible environmental auditing policy grows, certification will entail a

---

349. See Jones, *supra* note 4, at 204 (arguing for a partnership among industry, regulators, and the public to create a team atmosphere).

350. See Day 1 (Morning), *supra* note 145, at 84-85 (statement of Sanford Lewis, Director, The Good Neighbor Project for Sustainable Industries).

351. *Id.* at 86; Forbis Interview, *supra* note 138.

352. See Focus Group *supra* note 25, at 20-24 (statement of Christopher Dolan, Trial Lawyers for Public Justice).

353. The access to this information should be no less available than access to corporate financial information. The law prohibits a corporation from hiding negative financial information from investors and the public. See Elliott, *supra* note 302, at 10,238-40 (discussing Securities and Exchange Commission disclosure requirements). Clearly, a firm's environmental position is vitally important to the community and the public at large. One suggestion is that corporations be required to maintain environmental information at the local library.

354. Today, a corporation faces a significant disincentive to negotiate partnerships, Good Neighbor Agreements, or other mutual arrangements with citizen groups to improve the corporation's environmental compliance. Absent a formal consent decree reviewed by federal regulators and approved by a federal court, any agreement between a corporation and an environmental citizen group - even one providing for payments for attorneys, experts, environmental compliance, or environmental projects - is not binding on the government. The corporation, therefore, faces the risk that regulators will later attempt to assess civil penalties for non-compliance that may have been the subject of an arrangement with local citizen groups. Securing a formal consent decree each time a citizen-corporation agreement is sought is not always financially possible and often places the parties in an undesirable adversarial relationship.

To promote more beneficial citizen-corporate environmental partnerships, EPA or DOJ should develop regulations that allow corporations who have shown their commitment to auditing or self-compliance to use bona fide citizen-corporate agreements to reduce or offset federal environmental civil penalties. For example, under the certification program described above, a corporation with a certified auditing program should be provided some credit for monies paid under agreements with citizen groups when it can be established that the payments furthered the corporation's compliance with environmental laws.



certain amount of resource and expert sharing for greater participation by local groups. While only a few years ago it was naive to expect corporations to embrace the idea of citizen participation in corporate policy-making, inspections, and evaluations, voluntary participation agreements and partnerships are becoming more commonplace.<sup>355</sup> In fact, participation in auditing could prove very beneficial by reducing litigation where former "adversaries" participate jointly in the development of a Corrective Action Plan.<sup>356</sup>

### *C. Promote Environmental Auditing and Management Among Small Businesses*

The final recommendation addresses a problem which has otherwise not been addressed in this paper: small businesses. Unlike most of corporate America, small businesses have limited technical and financial resources to comply with the law, let alone engage in proactive environmental management strategies like environmental auditing.<sup>357</sup> Yet small businesses contribute significantly to the environmental hazards of a community.<sup>358</sup> To help bring these businesses within the fold of environmental management, I suggest three programs.

First, EPA or the state should provide limited grants or loan assistance programs to small businesses seeking to engage in environmental auditing or a form of environmental management. Small firms seriously lack financing and personnel to engage in environmental compliance management.<sup>359</sup> Financial assistance would allow some firms to hire compliance managers or environmental consultants, and government funds for this program could be raised by charging larger corporations "certification fees" for their environmental auditing programs.<sup>360</sup> Also, if a small business' environmental management program meets certain standards, its audits could have a limited protection from discovery in enforcement actions.

Second, government regulators should provide environmental auditing services to small businesses for reduced fees. For example, California has recently launched a program to reassign a portion of the

---

355. See Thompson, *supra* note 2, at xii-xiii.

356. The possibility of corporations and communities working together to promote sustainable industry is discussed in Lewis, *supra* note 138, at 3-1 to 3-10.

357. Day 1 (Morning), *supra* note 145, at 8 (opening remarks of Steven Herman, Assistant Administrator, EPA); Lewis, *supra* note 138, at 6-46.

358. See, e.g., Hazardous Waste Management System, 50 Fed. Reg. 31,278, 31,284 (1985) ("Given the general unfamiliarity of the small businessperson with the RCRA regulations, EPA believes that these small businesses may have a more difficult time interpreting and complying with complicated RCRA regulations.").

359. Day 1 (Morning), *supra* note 145, at 8 (opening remarks of Steven Herman); Lewis, *supra* note 138, at 6-46.

360. See *supra* part III.A.

state's environmental inspectors to an auditing/advising group. For a fee of \$50 an hour, with a maximum charge of \$250, a qualifying small business can have its facility audited and a compliance report issued. This report cannot be used against the business.<sup>361</sup> The money spent on this program is offset by the money saved by having the inspectors in the field, actively preventing environmental hazards and ensuing cleanup costs. Such a program seeks to prevent problems before they occur, since small businesses rarely have the resources for cleanup costs.

A third program is to provide technical assistance and training to small businesses.<sup>362</sup> Business assistance hot-lines to government regulators and recorded compliance information are available from the federal government.<sup>363</sup> In addition, state-subsidized training programs in hazardous waste handling, air pollution prevention, and other compliance issues are available.<sup>364</sup> An environmental auditing program should continue to foster these activities by providing adequate training resources to small businesses seeking to become proactive environmental managers.

Although EPA and the states have tried to develop programs for small businesses, the absolute commitment necessary for success has been lacking.<sup>365</sup> The reason for this lack of commitment may be that regulators' continued focus on command and control regulation techniques are not appropriate for small businesses. EPA must commit itself, especially financially, if small businesses are to join those Americans concerned with, and responsible for, protection of the environment.

#### CONCLUSION

The current debate over legal protection for environmental auditing reflects the difficulty of forging new instruments to enforce envi-

---

361. DEPARTMENT OF TOXIC SUBSTANCES CONTROL, CALIFORNIA EPA, CONSULTATIVE SERVICES (1996).

362. Such a program is being put into place in Missouri. Melissa Manda, *Compliance Incentives in Missouri State Agency Developments*, in 2 A.L.I.-A.B.A. COURSE OF STUDY MATERIALS: ENVIRONMENTAL LAW 683, 685 (Feb. 14-17, 1996). This program will provide information, training and services to help the public comply with environmental regulations, including help with Clean Air Act compliance, permit applications, and environmental site assessments. *Id.*

363. For example, EPA has a Small Business and Asbestos hotline. FEDERAL YELLOW BOOK, III-36b (Summer 1996).

364. This is exemplified by programs available through the extension programs of the University of California. See, e.g., U.C. BERKELEY EXTENSION (Fall 1996) (offering courses in quality management and environmental management).

365. See Interim Policy on Compliance for Small Businesses, 61 Fed. Reg. 27,984, 27,984 (1996) (stating that one of the major criticisms of the Interim Policy was that there are few on-site assistance compliance programs sponsored by government agencies); LEWIS, *supra* note 138, at 6-46.

ronmental regulations. Although twenty-five years of command and control regulation have made inroads to improving our land, air and water, command and control regulation also has serious drawbacks. Government, businesses and the public need additional enforcement tools as environmental regulation moves into its next twenty-five years.

Environmental auditing offers an effective supplemental enforcement mechanism. Environmental auditing is an opportunity to allow businesses to achieve environmental goals while reducing the costs of compliance and enforcement. Of course, auditing presents risks to all parties involved in the debate: businesses fear the retaliatory use of environmental audits in litigation and enforcement; regulators fear the loss of a valuable enforcement tool; and environmentalists fear the erosion of environmental standards. As with any change in policy, there are risks, but environmental auditing programs can be designed to reduce these risks: the government can set the standards for environmental auditing programs, businesses that meet these standards can be assured that their audits will not be used against them, and the public can retain its right to access the information in businesses' environmental audits.

Environmental auditing is an opportunity to build upon the current enforcement system by adding businesses and local citizens to the list of those responsible for environmental protection. Participants in the debate, whether businesses, government, or environmentalists, must remember that environmentalism is not solely about the rule of law, but encompasses the development of a society that can grow economically while fostering a healthy environment. The programs offered—for certifying auditing programs, including local citizen participation, and improving small businesses' environmental management—are, of course, only suggestions. However, any equitable environmental auditing policy must, at its core, promote greater participation in environmental enforcement and compliance in its efforts to improve our environment.

