

## COMMENTS

### PUTTING TOGETHER THE PIECES: A COMPREHENSIVE EXAMINATION OF THE LEGAL AND POLICY ISSUES OF ENVIRONMENTAL AUDITING

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I. INTRODUCTION

“Environmental auditing is no longer a trendy management tool, but . . . an acknowledged part of professional business planning.”<sup>1</sup> A recent survey by management consultants Arthur D. Little (ADL, Cambridge, MA) has found that top management involvement in corporate environmental audit programs has increased by seventy percent over the last three to five years.<sup>2</sup> In addition, eighty percent of those surveyed expected an increase in the scope of their audit programs in three to five years.<sup>3</sup>

“As part of their environmental compliance strategy, companies of all sizes are implementing environmental audit programs.”<sup>4</sup> Some large corporations have in house auditing teams that visit each site periodically, whereas smaller corporations tend to contract with independent auditing groups.<sup>5</sup> Such practices can improve operations and help bring plants into compliance with environmental regulations.<sup>6</sup>

An environmental audit should provide a complete and accurate picture of the environmental consequences of the business operations of a given company, including its environmental

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1. William N. Farran III & Thomas L. Adams Jr., *Environmental Regulatory Objective: Auditing and Compliance or Crime or Punishment*, 21 *Envtl. L. Rep. (Envtl. L. Inst.)* 10,239 (1991).

2. *Environmental Auditing Takes Off*, 1 GREEN MARKET ALERT, Jan. 1993.

3. *Id.*

4. David J. Freeman & Carolyn C. Cunningham, *The Environmental Audit: Management Tool or Government Weapon?*, N.Y. L.J., Dec. 30, 1991 at Outside Counsel 1.

5. *Environmental Audits: Protective Shields or Smoking Guns? How to Encourage the Private Sector to Perform Environmental Audits and Still Maintain Effective Enforcement*, 42 *J. OF URB. AND CONTEMP. L.* 389, 394 (1992) [hereinafter *Protective Shields or Smoking Guns?*].

6. *Id.* at 409.

practices.<sup>7</sup> The Environmental Protection Agency (EPA) has issued its own statement defining auditing.<sup>8</sup> The Environmental Auditing Policy Statement defines auditing as “a systematic, documented, periodic and objective review by regulated entities of facility operations and practices related to meeting environmental requirements.”<sup>9</sup>

There are several incentives for a regulated facility to engage in environmental auditing. First, an environmental audit serves as a proactive form of environmental management.<sup>10</sup> An audit may lead to early identification and correction of environmental liabilities, preventing costly litigation and decreasing clean-up costs. Second, regulated entities that perform environmental audits may receive lenient prosecutorial treatment for violations discovered during the audit.<sup>11</sup> Third, the EPA believes that environmental auditing will identify unknown environmental and health hazards.<sup>12</sup> Finally, in the future, environmental audits may even replace regular EPA inspections of regulated facilities.<sup>13</sup>

Conversely, there are still disincentives to performing environmental audits. Without some sort of legal protection from regular discovery channels, government prosecutors, private litigants bringing citizens’ suits and derivative actions, and the business competitors of the regulated party may easily obtain environmental auditing materials.<sup>14</sup> These reports may do more than expose a regulated facility to legal liability arising from noncompliance. Final

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7. George Van Cleve, *The Changing Intersection Of Environmental Auditing, Environmental Law and Enforcement Policy*, 12 CARDOZO L. REV. 1215, 1217 (1991).

8. Environmental Auditing Policy Statement, 51 Fed. Reg. 25,004, at 25,006 (1986) [hereinafter EPA Auditing Policy].

9. *Id.*

10. *Id.*

11. U.S. DEP’T OF JUSTICE, FACTORS IN DECISIONS ON CRIMINAL PROSECUTION FOR ENVIRONMENTAL VIOLATIONS IN THE CONTEXT OF SIGNIFICANT VOLUNTARY COMPLIANCE OR DISCLOSURE EFFORTS BY THE VIOLATOR 3 (1991) (on file with the *Tulane Environmental Law Journal* [hereinafter JUSTICE GUIDANCE]).

12. EPA Auditing Policy, *supra* note 8, at 25,004.

13. *See infra* Part IV, section C.

14. *See infra* Part IV, section B.

auditing reports may also divulge descriptions of unique industrial processes and competitive management systems.<sup>15</sup>

Consequently, the EPA has acknowledged that the confidentiality of information gathered during environmental audits is a legal issue which must be addressed if the efforts to promote auditing are to succeed.<sup>16</sup> The EPA claims an express policy of avoiding, whenever possible, forced disclosure of information contained in voluntarily compiled environmental auditing reports.<sup>17</sup> Nonetheless, the Agency's policy statement creates no legally cognizable privilege to protect environmental auditing reports from discovery by the government, nor does it have any influence on private parties seeking auditing material.<sup>18</sup> To some degree, the attorney-client privilege, the work product doctrine, and the self-evaluative privilege may protect environmental auditing material from unfettered discovery.<sup>19</sup>

Another problem with conducting audits is the lack of a standardized auditing procedure. Neither the regulators nor the regulated community have a gauge by which to evaluate the quality of an environmental audit. Therefore, it is difficult to determine whether a corporation will receive any of the benefits of a properly conducted audit (such as prosecutorial leniency).<sup>20</sup> Generally, the Department of Justice (DOJ) requires that an audit be in good faith, but fails to provide substantive guidelines on what amounts to a good faith audit.

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15. Phillip D. Reed, *Environmental Audits and Confidentiality: Can What You Know Hurt You as Much as What You Don't Know?*, 13 *Envtl. L. Rep. (Envtl. L. Inst.)* 10,303, 10,304 (1983).

16. *Id.*

17. EPA Auditing Policy, *supra* note 8, at 25,007.

18. *Id.* See also *Multnomah Legal Services Union v. Multnomah County Legal Aid Serv.*, 936 F.2d 1547, 1554 (9th Cir. 1991); *First Family Mortgage Corp. of Fla. v. Earnest*, 851 F.2d 843, 844 (6th Cir. 1988) (both holding that agency policy statements are not enforceable unless they carry the weight of law, *i.e.* are a function of agency's rule making power); *United States v. Wilson*, 614 F.2d 1224, 1227 (9th Cir. 1980) (holding U.S. Attorney's Manuals do not have the force of law and offer no binding authority on which a regulated entity may rely).

19. Trade secret law may also protect environmental auditing materials. That topic, however, is beyond the scope of this comment. The focus herein is procedural rather than substantive protection of the materials at issue.

20. JUSTICE GUIDANCE, *supra* note 11, at 4-5.

This comment will offer a wide-ranging look at the legal and policy issues associated with environmental auditing, discuss recent developments in the field, and outline important auditing trends.

## II. THE CONCEPT OF THE ENVIRONMENTAL AUDIT<sup>21</sup>

A company may choose from many different forms of auditing, depending on its particular size and needs.<sup>22</sup> There are, however, generally considered to be two basic types of environmental audits. First, management audits “test the nature of the company management systems controlling environmental risks”<sup>23</sup> that the company faces. Second, compliance audits “test the status of environmental compliance by company operations.”<sup>24</sup> The scope of the compliance audit is usually limited to examining those aspects of the company which are currently regulated.<sup>25</sup> These two types of audits are not mutually exclusive, and it may be beneficial to the company to perform both.<sup>26</sup>

Although many auditing options exist, the EPA suggests that “an effective environmental auditing system” should include these elements: (a) explicit top management support for environmental auditing and commitment to follow-up on audit findings; (b) an environmental auditing function independent of audited activities; (c) adequate team staffing and auditor training; (d) explicit audit program objectives, scope, resources and frequency; (e) a process which collects, analyzes, interprets and documents information sufficient to achieve audit objectives; (f) a process which includes specific procedures to promptly prepare candid, clear and appropriate written reports on audit findings, corrective actions, and schedules for implementation; and (g) a process which includes quality assurance

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21. This section is intended to acquaint the reader with the basics of an environmental audit.

22. As of yet, there is no standard auditing format, nor are there requirements which the audit must meet.

23. Van Cleve, *supra* note 7, at 1217.

24. *Id.*

25. *Id.* at 1218. However, management would be wise to obtain information that may pertain to future regulations to provide additional protection from liability.

26. See Memorandum from Thomas L. Adams, Jr., Assistant Administrator for Enforcement and Compliance Monitoring, Final EPA Policy on the Inclusion of Environmental Auditing Provisions in Enforcement Settlements 3 (Nov. 14, 1986).

procedures to assure the accuracy and thoroughness of environmental audits.<sup>27</sup>

### III. PRESENT FEDERAL GOVERNMENT POLICY ON ENVIRONMENTAL AUDITS

Both the EPA and the DOJ encourage companies and organizations that are environmentally regulated to voluntarily perform environmental audits.<sup>28</sup> In doing so, the government hopes that such practices will reduce the number and severity of violations of present regulations. Additionally, “voluntary environmental audits proactively address compliance, rather than a reactive governmental response via administrative, civil, or criminal sanctions.”<sup>29</sup>

#### A. *The EPA’s Guidelines*

The EPA’s position on environmental auditing is general and policy oriented.<sup>30</sup> The EPA Auditing Policy Statement states that the EPA’s goal is to encourage the use of auditing both to achieve and maintain compliance with environmental laws and regulations and to help correct unregulated environmental hazards.<sup>31</sup>

Although environmental auditing is not mandatory, the EPA Auditing Policy Statement attempts to encourage the use of auditing by naming some benefits for regulated industries.<sup>32</sup> The EPA declared that it would not mandate environmental auditing “because environmental auditing systems have been widely adopted on a voluntary basis in the past, and because audit quality depends to a large degree upon genuine management commitment to the program and its objectives.”<sup>33</sup>

Although the EPA strongly encourages corporate auditing to find possible violations of environmental regulation, the EPA Auditing Policy Statement declines to give protection from

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27. See EPA Auditing Policy, *supra* note 8, at 25,009.

28. *Id.* at 25,006-07. JUSTICE GUIDANCE, *supra* note 11.

29. *Protective Shields or Smoking Guns?*, *supra* note 5, at 396.

30. See EPA Auditing Policy, *supra* note 8.

31. See EPA Auditing Policy, *supra* note 8, at 25,004.

32. See EPA Auditing Policy, *supra* note 8, at 25,006-08.

33. See EPA Auditing Policy, *supra* note 8, at 25,007.

enforcement actions for those who audit.<sup>34</sup> Because the EPA recognizes the inhibiting effect this may have on corporate auditing, it has a policy of not requesting these audit reports unless it is necessary for an investigation.<sup>35</sup>

*B. The Department of Justice Guidelines*

As noted above, the DOJ has issued its own guidelines which also encourage corporate environmental auditing.<sup>36</sup> Stating that it will take voluntary compliance programs favorably into account in the exercise of prosecutorial discretion, the policy attempts to calm fears that audits will increase potential exposure to liability.<sup>37</sup> Like the EPA Auditing Policy Statement, however, this document declares that the DOJ retains full discretion to prosecute despite voluntary compliance efforts.<sup>38</sup> Furthermore, the policy fails to indicate whether the DOJ will demand the production of audits in discovery for criminal prosecutions.<sup>39</sup>

The guidelines list three main factors which the DOJ considers when prosecuting a violation of environmental regulations. First, the DOJ takes into consideration whether the person or business made a voluntary disclosure of the violation and when it reported that violation.<sup>40</sup> Companies should report violations immediately upon discovery to receive the maximum consideration by the prosecution.<sup>41</sup> Second, the DOJ considers whether the company cooperated with the government's investigation.<sup>42</sup> Cooperation with the investigation is independent of whether the disclosure was voluntary.<sup>43</sup> Third, the DOJ determines whether the corporation had a "regularized, intensive, and comprehensive" environmental compliance program in

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34. *Id.* "The EPA would only concede that facilities with good compliance records may receive fewer inspections or that the EPA 'may' consider the entity's compliance program and subsequent responses in exercising its discretion." *Protective Shields or Smoking Guns?*, *supra* note 5, at 400.

35. EPA Auditing Policy, *supra* note 8, at 25,007.

36. JUSTICE GUIDANCE, *supra* note 11.

37. Edmund Frost, *Mirror, Mirror, Up Against the Wall*, LEGAL TIMES, Dec. 16, 1991, at 50.

38. JUSTICE GUIDANCE, *supra* note 11, at 2.

39. *Id.*

40. *Id.* at 2-5.

41. *Id.* at 3. Consideration is also given to the quality of information. *Id.*

42. *Id.*

43. JUSTICE GUIDANCE, *supra* note 11, at 3.

effect.<sup>44</sup> The compliance program should contain preventative measures as well as methods for correcting violations.<sup>45</sup> The DOJ also considers the following factors: (a) the pervasiveness of noncompliance; (b) the existence of an internal disciplinary system within the company to address violations of environmental compliance policies; and (c) the extent of efforts undertaken to remedy any ongoing noncompliance and minimize the environmental harm.<sup>46</sup>

The policy behind the DOJ Guidelines is very similar to the EPA Auditing Policy Statement's policy. Both encourage environmental auditing but admit that the information may be used in criminal or civil prosecutions.<sup>47</sup> There is some relief in that the DOJ offers more lenient prosecutions for those who report their own violations promptly, those who are cooperative with the investigation, or those who have an effective auditing program in place. Those who make either no efforts or bad faith efforts to avoid compliance, however, will be prosecuted fully.<sup>48</sup>

#### IV. ARE THERE INCENTIVES TO AUDIT?

Although the EPA Auditing Policy Statement mentions general benefits to environmental auditing for corporations, it does not adopt a specific incentive program. The policy statement explains the reasons for this, stating:

Based on earlier comments received from industry, EPA believes most companies would not support or participate in an "incentives-based" environmental auditing program with EPA. Moreover, general promises to forgo inspections or reduce enforcement responses in exchange for companies' adoption of environmental auditing programs—the

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44. *Id.* at 4.

45. *Id.* Corporations will not receive leniency if their environmental auditing program is a sham designed to protect their defense interests rather than an effort to detect and correct violations.

46. *Id.* at 5-6.

47. See EPA Auditing Policy, *supra* note 8, at 25,007; JUSTICE GUIDANCE, *supra* note 11, at 3-4.

48. JUSTICE GUIDANCE *supra* note 11, at 14.



“incentives” most frequently mentioned in this context—are fraught with legal and policy obstacles.<sup>49</sup>

As previously mentioned,<sup>50</sup> EPA does state that it will consider a company’s compliance record in enforcement actions and that the EPA will not make routine requests of auditing results.<sup>51</sup> Furthermore, the EPA argues that audits have developed as a result of sound business reasoning, “particularly as a means of helping regulated entities manage pollution control affirmatively over time instead of reacting to crises.”<sup>52</sup> Unfortunately, this provides very little incentive for companies who do not currently audit to implement an auditing program.<sup>53</sup>

There are several reasons for the EPA’s failure to implement stronger incentives to encourage auditing. First, some states were reluctant to commit their resources to a nonregulatory program.<sup>54</sup> Also, environmental groups were concerned about shifting resources away from traditional enforcement.<sup>55</sup> Finally, industry was opposed to an incentive program because it seemed to be the first step towards mandating environmental auditing.<sup>56</sup> Industry was also concerned about the confidentiality of an environmental audit program.<sup>57</sup>

The EPA may have reasons other than those stated in its policy for not implementing an incentive program. For example, the EPA can obtain most of the information it needs for enforcement of environmental violations through both the administrative information demand authority and self-reporting requirements of the federal environmental laws.<sup>58</sup> Therefore, implementation of auditing

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49. EPA Auditing Policy, *supra* note 8, at 25,004.

50. *See supra* Part II—THE CONCEPT OF AN ENVIRONMENTAL AUDIT.

51. EPA Auditing Policy, *supra* note 8, at 25,007.

52. *Id.* at 25,006.

53. The cost of implementing an audit program may outweigh the benefits presently available for many corporations. Costs may include hiring an auditor or an auditing team, monitoring reports, and efforts to bring the corporation into compliance.

54. Van Cleve, *supra* note 7, at 1223.

55. *Id.*

56. *Id.* at 1224.

57. *Id.* This is still a major concern for companies in conducting environmental audits. An audit can be seen as both a sword (disclosing noncompliance may subject the company to prosecution) and a shield (the Department of Justice is more lenient on those with an effective compliance program). *See infra* Part V on the issues surrounding disclosure of audit results.

58. *Id.*

incentives may simply be another burdensome factor to consider in enforcement actions, without any offsetting benefits. Also, if the EPA further reduced enforcement efforts for those who audit, companies would be less likely to perform proper audits and correct violations.<sup>59</sup>

With this information in mind, environmental auditing may seem rather pointless and a waste of time to many companies. There are, however, benefits to auditing that are not found in the EPA Auditing Policy Statement.

#### A. *A Reduction in Penalties and Fines*

Environmental audits may be the best defense against environmental regulation violations which usually entail enormous penalties and fines.<sup>60</sup> Enforcement actions may be either civil or criminal, or both.<sup>61</sup> Many offenses that were previously misdemeanors are now felonies.<sup>62</sup> In addition, sentencing guidelines have made jail time a much more likely punishment of an environmental felony conviction.<sup>63</sup> The government may assess penalties for failure to comply with the regulations, and for violation of monitoring and reporting requirements.<sup>64</sup> In addition to the government's enforcement power, most of the environmental statutes create a cause of action for citizen enforcement suits.

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59. Van Cleve, *supra* note 7, at 1224. Another possible reason for EPA's failure to implement an incentive program was the time in which the EPA Auditing Policy Statement was written. *Id.* In 1986, environmental auditing was fairly new. *Id.* The EPA may have been reluctant to offer too much too early.

60. Federal judgments and penalties for environmental violations have included multimillion dollar civil penalties, and they are increasing. *See, e.g.,* United States EPA v. Environmental Waste Control, Inc., 917 F.2d 327 (7th Cir. 1990) (\$2.7 million RCRA penalty); United States v. Shell Oil Co., Civ. No. C-89 4220 (N.D. Cal. Mar. 26, 1990) (\$4.2 million in federal and state Clean Water Act and other civil penalties).

61. The standard for imposing criminal liability on an employee, officer, or company is low. For example, the only proof required for a RCRA violation is that the employee intended to place a drum of waste in a certain location. The employee does not have to have knowledge that he is violating a law. Thomas R. Bartman, *Dodging Bullets*, FORTNIGHTLY, Oct. 1, 1993, at 21.

62. Frost, *supra* note 37, at 50.

63. *Id.* For example, "the 1990 Clean Air Act amendments added a provision that . . . allows a felony criminal conviction based on negligence instead of knowledge when there is a release of a hazardous air pollutant that creates an imminent danger." *Id.*

64. Michael Herz, *Environmental Auditing and Environmental Management: The Implicit and Explicit Federal Regulatory Mandate*, 12 CARDOZO L. REV. 1241, 1246 (1991).

As previously mentioned, however, the DOJ is more forgiving of environmental violations for companies with effective monitoring programs.<sup>65</sup> The Sentencing Guidelines,<sup>66</sup> which delineate proposed sentencing for specific crimes, also provide more lenient penalties if the organization has taken “reasonable steps to achieve compliance with its standards, e.g., by utilizing monitoring and auditing systems reasonably designed to detect criminal conduct by its employees and other agents.”<sup>67</sup> As fines increase for violations, it may be in the company’s best interest to implement an auditing policy, both to mitigate fines and to prevent violations.

*B. Making Compliance with Environmental Regulations Less Difficult*

As corporations began to implement environmental auditing programs in the early 1980s, the federal regulatory structure was becoming quite complex. For example, Congress enacted the Resource Conservation and Recovery Act (RCRA) in 1984,<sup>68</sup> Superfund in 1986,<sup>69</sup> the Safe Drinking Water Act in 1986,<sup>70</sup> the Clean Water Act in 1987,<sup>71</sup> and the Clean Air Act in 1990.<sup>72</sup> In addition to these major statutes, companies must also comply with other federal environmental statutes, as well as state and local regulations. As a result of these regulations, compliance has become extremely difficult.<sup>73</sup>

An environmental auditing program combined with proactive management may help improve compliance. Proactive management has four main elements which may make it attractive to industries faced with the increasing burden of complying with environmental regulations.<sup>74</sup> First, because environmental costs are increasing at an

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65. See *supra* Part III, section B.

66. UNITED STATES SENTENCING COMMISSION GUIDELINES MANUAL § 8A1.2, cmt. (k)(5) (1993).

67. *Id.*

68. 42 U.S.C. §§ 6901 et seq. (1984).

69. 42 U.S.C. §§ 9601 et seq. (1986).

70. 42 U.S.C. §§ 300f et seq. (1986).

71. 42 U.S.C. §§ 1251 et seq. (1987).

72. 42 U.S.C. §§ 7401 et seq. (1988).

73. Frost, *supra* note 37, at 50.

74. *Green Finance: Exposing Your Firm to the Elements*, BUSINESS INTERNATIONAL MONEY REPORT, Sept. 13, 1993.

alarming rate, managers must tighten accounting requirements.<sup>75</sup> The problem is that there is “little specific guidance available concerning the recognition, measurement and disclosure of environmental costs, or the auditor’s responsibility for the detection of unrecorded environmental liabilities.”<sup>76</sup> Many are still attempting to clarify standards in this field by asking such questions as “How do auditors spot environmental red flags?” or “How can liability costs for the potentially responsible party (PRP) be assessed?”<sup>77</sup>

Second, proactive management allows companies to perform environmental “ratings.”<sup>78</sup> A rating is a measurement of a firm’s exposure to liability.<sup>79</sup> This is also a very new practice and has initially been adopted by the Big Six accounting firms.<sup>80</sup> Third, companies must be concerned with tighter lending requirements.<sup>81</sup> A bank may be less willing to lend funds where environmental liabilities exist because it could be held liable as an “operator.”<sup>82</sup> An environmental audit, if conducted properly, can help determine the amount of environmental risk to which a company is exposing itself when it conducts a certain activity. Companies should not expose themselves to the possibilities of enormous noncompliance penalties without thoroughly investigating the risks involved.

Finally, proactive management encourages shareholders to be active in the company’s management.<sup>83</sup> Shareholders in companies such as Monsanto Corporation are involved to the extent that they have begun to issue their own environmental auditing reports.<sup>84</sup> This type of action encourages stricter environmental standards for the company and will help protect against liability.

To receive maximum benefits from the integration of the proactive management elements with the environmental auditing program, companies should identify benchmarks by which to measure

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75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *See United States v. Fleet Factors Corp.*, 821 F. Supp. 707 (S.D. Ga. 1993).

83. *Green Finance*, *supra* note 74.

84. *Id.*

the effectiveness of their programs.<sup>85</sup> “Such gauges could involve trends in audit findings (for example, repetitions of similar deficiencies over time); the number of compliance orders and penalties received and their seriousness; the number of spills and releases; or employees’ levels of awareness of company compliance policies and requirements as measured in refresher training sessions.”<sup>86</sup> In this way the company can measure progress and spot areas which need improvement.

### C. *Future Incentives*

In the future, the government may develop official incentive programs.<sup>87</sup> For example, the EPA is developing an “Environmental Excellence Program” similar to OSHA’s “Voluntary Protection Program” (VPP), requiring the implementation of health and safety audits.<sup>88</sup> The program will reward positive corporate behavior, as does the VPP.<sup>89</sup> If there are more incentives to audit, perhaps more companies without such programs will feel that the benefits of auditing outweigh the costs.

## V. THE DISINCENTIVES OF ENVIRONMENTAL AUDITING

### A. *The Lack of Confidentiality of Auditing Reports*

A regulated facility that performs an environmental audit may subject itself to a greater risk of liability than one that has not implemented an auditing program. On the one hand, a facility that performs an environmental audit may achieve more widespread compliance through self-examination and thereby avoid federal or state enforcement actions or private litigation.<sup>90</sup> On the other hand, if a regulated facility gathers extensive information on its compliance with environmental regulations and amalgamates it into one report, it

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85. Bartman, *supra* note 61, at 21.

86. *Id.*

87. For a detailed discussion of the incentives programs considered by the EPA, see Terrell E. Hunt, *Environmental Auditing and Compliance Policy*, 16 HARV. ENVT. L. REV. 365 (1992).

88. Lynn L. Bergeson, *Compliance Audits are the Key to Staying out of Court; The Writing is on the Wall*, CORP. LEGAL TIMES, Nov. 1992, at Environmental Issues 17.

89. *Id.* The reward for satisfying VPP criteria is reduced inspection and enforcement proceedings.

90. *See supra* Part IV, section A.

exposes itself to several risks. The most significant risk involved with a voluntary audit is the potential use of the information as evidence at trial by the government or an adverse private litigant.<sup>91</sup> The lack of protection from discovery given to environmental auditing reports remains as a disincentive to audit.

As evidence of a violation, auditing reports can be damning in several ways and in various contexts. On the most basic level, opposing parties may use auditing material to establish the fact that a violation of the environmental statute at issue occurred.<sup>92</sup> Consequently, the burden of an extensive factual investigation is lifted from the plaintiff or the prosecution when a corporation has compliance information neatly on file and readily accessible through subpoena, regular discovery channels, and under the provisions of the environmental statutes themselves.<sup>93</sup> Used in this capacity, environmental auditing material poses a threat of liability in both civil, administrative, and criminal enforcement actions and in private litigation.

Commentators have focused attention on the potential use of environmental auditing material in criminal prosecutions. In criminal prosecutions, prosecutors could use environmental auditing reports as factual evidence showing that violations had occurred and also as evidence proving that corporate officers had knowledge of the violations.<sup>94</sup> Such a showing of knowledge would satisfy the *mens rea* element of most pollution control criminal provisions.<sup>95</sup> Knowing violations of numerous environmental statutes may result in jail time.<sup>96</sup> Hence, the potential liability associated with

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91. For a discussion of cases in which this risk has been realized, see *infra* note 105 and the accompanying text.

92. See *infra* notes 103-111 and accompanying text.

93. See *infra* notes 116-122 and accompanying text for a discussion of how the government and private parties may obtain environmental auditing material.

94. See Reed, *supra* note 15, at 10,304.

95. See, e.g., Solid Waste Disposal Amendments of 1980, 42 U.S.C. § 6928 (1988) [hereinafter RCRA]; The Federal Water Pollution Control Act, 33 U.S.C. § 1319(c) (1988) [hereinafter CWA]; The Clean Air Act 42 U.S.C. § 7413(c) (1988) [hereinafter CAA]. For a full discussion of the *mens rea* requirement in environmental statutes, see also Ruth Ann Weidel, *et al.*, *Erosion of Mens Rea in Environmental Criminal Prosecution*, 21 SETON HALL L. REV. 1100 (1991); Michael Vitiello, *Does Culpability Matter?: Statutory Construction Under 42 U.S.C. § 6928*, 6 TUL. ENVTL. L.J. 187 (1993).

96. See, e.g., RCRA, 42 U.S.C. § 6928(d)(7); CAA, 42 U.S.C. § 7413(c); CWA, 33 U.S.C. § 1319(c).

environmental auditing goes far beyond the threat of financial loss. In fact, EPA expressly states in its environmental auditing policy statement that prosecutors may request auditing material in enforcement actions where intent is a relevant element of inquiry, such as in a criminal prosecution.<sup>97</sup> Although the EPA and DOJ seem to act consistently with their policy statements by not prosecuting violators who voluntarily disclose noncompliance,<sup>98</sup> an audit may still create potential criminal liability for a facility who voluntarily discloses evidence of a violation.

The DOJ guidance also lists timely response to the noncompliance, the institution of preventative measures and compliance programs, and a swift internal disciplinary action as factors which should be considered when determining whether to prosecute a regulated party who has voluntarily reported noncompliance. If an auditing facility voluntarily discloses a violation but fails to take internal disciplinary action, the DOJ may choose to prosecute the violator.<sup>99</sup>

Due to internal limitations such as the general corporate structure or a lack of financial resources or experience in dealing with environmental matters, first-time auditors and smaller regulated entities may be slow to punish their employees or to initiate extensive, costly compliance programs which will satisfy the DOJ. Consequently, the DOJ may perceive the inability to take prompt corrective action after voluntary disclosure as systemic noncompliance deserving of criminal prosecution.<sup>100</sup>

When the DOJ considers bringing an enforcement action against a facility, the government will generally subpoena all

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97. EPA Auditing Policy, *supra* note 8, at 25,007.

98. There are no cases in which the Justice Department based a criminal prosecution on information obtained through self-disclosure by a regulated facility. As noted above, however, guidance from neither the Justice Department nor the EPA creates a substantive or procedural right claimable by defendants.

99. JUSTICE GUIDANCE, *supra* note 11, at 5-6. The Justice Department Guidance does not entirely strip federal prosecutors of their ability to exercise discretion in selecting targets for criminal enforcement actions, nor does it provide enough information for the prosecutors to determine what type of behavior is disfavored by the guidance. See *Environmental Audits May Improve Compliance, But Beware of Disclosure, Attorneys Caution*, 22 Env't Rep. (BNA) No. 18, at 1195 (Aug. 30, 1991) (quoting remarks made by Donald A. Carr, former assistant attorney general for the Department of Justice, to ABA meeting on corporate liability for environmental crimes).

100. JUSTICE GUIDANCE, *supra* note 11, at 5-6.

information relating to the suspected violation during the grand jury investigation, including information contained in an environmental audit.<sup>101</sup> Although intentionally ignoring or moving slowly to rectify environmental violations discovered in an audit is more culpable conduct than a good faith delay in self-correction, the issue still remains as to whether parties should be allowed to use material compiled by the violator as evidence against that violator in a legal proceeding.

While the risk of criminal liability arising from an environmental audit remains real, the possibility of civil penalties assessed either by the federal or state authorities is a matter of greater concern. Guidance from the EPA and DOJ discuss only the federal government's selection of cases for criminal prosecution.<sup>102</sup> Therefore, regulated facilities who audit have no assurances that federal enforcement authorities will not seek civil or administrative penalties for noncompliance discovered in an environmental audit. State authorities may also impose fines for violations discovered through voluntarily submitted auditing material. The Coors Brewery action described below is a case in point.<sup>103</sup>

The Coors Brewing Company recently conducted a \$1 million audit and study of its Golden, Colorado facility.<sup>104</sup> The audit and study revealed that the Brewery emitted a higher amount of volatile organic compounds (VOCs), such as ethanol, during the fermentation process than previously estimated.<sup>105</sup> The Coors auditors determined

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101. See *In re Grand Jury Matter 91-832*, 147 F.R.D. 82, 87 (E.D. Pa. 1992). In this case a corporation prepared an environmental audit in connection with violations of state hazardous waste disposal laws alleged by the Pennsylvania Department of Environmental Regulation in 1990. The U.S. EPA later initiated a grand jury investigation of the corporation to determine if it had violated the criminal provisions of RCRA. During the grand jury investigation, the EPA subpoenaed the environmental auditing material from the third party auditor. The alleged violator was unsuccessful in asserting either the attorney-client privilege or the work product doctrine for the auditing material. See also Representative Environmental Crime Grand Jury Subpoena, provided by the United States Attorney's Office, New Orleans, La. (on file with the *Tulane Environmental Law Journal*). The subpoena requests the subject of the investigation to produce all documents related to the alleged violation to the grand jury.

102. JUSTICE GUIDANCE, *supra* note 11, at 1.

103. *\$1.05 Million Fine Against Coors May Deter Corporate Environmental Audits, Firm Says*, 24 Env't Rep. (BNA) No. 13 at 570 (July 30, 1993) [hereinafter *Fine Against Coors*].

104. *Id.*

105. *Id.*



that the higher amounts of VOC emissions resulted from the evaporation of beer normally spilled during production. Consequently, Coors concluded it was not in compliance with certain state air emission standards and voluntarily reported the noncompliance to the State.<sup>106</sup> Prior to conducting the study—the first of its kind by any brewery—Coors acted under the assertions of an EPA guidance document, which concluded that the fermentation process is a minor source of VOC emissions.<sup>107</sup>

In recognition of its auditing efforts and its voluntary disclosure of noncompliance, in July 1993 the Colorado Department of Health (CDH) issued a \$1.05 million penalty against the Coors Brewing Company for alleged violations of the State air pollution laws.<sup>108</sup> The penalty is the largest fine ever issued by CDH for an air violation.<sup>109</sup> Environmental enforcement authorities will probably use the Coors study to set the standards for VOC emissions by breweries.<sup>110</sup> Perhaps not a perfect candidate for criminal prosecution under the DOJ and EPA guidelines, Coors still suffered as a result of performing an extensive environmental audit.<sup>111</sup>

Of course, in the arena of private litigation, plaintiffs are not influenced by agency policy statements or the potential chilling effect resulting from their use of environmental auditing material at trial. Plaintiffs in citizen suits,<sup>112</sup> derivative actions, and toxic tort litigation may benefit from discovery of environmental auditing materials.<sup>113</sup>

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106. *Id.*

107. *Id.* at 571. In addition to EPA Document AP-42, Coors also rely on a report issued by the California Air Resources Board which concluded that VOC emissions by breweries in that state were minor in relation to their production output. *Id.*

108. *Fine Against Coors*, *supra* note 103, at 570.

109. *Id.*

110. *Id.*

111. After almost seven months of negotiations with the State of Colorado, Coors settled with Colorado Department of Health, agreeing to a \$237,000 penalty and to reduce VOC emissions in the Golden facility. *Coors Agrees to Pay Colorado \$237,000 Penalty*, 24 *Env't Rep. (BNA) No. 43* at 1667 (Feb. 1994).

112. Most environmental statutes have citizen suit provisions which allow private parties with standing to enforce the substantive provisions of the statute or to compel the administrator of the EPA to initiate an enforcement action against a violator. *See, e.g.*, CWA, 33 U.S.C. § 1365; CAA, 42 U.S.C. § 7604.

113. Telephone interview with Alan Kanner, Esq., a specialist in toxic tort litigation, (Mar. 11, 1994) (notes on file with the *Tulane Environmental Law Journal*). Mr. Kanner stated that environmental auditing material is useful in establishing negligence when required in a toxic tort action.

*B. Ease of Access to Environmental Auditing Records*

The risk of legal liability associated with performing environmental audits is exacerbated by the ease with which persons with interests adverse to the regulated facility may obtain auditing material. The EPA may obtain environmental auditing reports under the authority which Congress granted in the various pollution control statutes.<sup>114</sup> Also, some statutes require disclosure to the government of certain events which the regulated facility may discover during the auditing process.<sup>115</sup> Although the regulated community has challenged the constitutionality of the EPA's broad information gathering authority under the various organic statutes, at least one federal appellate court has found it to be permissible.<sup>116</sup> The government may also obtain auditing materials through regular discovery channels.<sup>117</sup>

Private litigants may obtain environmental auditing information either from the government or directly from the auditing facility. If the EPA has obtained auditing reports from a facility,<sup>118</sup> the Freedom of Information Act (FOIA) allows private parties to obtain the documents from the EPA.<sup>119</sup> Beyond FOIA, some organic statutes require the EPA to make available to the public any report obtained under the authority of the statute.<sup>120</sup> Where the federal government does not have the auditing material sought, private

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114. See, e.g., CWA, 33 U.S.C. § 1318(a)(A)(v); CAA, 42 U.S.C. § 7414(a)(1)(G).

115. See, e.g., Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9603(a) (1988).

116. *United States v. Tivian Laboratories, Inc.*, 589 F.2d 49, 54-55 (1st Cir. 1978), *cert. denied*, 442 U.S. 942 (1972) (holding that the EPA's subpoena authority under the CAA and CWA was not in violation of the Fourth Amendment's prohibition of unreasonable searches and seizures, the Thirteenth Amendment's bar against involuntary servitude, or the Fifth Amendment's guarantee of due process of law); see also *United States v. Charles George Trucking Co.*, 823 F.2d 685, 692 (1st Cir. 1987) (holding EPA's statutory subpoena powers under CERCLA to be constitutional).

117. See FED. R. CIV. P. 26-33.

118. The EPA may initially obtain the information under its statutory subpoena authority. See *supra* note 114 and accompanying text. The EPA may also obtain the information through regular discovery channels. See *supra* note 117.

119. 5 U.S.C. § 552 (1988). Discovery may not be had through FOIA if the material being sought is a trade secret, commercial or financial in nature and privileged. *Id.* § 552(b)(4).

120. See, e.g., CWA, 33 U.S.C. § 1318(b). Section 1318 excludes trade secrets from this type of statutory disclosure.

litigants can obtain auditing material through normal pretrial discovery.<sup>121</sup>

Therefore, unless the courts or Congress grant auditing materials the status of privileged material, the accessibility of these materials may expose companies who audit to an increased risk of liability. The increased risk may discourage companies from auditing altogether or may cause them to limit the scope of the audit to an extent that would render it ineffective.

## VI. APPLICATION OF "COMMON LAW" PRIVILEGES TO ENVIRONMENTAL AUDITING MATERIALS

### A. *The Purposes of Discovery and Privileges and the Biases of the Federal Rules*

The rules controlling discovery are designed predominantly to promote the presentation of objective truth at trial.<sup>122</sup> The rules of privilege, however, serve exactly the opposite purpose; "rather than facilitating the illumination of truth, they shut out the light."<sup>123</sup> Privileging information from discovery, however, also serves an important function in the operation of the judicial system. The predominant rationale for allowing privileges is that they benefit the public good by encouraging the free flow of information within relationships whose social utility is dependent upon the absolute candor of the communicants.<sup>124</sup> When determining whether a communication should be privileged, courts typically balance the public interest in the need for disclosure of the truth at trial with the need to keep communications within certain relationships private.<sup>125</sup>

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121. See *supra* note 117.

122. MCCORMICK, MCCORMICK ON EVIDENCE (Edward W. Cleary, 3d ed.) § 72, p. 170-71. See *infra* notes 134-138 and accompanying text for a discussion of the controlling rules of civil procedure and evidence.

123. *Id.* at 171.

124. See 8 WIGMORE, WIGMORE ON EVIDENCE §§ 2192, 2197 & 2285 (4th ed. 1985) (such relationships include the attorney-client, doctor-patient, priest-confessor, etc.).

125. *The Privilege of Self Critical Analysis*, 96 HARV. L. REV. 1083, 1084 (1983) [hereinafter *Privilege Note*]. See *McMann v. Securities & Exch. Comm'n*, 87 F.2d 377, 378 (2d Cir. 1937). Judge Learned Hand wrote: "The suppression of truth is a grievous necessity at best, more especially when as here the inquiry concerns the public interest; it can be justified at all only when the opposed private interest is supreme." *Id.*

On balance, the scale tips in favor of “privileging” environmental auditing material. The stated purpose of numerous environmental laws is to protect human health and the environment.<sup>126</sup> If environmental auditing will encourage compliance with these environmental laws and further assist in the identification of unknown environmental and health hazards, as the EPA claims,<sup>127</sup> then auditing advances a compelling public interest. The countervailing interest in the disclosure of facts at trial is minimal since information contained in an audit is available from other sources. The government should, therefore, encourage auditing by removing possible liability associated with its discovery.

This balancing test is implicit in the Federal Rules of Evidence, which ultimately control the creation and application of privileges in both civil and criminal enforcement actions during both discovery and at trial.<sup>128</sup> The Rules of Evidence, specifically Rule 501, merely empower the courts to continue applying common law with respect to privileges.<sup>129</sup>

When adopting Rule 501, Congress flatly rejected the version of the rule which the advisory committee offered and the United States Supreme Court approved.<sup>130</sup> The recommended rule carved out nine relationship-specific statutory privileges.<sup>131</sup> Since the recommended list of privileges did not include a rule based on the common law balancing approach, many critics feared the courts

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126. See, e.g., CAA, 42 U.S.C. § 101(b)(1); RCRA, 42 U.S.C. § 6901(b)(2).

127. EPA Auditing Policy, *supra* note 8, at 25,004.

128. The meaning of “privileged” in the Federal Rules of Civil Procedure is generally construed to refer to privileges as they arise under the Federal Rules of Evidence. This view is supported by evidentiary rule 1101(c), which states: “The rule with respect to privileges applies at all stages of all actions, cases, and proceedings.” FED. R. EVID. 1101(c); see also *Privilege Note*, *supra* note 125, at 1084.

129. Rule 501 of the Federal Rules of Evidence provides:

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.

FED. R. EVID. 501.

130. See H.R. REP. NO. 650, 93d Cong., 1st Sess. 8 (1973); S. REP. NO. 1277, 93d Cong., 2d Sess. 11 (1974).

131. The following specific privileges recommended by the advisory board were not enacted by Congress: required reports privileged by statute; lawyer-client; psychotherapist-patient; husband-wife; communications to clergymen; political vote; trade secrets; state secrets; and communications of government informers.

would interpret the list so as to limit any judicial expansion.<sup>132</sup> However, since the adopted version of Rule 501 codifies the use of the public interest balancing test to determine the applicability and scope of privileges, it reflects a congressional intent to keep the privilege doctrine fluid.<sup>133</sup>

Although Congress gave the judiciary the flexibility to develop privileges according to the public interest, courts are slow to create new categorical privileges.<sup>134</sup> One reason for courts' hesitancy to create new privileges, at least in civil proceedings, may be the obvious bias of the Federal Rules of Civil Procedure in favor of broad discovery.<sup>135</sup> Under Rule 26(b)(1), the Rules of Civil Procedure provide for discovery of all unprivileged information

relevant to the subject matter involved in the pending action . . . [and,] the information sought need not be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.<sup>136</sup>

The burden imposed by the "reasonably calculated" standard in 26(b)(1) is so low that it provides almost no check on discovery. The United States Supreme Court has overcome the bias for discovery by expanding the scope of pre-existing privileges.<sup>137</sup> The Supreme

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132. See, e.g., 2 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S EVIDENCE, 501-13 (1982).

133. *Privilege Note*, *supra* note 125, at 1084-85 n.9.

134. See e.g., *United States v. Arthur Young & Co.*, 465 U.S. 805 (1984) (refusing to create a new common law accountant-client privilege for accountants).

135. The most recent amendments to Rule 26 of the Federal Rules of Civil Procedure have broadened discovery even further. Rule 26(a)(1)(B), an entirely new rule, now requires parties to provide copies or descriptions of the type and location of all information, documents, data or tangible things in control of the party that are relevant to the disputed facts alleged without waiting for a discovery request. FED. R. CIV. P. 26(a)(1)(B). Justice Scalia argued that this amendment offers a serious challenge to our adversarial system of justice. Amendments to the Federal Rules of Civil Procedure, 61 U.S.L.W. 4365, 4393-94 (Apr. 27, 1993) (Scalia, J. dissenting, joined by Thomas & Souter, JJ.). Courts may perceive these changes as a signal from Congress that discovery should become more open. Such an interpretation would place a greater burden on parties seeking to assert a privilege for environmental auditing material. Interview with Jonathan B. Andry, Esq. (Mar. 14, 1993) (notes on file with the *Tulane Environmental Law Journal*).

136. FED. R. CIV. P. 26(b)(1).

137. See *Upjohn v. United States*, 449 U.S. 383, 386 (1981).

Court recommends, however, that the judiciary move cautiously on a case-by-case basis even when expanding a privilege.<sup>138</sup>

*B. Application of the Attorney-Client Privilege to Environmental Auditing Reports*

The attorney-client privilege is designed to protect communications between a lawyer and his client under limited circumstances. The attorney-client privilege is based on the “need for the advocate and counselor to know all that relates to the client’s reasons for seeking representation [in order that his] professional mission . . . [may] be carried out.”<sup>139</sup> The Supreme Court recognized the necessity of an attorney-client privilege as early as 1888.<sup>140</sup> Members of the legal profession also consider the privilege to be essential to the effective administration of justice.<sup>141</sup> The protection of the attorney-client privilege is absolute. Once the party asserting the privilege satisfies the elements necessary to establish that privilege, no showing of need will compel discovery.<sup>142</sup>

Judge Wyzanski most clearly established the elements of the attorney-client privilege in *United States v. United Shoe Machinery Corp.*<sup>143</sup> The privilege only applies if: a) the person claiming the privilege is, or sought to become, a client; b) the person receiving the communication is a member of the bar, or his subordinate, and in connection with the communication is acting as an attorney; c) the communication is related to a fact of which the attorney was informed by a client in confidential surroundings for the primary purpose of

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138. *Id.*

139. *See, e.g.,* Trammel v. United States, 445 U.S. 40, 51 (1980). This rationale is consistent with Dean Wigmore’s utilitarian approach to privileges. *See supra* notes 124-125.

140. *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888) (reasoning that candor between the attorney and his client resulting from the confidentiality of the communication was essential to effective legal representation).

141. MODEL CODE OF PROFESSIONAL RESPONSIBILITY, EC 4-1 reads:

A lawyer should be fully informed of all the facts of the matter he is handling in order for his client to obtain the full advantage of our legal system. . . . to hold inviolate the confidences and secrets of his client not only facilitates the full development of facts essential to proper representation of the client but also encourages laymen to seek early legal assistance.

MODEL CODE OF PROFESSIONAL RESPONSIBILITY. EC 4-1 (1993).

142. *Diversified Industries, Inc. v. Meredith*, 572 F.2d 596, 601-02 (8th Cir. 1977).

143. 89 F. Supp. 349, 358-59 (D. Mass. 1950).

securing legal advice, services or assistance; d) the communication is not made for the purpose of committing a crime or tort; and the e) the privilege was claimed and not waived by the client.<sup>144</sup>

A court may face several of these issues when a party attempts to assert the attorney-client privilege to protect environmental auditing material. First, the court must determine whether the party asserting the privilege was a client.<sup>145</sup> In the environmental auditing context, this question is most often framed as whether low level employees of a corporation may be viewed as clients of the corporation's in-house counsel.<sup>146</sup>

In *Upjohn*, the United States Supreme Court held that the rank of the employee should have no bearing on determining whether a communication that he or she makes to the in-house counsel is privileged.<sup>147</sup> In that case, as part of an internal investigation, Upjohn's corporate counsel sent to mid-level managers questionnaires concerning payments made to foreign government officials. The questionnaires were returned to counsel, and the facts garnered from them were incorporated into a report which Upjohn voluntarily disclosed to the government. Subsequently, the Internal Revenue Service demanded production of the questionnaires as part of an investigation of Upjohn to determine the tax consequences of the payments.<sup>148</sup>

Holding that the questionnaires were privileged material, the Court reasoned that effective legal representation was possible only where all employees, regardless of rank, conveyed all relevant

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144. *Id.*

145. *Id.*

146. For an in depth analysis of the attorney-client privilege in the corporate context, see Michael L. Waldman, *Beyond Upjohn: The Attorney-Client Privilege in the Corporate Context*, 28 WM. AND MARY L. REV. 473 (1987).

147. *Upjohn v. United States*, 449 U.S. 383, 396-97 (1981). Holding that the material was privileged, the Court reasoned that the control group test applied "below frustrate[d] the very purpose of the privilege by discouraging the communication of relevant information by employees of the client to attorneys seeking to render legal advice to the client corporation." *Id.* at 392.

The "control group test" requires that for a communication to be protected by the attorney-client privilege under this test, the party communicating to the attorney must be in a position to control or take a substantial part in any decision about any action which the corporation may take upon the advice of the attorney. *Id.* at 390.

148. *Id.* at 386-89.

information to the investigating counsel.<sup>149</sup> Without the protection of the attorney-client privilege, corporate counsel may be less likely to seek compliance information from low level employees.<sup>150</sup>

Environmental auditing is analogous to the type of internal investigation conducted in *Upjohn*. Material for a final audit report is often gathered via questionnaires submitted to mid and low level employees.<sup>151</sup> Compliance with environmental regulations is dependent upon the candid response of the employees. In order to accurately assess a company's compliance status, the assembly line worker and the loading dock foreman who handle hazardous wastes and control the machinery which produce effluent emissions must be allowed to communicate confidentially with legal counsel. If corporate counsel desires to effectively represent the client corporation, he must be able to make an accurate assessment of the regulated facility. Therefore, in accordance with *Upjohn*, communications made during environmental audits between employees, regardless of rank, and the general counsel must fall within the attorney-client privilege.

Second, in order to meet the elements required to establish the attorney-client privilege, the proponent of the privilege must show that the recipient of the information is an attorney.<sup>152</sup> This seemingly simple requirement is often problematic when applied to environmental auditing. The information examined during an environmental audit can be highly technical. Therefore, staff engineers and scientists will often act as intermediaries between employees of the client corporation and the general counsel. Courts, however, have generally found a privilege for documents prepared with the assistance of nonlegal personnel as long as the nonattorney is not conducting an independent inquiry.<sup>153</sup>

Given the necessity of technical assistance in interpreting environmental data during the auditing process, courts should expand

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149. *Id.* at 390-92.

150. *Id.* at 392.

151. See FRANK FRIEDMAN, PRACTICAL GUIDE TO ENVIRONMENTAL MANAGEMENT 241-60 (1991).

152. *United States v. United Shoe Machinery Corp.*, 89 F. Supp. 349, 358 (D. Mass. 1950).

153. *In re Grand Jury Subpoena*, 599 F.2d 504, 513 (D. Me. 1984); *Scott Paper Co. v. Ceilcote Co.*, 103 F.R.D. 591, 594 (D. Me. 1984); *Sterling Drug Co. v. Harris*, 488 F. Supp. 1019, 1026-27 (S.D.N.Y. 1980); *Spalding v. Denton*, 68 F.R.D. 342, 345 (D. Del. 1975).



the attorney-client privilege to cover final auditing reports compiled with the assistance of nonattorneys. If communications necessarily involving nonattorneys are not accorded the attorney-client privilege, attorneys may be inclined to act on unclear information or under erroneous technical assumptions in order to maintain the confidentiality of the information. In such cases, the attorney's lack of technical expertise decreases the effectiveness of the environmental audit.

Third, a regulated facility seeking to apply the attorney-client privilege to environmental auditing material must show that it was seeking legal counsel as opposed to business advice.<sup>154</sup> The mere presence of an attorney at the helm of an environmental auditing effort may fail to satisfy this element.<sup>155</sup> Nonetheless, some courts have deferred to the presumption that any attorney-client communication is *prima facie* for legal advice and protected by the privilege.<sup>156</sup>

As a practical matter, commentators suggest that all communications between counsel and employees of the client corporation during an investigation be labeled "attorney-client communication."<sup>157</sup> While the suggestion may seem unconvincing, labeling documents may sway a court to privilege environmental auditing materials. In *United States v. Chevron*,<sup>158</sup> a federal district court denied the defendant's claim of attorney-client privilege for environmental auditing documents because "Chevron never indicated" that it was seeking legal advice during the audit.<sup>159</sup>

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154. *United Shoe*, 89 F. Supp. at 358-59.

155. See *infra* note 159 and accompanying text (discussing effect of attorney's presence during the audit in *Chevron*).

156. See, e.g., *Diversified Industries, Inc. v. Meredith*, 572 F.2d 596, 610 (8th Cir. 1977).

157. Interview with Jonathan Andry, Esq. (Mar. 10, 1994) (notes on file with *Tulane Environmental Law Journal*).

158. *United States v. Chevron U.S.A., Inc.*, No. 88-6681 (E.D. Pa. Oct. 16, 1989).

159. *Id.* at 18. In *Chevron*, the defendant asserted the attorney-client privilege for certain environmental audit status reports during a civil enforcement action for air violations. The defendant claimed that disclosure of the status reports would necessarily reveal information from the initial audit, which was conducted by a three member team that included Chevron's senior counsel. In addition to finding that Chevron was not seeking legal advice by performing the audit, the Court found no indication that the defendant's senior counsel was acting in the capacity of a legal counselor. *Id.*

Perhaps, in an effort to assure that the audit would be protected by the attorney-client privilege, Chevron made the fatal mistake of overkill. It overly involved the attorney in the

Labeling a document may provide the indication necessary to assert the privilege successfully.<sup>160</sup>

Courts should presume that environmental audits are for legal advisory purposes.<sup>161</sup> This presumption is warranted since compliance with the numerous, complex pollution control statutes is “hardly an instinctive matter”<sup>162</sup> and because environmental auditing is a process by which regulated parties attempt to improve their compliance with laws. The presumption that environmental audits are performed primarily for the purpose of attaining legal advice is also consistent with the logic of *Upjohn*. The presumption that the attorney-client privilege protects environmental auditing materials promotes the free flow of information between an attorney and his or her client allowing the client to better comply with the law.<sup>163</sup>

Finally, to preserve the attorney-client privilege for a certain communication, the communication must be kept confidential.<sup>164</sup> The confidentiality of a communication between a client and an attorney may be vitiated if either party conveys the substance of the communication to any nonprivileged third-party.<sup>165</sup> Voluntary disclosure of materials containing confidential information to a third

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factual investigation during the audit. Facilities wishing to preserve the attorney-client privilege for an audit must only utilize an attorney for his legal acumen, although the temptation is very strong to employ counsel at every stage of the audit. Interview with Jonathan Andry (Mar. 12, 1994) (notes on file with the *Tulane Environmental Law Journal*).

160. *But see In re Grand Jury*, 147 F.R.D. 82, 87 (E.D. Pa. 1992). In this case the district court held that environmental auditing material prepared by environmental consultants under contract with the law firm retained by the defendant corporation was not protected by the work product doctrine or the attorney-client privilege. The court did not find the labeling of the audit material as attorney-client communications or attorney work product persuasive. The court focused on the substance rather than form of the communications. The engineers had met with corporate officers outside the presence of the attorney. The environmental consultants and corporate officers had also met with state environmental officials without the attorney. *Id.* at 83-85.

161. This presumption is particularly warranted where the audit at issue is only a compliance audit. Compliance audits focus on whether the regulated facility has met its legal duties. Management audits appear to be conducted more for business purposes than for legal reasons since they focus on corporate structure and the flow of environmental information within that structure.

162. *Upjohn v. United States*, 449 U.S. 383, 392 (1981).

163. *Id.*

164. *United States v. United Shoe Machinery Corp.*, 89 F. Supp. 349, 358 (D. Mass. 1950).

165. *See Philadelphia Electric Co. v. Anaconda American Brass Co.*, 275 F. Supp. 146 (E.D. Pa. 1967) (holding that disclosure to a single third party waives the privilege).

party waives the attorney-client privilege.<sup>166</sup> Generally, once any part of a privileged communication is disclosed to a third party, the privilege is also waived for the undisclosed portion of the communication.<sup>167</sup>

Either the attorney or the client may implicitly waive the privilege. A party may implicitly waive the attorney-client privilege in subsequent litigation when he discloses information to the government during prior investigation or enforcement action.<sup>168</sup> An implied waiver occurred in *In re Subpoenas Duces Tecum*.<sup>169</sup> In that case, derivative suit plaintiffs demanded reports resulting from an internal investigation compiled by the defendant corporation concerning payments to foreign government officials.<sup>170</sup> The defendant had previously disclosed the reports from the investigation to the Securities and Exchange Commission (SEC) in exchange for prosecutorial leniency.<sup>171</sup> The corporation claimed that the attorney-client privilege protected the documents from discovery in the derivative action, but the court held that the defendants waived the privilege by providing the information to the SEC in the preceding prosecution.<sup>172</sup>

Holding that voluntary disclosure of environmental auditing materials to the federal government constitutes an implied waiver of the attorney-client privilege also discourages auditing. One of the claimed benefits of environmental auditing is lenient prosecutorial

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166. See, e.g., *Byrnes v. Jetnet Corp.*, 111 F.R.D. 461, 465 (M.D.N.C. 1986). If courts use an approach similar to the control group test when determining whether a corporate employee is a "client" or a "third party" in the waiver context, they may find that an in-house counsel waives the privilege by passing on auditing material to low level employees who need the information to make the audit effective. Such a broad interpretation of what constitutes a breach of confidentiality poses a serious threat to the application of the attorney-client privilege to environmental auditing material; it would also be inconsistent with the effect of *Upjohn*. Environmental auditing will only succeed if every employee necessary to assure compliance can both freely give and freely receive auditing materials. For an explanation of the control group test, see *supra* note 147.

167. See, e.g., *In re Martin Marietta Corp. v. Pollard*, 856 F.2d 619, 622-23 (4th Cir. 1988), cert. denied, 490 U.S. 1011 (1989); *In re Sealed Case*, 676 F.2d 793, 809 (D.C. Cir. 1982).

168. *Martin Marietta*, 856 F.2d at 622-23.

169. 738 F.2d 1367 (D.C. Cir. 1984).

170. *Id.*

171. *Id.* at 1370.

172. *Id.*

treatment upon voluntary disclosure of auditing material.<sup>173</sup> However, a regulated entity that takes advantage of this benefit places itself in a vulnerable position. Disclosure of auditing material by a company to a regulatory agency may open the door to discovery of the auditing material in subsequent private litigation. The risk of attracting a prolonged and expensive citizen suit or derivative action ending in a financially crippling judgment offsets any economic benefit from the prosecutorial leniency resulting from voluntary disclosure to the government.

Some appellate courts have held that the disclosure of internal reports to a regulatory agency does not amount to a waiver of the attorney-client privilege. In *Diversified Industries, Inc. v. Meredith*,<sup>174</sup> the Eighth Circuit Court of Appeals held that the disclosure to the SEC of reports from an internal investigation similar to the one at issue in *In re Subpoena Duces Tecum* did not constitute a waiver of the attorney-client privilege in a later action.<sup>175</sup> The court recognized that a finding of no privilege in this instance would “have the effect of thwarting the developing procedure of corporations to employ . . . counsel to investigate and advise them in order to protect stockholders, potential stockholders and customers.”<sup>176</sup>

Courts should also apply this reasoning to the environmental auditing process. Effective performance of an audit will protect the stockholders of a company from financial loss associated with environmental liability as well as protect the general public from attendant health hazards. For these reasons, the attorney-client privilege should protect environmental auditing material.

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173. EPA Auditing Policy, *supra* note 8, at 25,006.

174. 572 F.2d 596 (8th Cir. 1977).

175. *Id.* at 611.

176. The court also noted that its holding would not preclude private litigants from obtaining the same information through nonprivileged sources, *e.g.*, business documents or financial records. *Id.*

Applying the attorney-client privilege to environmental auditing material merely prevents a “learned profession [from] perform[ing] its functions on wits borrowed from the adversary.” *Hickman v. Taylor*, 329 U.S. 495, 516 (1947) (Jackson, J., concurring).

C. *Application of the Work Product Doctrine to Environmental Auditing Reports*

Although more limited in scope than the attorney-client privilege, the work product doctrine has a limited application in the environmental auditing context. Simply put, the work product doctrine shields from discovery material “prepared in anticipation of litigation.”<sup>177</sup> The work product doctrine was judicially created in the landmark case of *Hickman v. Taylor*<sup>178</sup> and codified in 1970 in the Federal Rules of Civil Procedure.<sup>179</sup> The doctrine as codified in the Rules of Civil Procedure is somewhat different, however, from the judicial formulation of work product in *Hickman*.<sup>180</sup> This inconsistency, along with the internal structure of Rule 26(b)(3), has led to the recognition of four different types of work product, each warranting varying degrees of protection from discovery.<sup>181</sup>

The four types of work product are: facts, ordinary work product, opinion work product, and legal theories. Facts contained within a document classified as work product are completely unprotected by Rule 26(b)(3), and may be discovered by deposition or interrogatory.<sup>182</sup> Legal theories found within work product also remain discoverable through interrogatories or requests for

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177. FED. R. CIV. P. 26(b)(3). The rule states:

[A] party may obtain discovery of documents and tangible things otherwise discoverable under . . . this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party’s representative . . . only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party’s case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means.

*Id.*

178. 329 U.S. 495 (1947).

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

180. Perhaps the most noticeable difference between the work product doctrine as stated in the rules and as formulated in *Hickman* is the scope of the protection. On its face, Rule 26(b)(3) protects the work product of both attorneys and nonattorneys, whereas *Hickman* only protects attorney work product. For a detailed discussion of the differences between the doctrine as stated in *Hickman* and in the Federal Rules, as well as an examination of the historical development of the work product doctrine, see *Special Project: The Work Product Doctrine*, 68 CORNELL L. REV. 760, 762-84 (1983).

181. *Id.* at 788-89.

182. See *Hickman v. Taylor*, 329 U.S. 495, 513 (1947); see also FED. R. CIV. P. 26(b)(3) advisory committee note, 48 F.R.D. 487, 501 (1970).

admission.<sup>183</sup> To obtain ordinary work product,<sup>184</sup> an adverse party must demonstrate undue hardship in obtaining a substantial equivalent of the information by other means.<sup>185</sup> Under the doctrine, opinion work product receives a higher degree of protection than does ordinary work product.<sup>186</sup>

Despite the ambiguities in the application of the work product doctrine, a party must meet three basic requirements to receive work product protection. The material must: a) consist of documents or tangible things; b) be prepared in anticipation of litigation or for trial; and c) be prepared by or for another party.<sup>187</sup> Applying these standards to environmental auditing material, parties may be able to successfully assert work product protection.

As a threshold issue, a court applying the work product doctrine must decide what type of work product the material represents. Classifying material as “opinion work product” is favorable because the category receives the highest degree of protection.<sup>188</sup> Much of the information contained in a final environmental auditing report may qualify as opinion work product. The Rules of Civil Procedure define “opinion work product” as a document which contains the “mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a

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183. FED. R. CIV. P. 33(b) and 36(a).

184. Rule 26(b)(3) implicitly distinguishes between ordinary and opinion work product. All materials not containing the mental impressions of attorneys are ordinary work product. *Special Project*, *supra* note 180, at 793. *See also In re Doe*, 662 F.2d 1073, 1076 n.2 (4th Cir. 1981) and *In re Murphy*, 560 F.2d 326, 334 (8th Cir. 1977) (noting the difference between opinion and ordinary work).

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

186. There is conflict between the courts as to whether opinion work product receives heightened or absolute protection under the Federal Rules of Civil Procedure. *See, e.g., Upjohn v. United States*, 449 U.S. 383, 400 (1981) (holding that a greater showing of need must be made for the court to order production of opinion work product); *Hickman v. Taylor*, 329 U.S. 495, 512-13 (1947) (holding that opinion work product should receive special protection); *see also Duplan Corp. v. Moulinage et Retorderie de Chavanoz*, 509 F.2d 730, 734-35 (4th Cir. 1974), *cert. denied*, 420 U.S. 997 (1975) and *In re Grand Jury Proceedings v. United States*, 473 F.2d 840, 848 (8th Cir. 1973) (holding that no showing of hardship shall overcome work product immunity for opinion work product).

187. *See* FED. R. CIV. P. 26(b)(3); *Hickman v. Taylor*, 329 U.S. 495, 510 (1947).

188. *See supra* note 187. Furthermore, a literal reading of Rule 26(b)(3) indicates that the entire document containing opinion work product is protected under the elevated standard; nevertheless, a court may, providing the other requirements of discovery are met, excise the opinion work product from a document and allow the remainder of the material to be produced. *See, e.g., Duplan*, 509 F.2d at 736.

party concerning the litigation.”<sup>189</sup> Courts have characterized materials ranging from notes of conversations with a witness to notebooks prepared during financial audits as opinion work product.<sup>190</sup>

The determination of whether a regulated facility has violated a pollution control statute will frequently require an attorney to advance a legal opinion or draw conclusions based on applying a statute to the facts contained in the audit. For example, if an attorney receives factual information during an environmental audit concerning the client’s handling of an industrial solvent by the client, the attorney will be required to determine whether the solvent is a substance regulated under Subtitle C of RCRA. The attorney must perform a complex legal analysis to conclude whether or not the solvent is in fact regulated.<sup>191</sup> This analysis requires the attorney to apply a great deal of law and regulatory material to the facts and reach an educated legal conclusion. As long as such analyses are present in the material sought through discovery, the reports should be classified as opinion work product.

Beyond classifying environmental auditing material as opinion work product, courts should extend absolute immunity from discovery to such materials. Extending absolute protection to auditing materials does not hinder the goals of open discovery.<sup>192</sup> Facts remain widely available in the area of environmental law. Disclosure of facts is a basic component of the various statutory

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189. FED. R. CIV. P. 26(b)(3). Courts tend to define opinion work product a little more colorfully. See *In re Doe*, 662 F.2d 1073, 1076 (4th Cir. 1981) (holding “opinion work product [is that which] contains those fruits of the attorney’s mental processes”).

190. See *In re Grand Jury Investigation*, 412 F. Supp. 943, 949 (E.D. Pa. 1976); *Berkey Photo, Inc. v. Eastman Kodak Co.*, 74 F.R.D. 613, 616 (S.D.N.Y. 1977).

191. For the controlling regulations, see 40 C.F.R. § 261.2 *et seq.* Basically, an attorney must first determine whether the solvent will meet the statutory definition of a solid waste. Then he must decide whether the substance will fall into a subtitle C exclusion or may be the subject of a variance. If the substance is a solid waste not subject to an exclusion or variance under the regulations, an attorney must then determine whether the solid waste is a hazardous waste. If the solid waste is not a listed hazardous waste, the attorney will then decide whether it exhibits one of the four criteria of a characteristic hazardous waste. The determination may also demand application of the “mixture” and “derived from” rules. *Id.*

Similar legal interpretations are required when determining whether a CERCLA-activating “release” has occurred. See, e.g., *Cose v. Getty Oil Co., et al.*, 4 F.3d 700 (9th Cir. 1993); *United States v. Alcan Aluminum Corp.*, 990 F.2d 711 (2d Cir. 1993).

192. See *supra* notes 122-125 and accompanying text.

permitting and reporting programs.<sup>193</sup> In private litigation, facts remain available through regular discovery channels, as do legal theories.<sup>194</sup>

Assuming the material from the environmental audit is in writing, the predominant issue arising when work product doctrine is asserted is whether the material was prepared for litigation.<sup>195</sup> Although some courts continue to rely on a policy-oriented analysis to resolve this question,<sup>196</sup> most courts employ a mechanical, fact-specific inquiry to determine whether documents were prepared in anticipation of litigation.<sup>197</sup> The fact specific approach is complicated by the court's numerous formulations of the "in anticipation of litigation" standard.<sup>198</sup>

A party asserting work product immunity for environmental auditing material has the burden of showing that the document was prepared in anticipation of litigation. However, the burden may be lower than the language of 26(b)(3) implies.<sup>199</sup> Perhaps most importantly in the environmental auditing context, materials prepared prior to the inception of litigation may be protected under the work

193. See, e.g., CAA, 42 U.S.C. § 7414; Emergency Planning and Community Right-to-Know Act, 42 U.S.C. § 11021-11223 (1988); CWA, 33 U.S.C. § 1318.

194. See *supra* note 112-113 and accompanying text.

195. *Hickman v. Taylor*, 329 U.S. 495, 511 (1947). Litigation includes various types of adversarial proceedings, such as an administrative trial.

196. See, e.g., *Virginia Elec. & Power Co. v. Sun Shipbuilding & Dry Dock Co.*, 68 F.R.D. 397, 401-06 (E.D. Va. 1975) (Holding that the work product doctrine did not apply, the court made no reference to the Federal Rules of Civil Procedure. Rather, they exclusively pursued the common law balancing approach). *Id.* The work product doctrine, like the attorney-client privilege, is justified by its social utility. Although the doctrine may at times hinder the maximization of facts and issue formulation, it is necessary to encourage thorough preparation of trial materials, an essential element in the successful operation of our adversarial system of justice.

197. See, e.g., *Coastal Corp. v. Duncan*, 86 F.R.D. 514, 522 (D. Del. 1980), and *United States v. AT&T*, 86 F.R.D. 603, 627 (D.D.C. 1979) (holding that a party asserting the work product immunity for certain documents must establish the fact that they were prepared in anticipation of litigation).

198. The critical language in the Federal Rules of Civil Procedure (b)(3) is "in anticipation of litigation." The *Diversified Industries* court advocates an arguably lower standard, requiring only a "prospect" of litigation to trigger the doctrine. *Diversified Industries, Inc. v. Meredith*, 572 F.2d at 624. The *Hickman* Court required only that the materials at issue be prepared "with an eye toward litigation." *Hickman v. Taylor*, 329 U.S. 495, 511 (1947).

199. See, e.g., *GAF Corp. v. Eastman Kodak Co.*, 85 F.R.D. 46, 51 (S.D.N.Y. 1979) (holding that documents which were prepared for use by the government in a separate investigation and for use in a trial were protected by the doctrine).



product doctrine.<sup>200</sup> Nonetheless, the inconsistent application of the “in anticipation of litigation” standard may be a disincentive to relying on the privilege to protect environmental auditing materials.

Courts generally look for a threat of suit or enforcement action when determining whether documents were prepared in anticipation of litigation.<sup>201</sup> *Herbert v. Lando* provides a clear example of what a court may perceive as a threat of litigation.<sup>202</sup> In *Herbert*, the trial court held that a magazine was prepared in anticipation of litigation when an article was released even after the interested party informed the publisher of several “discrepancies” in the article.<sup>203</sup> The court believed that the magazine was taking a prudent course of action by preparing for the potential defamation action which was eventually filed.<sup>204</sup>

Analogously, regulated facilities should be able to claim work product immunity for environmental auditing reports prepared in response to complaints of violation. If courts apply this standard, an official warning of violation issued by a government inspector may trigger work product immunity.<sup>205</sup> Perhaps a threatening letter from a powerful public interest group would have the same effect. It would be imprudent to assume that governmental and private organizations with legal resources will not follow such complaints with a lawsuit.

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200. See, e.g., *Thomas Organ Co. v. Jandraska Slobonda Plovidba*, 54 F.R.D. 367, 370-71 (N.D. Ill. 1972); *Sneider v. Kimberly-Clark, Corp.*, 91 F.R.D. 1, 6 (N.D. Ill. 1980); *Burlington Industries v. Exxon Corp.*, 65 F.R.D. 26, 43 (1974); *Fox v. California Sierra Financial Services*, 120 F.R.D. 520 (N.D. Cal. 1988).

201. See *supra* note 100. Timing is only a minor consideration when courts determine whether material was prepared in anticipation of litigation. See, e.g., *Sneider*, 91 F.R.D. at 6.

202. 73 F.R.D. 387 (S.D.N.Y. 1977), *rev'd on other grounds*, 568 F.2d 974 (2d Cir. 1977), *rev'd on other grounds*, 441 U.S. 153 (1979). In determining whether work product was prepared in anticipation of litigation, the court also requires a showing that the party asserting the privilege did not prepare the documents in the ordinary course of business. As one might expect, the determination of whether a document was prepared in the ordinary course of business varies from court to court. For example in *Thomas Organ*, the court concluded that “any report or statement . . ., which has not been requested by nor prepared for an attorney nor which otherwise reflects . . . an attorney’s legal expertise must be conclusively presumed to have been made in the ordinary course of business.” *Thomas Organ Co.*, 54 F.R.D. at 372.

203. *Herbert v. Lando*, 73 F.R.D. 387, 400-03 (S.D.N.Y. 1977).

204. *Id.*

205. Work product protection failed, however, to protect environmental auditing material prepared in *In Re Grand Jury Matter 91-832*, 147 F.R.D. 82 (E.D. Pa. 1992).

Application of the work product doctrine to environmental auditing material is limited by the “in anticipation of litigation” requirement. If environmental audits are being used as a proactive form of corporate environmental management, they are most likely not prepared in anticipation of litigation. Further, while the doctrine may be an effective shield for the opinion work product contained in a final auditing report,<sup>206</sup> it offers no protection for the underlying facts.<sup>207</sup> Courts may extend opinion work product protection to final auditing reports with extensive analysis of the underlying facts, as long as they were prepared in anticipation of litigation.

*D. Application of the Self-Evaluative Privilege to Environmental Auditing Materials*

*Bredice v. Doctor's Hospital, Inc.*,<sup>208</sup> is the seminal case in which a court applied the self-evaluative privilege. In *Bredice*, the court held that the minutes and reports of a hospital internal review board were protected from discovery in a wrongful death action.<sup>209</sup> The court found that the purpose of the review board meetings is the “improvement, through self-analysis, of the efficiency of medical procedures and techniques,” and reasoned that there was an “overwhelming public interest” in the hospital conducting strictly confidential self-analysis in these meetings.<sup>210</sup> Without confidentiality, the court reasoned, the hospital may be less candid in its handling of life or death matters, thus adversely affecting the health of the community.<sup>211</sup>

*Bredice* indicates that self-analytical material is privileged if there is a strong public interest in fostering a free exchange of information during the self-evaluation, and discovery of the material

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206. See *supra* notes 188-193 and accompanying text.

207. See *supra* note 186-188. Prosecutors and plaintiffs may desire auditing material disclosing the facts of the procedure more than the final audit report. Draft reports, audit check lists and protocols typically offer a more accurate portrayal of a corporation's compliance status. Final auditing reports generally cast the regulated entity in the most favorable light. Andry Interview, *supra* note 159.

208. 50 F.R.D. 249 (D.D.C. 1970).

209. *Id.* at 249. There is no indication that an attorney was part of the hospital review board, nor do any of the other cases applying the self-evaluative privilege require that an attorney participate in the internal review.

210. *Id.* at 250-51.

211. *Id.* at 250.

at issue would dampen self-evaluative efforts.<sup>212</sup> This policy analysis essentially tests whether applying the privilege to the case at bar satisfies Wigmore's utilitarian justification for privilege.<sup>213</sup>

Courts have slowly broadened the scope of the self-evaluative privilege. To date, courts have applied the privilege in three distinct areas: a) internal hospital reports;<sup>214</sup> b) equal opportunity compliance reports;<sup>215</sup> and c) some internal corporate accident investigations.<sup>216</sup> Courts have failed to recognize the privilege when discovery of self-evaluative material is sought by the government.<sup>217</sup>

The inapplicability of the self-evaluative privilege against the government defeated the privilege in the only environmental auditing case to date. In *United States v. Dexter*,<sup>218</sup> the EPA sought discovery of environmental auditing materials in a Clean Water Act civil enforcement action. In response to the discovery request, Dexter claimed the self-evaluative privilege, but the court compelled discovery pursuant to the Federal Rules of Civil Procedure.<sup>219</sup> The court's reasoning in the two page opinion was remarkably superficial. First, the court stated that Congress had already performed the public interest inquiry when it passed the Clean Water Act and decided that "there should be no discharges of oil or hazardous substances into or upon the navigable waters of the United States. . . ." <sup>220</sup> This statement, offered with no further explanation, completely begs the question. Even if Congress has identified a public interest in a statute, the courts must still determine whether that interest is

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212. *Id.*

213. See notes 124-125 *supra* and accompanying text describing the social utility of privilege.

214. See, e.g., *Bredice v. Doctor's Hospital, Inc.*, 50 F.R.D. 249 (D.D.C. 1970); *Gillman v. United States*, 53 F.R.D. 316 (S.D.N.Y. 1971).

215. See, e.g., *Webb v. Westinghouse Elec. Corp.*, 81 F.R.D. 431 (E.D. Pa. 1978); *O'Connor v. Chrysler Corp.*, 86 F.R.D. 211 (D. Mass. 1980).

216. See, e.g., *Richards v. Main Cent. R.R.*, 21 F.R.D. 590 (D. Me. 1957) and *Southern Ry. Co. v. Lanham*, 403 F.2d 119 (5th Cir. 1968) (holding that materials compiled in relation to railroad accidents were privileged for self-evaluation); *Dowling v. American Hawaii Cruises, Inc.*, 133 F.R.D. 150 (D. Haw. 1990) (holding that minutes of vessel's safety committee meeting were privileged in negligence suit brought under the Jones Act).

217. See, e.g., *Federal Trade Comm'n v. TRW, Inc.*, 479 F. Supp. 160, 162-63 (D.D.C. 1979) (holding with no explanation that the privilege is not enforceable against the government).

218. 132 F.R.D. 8 (D. Conn. 1990).

219. *Id.* at 8.

220. *Id.* at 9 (quoting 33 U.S.C. § 1321(b)(1)).

advanced by self-evaluation and whether a chilling effect on self-evaluation will result from discovery of the material at issue.<sup>221</sup>

The court also stated that privileging the environmental auditing material in this case “would effectively impede the [EPA] Administrator’s ability to enforce the Clean Water Act.”<sup>222</sup> This statement is only as persuasive as stating the obvious can be. When applied in a government action, all privileges impede the state’s ability to enforce the laws. It is up to the courts to determine whether such an imposition advances a socially desirable goal, such as compliance with pollution control statutes. Also, the fact that some aspect of judicial procedure impedes the government’s ability to enforce a law is no criticism. The Federal Rules of Evidence, the Federal Rules of Civil Procedure, and the United States Constitution all place requirements on the government that impede its ability to enforce the law.<sup>223</sup>

Again, the question is not whether the self-evaluative privilege impedes the government’s enforcement ability; it is whether an overriding public interest in keeping certain information confidential justifies that imposition. The EPA has recognized the benefits of environmental auditing.<sup>224</sup> Not applying the self-evaluative privilege to environmental auditing materials requested in agency enforcement actions will cast a chilling effect over self-policing efforts. Courts should construe the self-evaluative privilege to protect environmental auditing materials from discovery by government agencies.

The self-evaluative privilege should also protect environmental auditing material in private litigation. In *Bredice*, the court justified privileging the material at issue because it ultimately promoted the health of the community.<sup>225</sup> The promotion of public health is the stated policy motive of most pollution control statutes.<sup>226</sup> If environmental auditing helps promote compliance with these statutes, it ultimately advances the same compelling public interest in

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221. *Bredice v. Doctor’s Hospital, Inc.*, 50 F.R.D. 249, 250-01 (D.D.C. 1970).

222. *United States v. Dexter*, 132 F.R.D. 8, 9 (D. Conn. 1990).

223. If an imposition on the government’s ability to enforce the law were a valid policy criticism, then a court could legitimately overturn the hearsay rule, the rules governing service of process, and perhaps the Fourth, Fifth, and Sixth Amendments of the Constitution.

224. *See supra* Part III, section A.

225. *Bredice*, 50 F.R.D. at 250-51.

226. *See, e.g.*, Toxic Substances Control Act (TSCA), 15 U.S.C. § 2601(a)(2) (1988); CAA, 42 U.S.C. § 7401(a)(2); RCRA, 42 U.S.C. § 6901(b)(2).

the health of the population. Therefore, courts should not limit *Bredice* to its specific facts. The rationale for its holding is well tailored to support application of the self-evaluative privilege to environmental auditing material.

In sum, the self-evaluative privilege may be the most promising form of protection for environmental auditing materials. Companies generally perform audits for self-evaluative purposes. Thus the “anticipation of litigation” problem of the work product doctrine is avoided.<sup>227</sup> The self-evaluative privilege does not require an attorney to handle all of the material at issue. Finally, the policy arguments in favor of privileging environmental auditing material are strong since environmental statutes are so frequently couched in terms of their public health benefits.<sup>228</sup>

*E. Alternatives to “Common Law” Privileges*

Although the privileges which shield attorney-client communications, attorney work product, and materials prepared for self-evaluation from discovery may rationally be expanded to embrace environmental auditing materials, much uncertainty remains surrounding their application in this context. A federal statutory privilege for environmental auditing material would eliminate the uncertainty associated with the common law privileges and further the EPA’s policy promoting self-evaluation.

Oregon has passed a statutory privilege for environmental auditing material which may be an effective model for a federal statutory privilege.<sup>229</sup> Under the Oregon statute, environmental auditing reports<sup>230</sup> are privileged in criminal, civil, and administrative

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227. Those challenging the applicability of the self-evaluative privilege to environmental auditing material question whether audits are truly for self-evaluation or whether they are merely a type of insurance policy against enforcement actions. If audits are performed simply to maintain a “clean” reputation with the public and to keep EPA inspectors away, they may not be for self-evaluative purposes. Andry Interview, *supra* note 159.

228. *See supra* note 227.

229. Or. Laws Adv. Sh. No. 422 § 20. Governor Barbara Roberts signed the Oregon bill into law on July 22, 1993. At the time of the writing, Oregon courts had not addressed any claims of privilege under the statute.

230. An environmental audit report is defined by the statute as a set of documents, each labeled “Environmental Audit Report: Privileged Information” and prepared as a result of an environmental audit. An environmental audit is defined as a voluntary, internal,

proceedings.<sup>231</sup> Notably the Oregon statute does not require the involvement of an attorney to guarantee the protection of the privilege. In criminal proceedings, the prosecution may attain environmental auditing reports only upon a showing of one of the following: (a) the privilege is asserted for a fraudulent purpose;<sup>232</sup> (b) the material is not subject to the statutory privilege;<sup>233</sup> (c) the material shows evidence that illustrates noncompliance with either Oregon or federal environmental law and efforts to correct such noncompliance were not promptly taken;<sup>234</sup> or (d) the material contains evidence relevant to the breach of state criminal environmental provisions and the prosecution can show a compelling need for the material.<sup>235</sup> Discovering parties in a civil action may overcome the privilege with one of the first three showings available in criminal proceedings.<sup>236</sup> Also, in both the civil and criminal context, a party claiming the privilege may expressly or impliedly waive the privilege.<sup>237</sup> Once the privilege is waived for certain material, that material becomes discoverable.<sup>238</sup>

The procedural requirements for asserting and contesting the privilege are somewhat complex. A party seeking disclosure of the information has the burden of proving that the material was prepared for fraudulent purposes.<sup>239</sup> Where the material is sought by the state, the attorney general may attain the information under criminal search warrant, by subpoena, or through regular discovery channels upon a showing of probable cause.<sup>240</sup> Upon attaining the auditing reports, he or she must place them under seal and cannot review or disclose their

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comprehensive evaluation that is designed to identify and prevent noncompliance and to improve compliance with applicable environmental regulation. *Id.*

Audit reports may include the final report of the auditor, including field notes, observations, draft reports, photographs, etc., provided it is developed for auditing purposes. Audit reports may also include memorandums analyzing portions of the auditor's report, and implementation plans resulting from the audit. *Id.*

231. *Id.*

232. *Id.*

233. *Id.*

234. *Id.*

235. *Id.*

236. *Id.*

237. *Id.*

238. *Id.*

239. *Id.*

240. *Id.*

contents.<sup>241</sup> Within thirty days of the attorney general obtaining the environmental auditing report, the party responsible for the report must assert the privilege by petitioning the appropriate court for an *in camera* hearing to determine the applicability of the statute.<sup>242</sup>

A federal statutory privilege for environmental auditing reports similar to the Oregon law would have several positive effects. First, since an attorney is not required to participate in the audit process, the privilege would allow regulated facilities to audit without creating a bottleneck in their general counsel's office or incurring the expense of retaining an outside law firm. Auditing would then be more attractive, requiring less of the general counsel's valuable time or requiring fewer legal fees. Second, it would improve the administrative efficiency of the courts in the environmental law context by replacing frequent pretrial motion hearings with a simpler *in camera* review. Third, it would focus the legal arguments on the true problems associated with privileging environmental auditing material. Rather than squabbling about whether an audit was prepared "in anticipation of litigation," litigants would have to address whether the audit was fraudulent in nature or whether it was used to serve its ultimate purpose—assisting a regulated facility to comply with applicable environmental regulations. Perhaps more importantly, while a statutory privilege may not provide absolute uniformity among courts, it would promote a greater sense of predictability, thereby encouraging facilities to perform audits.

## VII. THE FUTURE OF ENVIRONMENTAL AUDITING

### A. *Environmental Auditing Trends*

Regardless of the liabilities associated with environmental auditing, the practice continues to expand. The present trend in auditing seems to be stricter auditing requirements, including some mandatory audit provisions. "Until recently, no environmental statute has contained 'self-auditing' requirements, although some [such as

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241. *Id.*

242. *Id.*

the RCRA and the Federal Water Pollution Control Act] contain self-monitoring and reporting requirements.”<sup>243</sup>

In 1986, there was discussion concerning the EPA’s decision not to mandate environmental auditing. Several commentators disagree with the rationale set forth in the EPA Auditing Policy Statement<sup>244</sup> and have proposed their own explanations for the EPA’s decision.<sup>245</sup> One article suggested that the EPA felt that mandating auditing was beyond its scope of “command-and-control.”<sup>246</sup> The EPA seems to believe management would develop more effective auditing programs if it did so voluntarily.<sup>247</sup> Other commentators proposed that the EPA found the task of creating uniform standards too difficult, given the diversity of approaches of management procedures within companies.<sup>248</sup> It seems the EPA was convinced that if left alone, corporations would develop their own effective environmental auditing programs.<sup>249</sup> The development of such programs has not occurred, however, and Congress has taken steps toward forcing the EPA to implement auditing requirements.

For example, the Senate recently passed the Violent Crime Control Act of 1991.<sup>250</sup> This act included an amendment by Sen. Harris Wofford (D-Pa.) mandating federal courts when sentencing a company for a criminal violation of any environmental statute to require the company to pay for an environmental audit.<sup>251</sup> The court must appoint an independent expert to conduct the audit, to find the source of the violation, and to recommend a solution for the problem.<sup>252</sup> The company must then implement all “appropriate” audit recommendations. The legislation fails to define the cost and the duration of the audit. Therefore, courts could require audits to

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243. David J. Freeman & Carolyn C. Cunningham, *The Environmental Audit: Management Tool or Government Weapon?*, N.Y. L.J., Dec. 30, 1991, at Outside Counsel 1.

244. EPA Auditing Policy, *supra* note 8.

245. Van Cleve, *supra* note 7, at 1221.

246. *Id.* (citing Blumenfeld & Haddad, *The Responsibility of Regulators*, in THE MCGRAW-HILL ENVIRONMENTAL AUDITING HANDBOOK 5-3 (McGraw-Hill Book Company 1984)).

247. *Id.*

248. *Id.*

249. *Id.*

250. H.R. 3641, 101st Cong., 1st Sess. (1987).

251. *Id.*

252. *Id.*



cover all the activities of a company worldwide, instead of limiting the scope of the audit to the area where the violation occurred.<sup>253</sup>

The new Clean Air Act Amendments also contain certain auditing requirements.<sup>254</sup> “Under Title V, . . . permittees must ‘certify’ their compliance with all applicable emission provisions in the permit applications and in annual submissions to the agency while operating under a permit.”<sup>255</sup> A “responsible corporate official” must sign and verify the accuracy of the certifications.<sup>256</sup> “Under the Amendments, EPA may compel compliance certifications at other intervals from any regulated source operator and may require stationary air source operators and anyone who has ‘relevant’ knowledge to perform audits.”<sup>257</sup>

The Clean Water Act reauthorization bill also contains a provision requiring National Pollutant Discharge Elimination System permittees<sup>258</sup> and companies required to report under § 313 of the Emergency Planning and Community Right-to Know Act to perform environmental auditing.<sup>259</sup> Congress intended these auditing provisions to increase compliance by making companies aware of their noncompliance areas. The EPA would schedule the audits and certify the auditors.<sup>260</sup> Audit reports would be returned to the government and the information from the reports would be used to modify permits.

Several states have issued their own policies on auditing. On May 15, 1992, the New Jersey Environmental Prosecutors issued the New Jersey Voluntary Environmental Audit/Compliance Guidelines.<sup>261</sup> These guidelines provide that the prosecutor may be more lenient in prosecuting environmental violations if a company

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253. *Id.*

254. *See* 42 U.S.C. § 7661 (1988).

255. *The Environmental Audit*, *supra* note 244 (citing 42 U.S.C. § 7661(b)(2) (1988)).

256. *Id.*

257. *Id.*

258. Under the Clean Water Act, all discharges of wastes into U.S. waters from point sources must be allowed by a NPDES permit which provides pollutant limitations, reporting and monitoring requirements, and prohibitions. L. Lee Harrison, *in A Guide to Corporate and Environmental Risk Management*, THE MCGRAW-HILL ENVIRONMENTAL AUDITING HANDBOOK 2-29 (McGraw-Hill Book Company 1984).

259. S. REP. NO. 1081, 102d Cong., 1st Sess. 25 (1988).

260. *Id.*

261. Lynn L. Bergeson, *Compliance Audits are the Key to Staying out of Court; The Writing is on the Wall*, CORP. LEGAL TIMES, Nov. 1992, at Environmental Issues 17.

performs voluntary audits. This is very similar to the U.S. Sentencing Commission Sentencing Guidelines, in which corporations with audit programs are eligible for reduced sentences.<sup>262</sup> In addition, a group of industry representatives have been preparing legislation that would grant immunity to organizational defendants if they fully complied with the guidelines.<sup>263</sup>

Another sign of the move towards mandatory auditing is the contractor listing sanction.<sup>264</sup> Under the Clean Air Act and Clean Water Act, the EPA may bar entities guilty of criminal or civil violations from entering into federal assistance agreements or receiving federal loans.<sup>265</sup> The two listing categories in which these statutes place violators are mandatory and discretionary.<sup>266</sup> EPA must list a company if it commits a criminal violation under Section 113(c)(1) of the Clean Air Act or Section 309(c) of the Clean Water Act.<sup>267</sup> Section 705 of the Clean Air Act Amendments of 1990 expanded the scope of the listing sanction to include all facilities that the company owns, not just the one where the violation occurred.<sup>268</sup> The EPA has “vowed to use this powerful mechanism more often in the future. EPA is especially keen on exercising its discretionary listing and debarment enforcement mechanisms.”<sup>269</sup>

These new regulations represent a major change for companies. Auditing is becoming more standardized, and may soon be mandatory. Companies may no longer have the option to determine whether environmental auditing is in its best interest.

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262. U.S. Sentencing Commission Organization Guidelines and U.S. Department of Justice Policy Statement on Environmental Criminal Prosecution, C778 ALI-ABA 50. *See supra* text accompanying notes 30-48 (discussing more lenient penalties for companies who audit).

263. Bergeson, *supra* note 267.

264. CAA, 42 U.S.C. § 113(c)(1) & CWA, 33 U.S.C. § 309(c).

265. *Id.*

266. *Id.*

267. *Id.*

268. *Id.*

269. *Id.*

*B. The Emergency Planning and Community Right to Know Act as a Model for Implementing Environmental Auditing into other Federal Statutes*

The Emergency Planning and Community Right to Know Act (EPCRA)<sup>270</sup> may serve as a model for other federal statutes to implement a mandatory auditing policy. It requires corporations to disclose information about their activities with respect to possible environmental violations.<sup>271</sup> EPCRA requires state and local governments to develop response plans for chemical leaks and emergency situations.<sup>272</sup> The purpose of the disclosure requirement is to make the public aware of any possible risks to safety and health.

EPCRA also requires environmental audits from companies which produce hazardous chemicals. These audits must contain information about the chemicals and any releases, as well as accident risks.<sup>273</sup> Even though the reporting requirement only applies to certain chemicals, it applies to some chemicals that are otherwise unregulated.

EPCRA requires that each company file a report with the state and local authorities for each chemical it manufactures, uses, handles, or disposes.<sup>274</sup> This report must fully describe the characteristics of the chemical, including its carcinogenicity and physical health hazards, the primary routes of entry, the permissible exposure limit, appropriate precautions, emergency first aid procedures, and the name, address, and telephone number of the manufacturer.<sup>275</sup>

Finally, the companies must also file an annual chemical release form with the EPA stating how much of each listed chemical is present at its facility.<sup>276</sup> All information submitted to the government under this regulation is available to the public.<sup>277</sup> The Act provides protection only for trade secrets.<sup>278</sup>

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270. 42 U.S.C. § 11003 (1988).

271. *Id.*

272. *Id.* §§ 11021, 11022.

273. *Id.* § 11004.

274. *Id.* § 11021.

275. 29 C.F.R. § 1910.1200(g); H.R. REP. NO. 253, 99th Cong., 1st Sess. 116 (1985), reprinted in 1986 U.S.C.C.A.N. 2835, 2898. See also Herz, *supra* note 64, at 1253.

276. 42 U.S.C. § 11023.

277. *Id.*

278. *Id.* § 11042.

Similar to voluntary environmental auditing programs, companies are concerned about the lack of a confidentiality requirement in the EPCRA program.<sup>279</sup> If the public and enforcement agencies have access to records containing violations, companies face a great risk that enforcement actions will ensue.

On one hand, audits will help companies to recognize areas of noncompliance and provide prosecutorial leniency. On the other hand, with no promise of nondisclosure, companies could expose themselves to increased liability.

*C. Alternative Environmental Auditing Policies: Economic Incentives and Tradeable Emission Rights*

One alternative to government enforcement is industry self-regulation. The meat and poultry industry has adopted this approach.<sup>280</sup> Demonstrating the potential seriousness of self-regulation as a possible enforcement mechanism, the Administrative Conference of the United States issued a request for proposals for a research project on this topic.<sup>281</sup> This shift towards self-policing is consistent with the 1980's emphasis on deregulation.<sup>282</sup>

Another trend in environmental regulation is regulatory schemes based on economic incentives and tradeable emissions rights.<sup>283</sup> These programs involve practices such as marketable permits and offset programs. There are several current examples of this trend including the Montreal Protocol's phasing down chlorofluorocarbon production,<sup>284</sup> the Clean Air Act's "bubble

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279. Herz, *supra* note 64, at 1254.

280. *Id.* at 1259.

281. *Id.* at 1259 n.103 (citing Administrative Conference of the United States, Possible Administrative Conference Research Projects, Item 13 ("Use of Audited Self-certification") (distributed Aug. 1990)).

282. *Id.* "If present environmental self-assessments and the new emphasis on environmental management can establish companies' ability to monitor their own activities effectively, environmental protection would be a logical candidate for increased reliance on self-regulation." *Id.*

283. *Id.*

284. 40 C.F.R. § 82 (1990).

policy,”<sup>285</sup> and the acid rain provisions in recent Clean Air Act amendments.<sup>286</sup>

The difficulty for companies in these programs is their dependence on accurate information about emissions and plant operations.<sup>287</sup> Companies must keep extensive records to keep track of the allowances. An advantage of these programs is that participants have a great incentive to ensure accurate monitoring and reporting by the other participant in order to protect their investments.<sup>288</sup> This results in more thorough monitoring and information gathering which benefits citizens and the company.<sup>289</sup>

Another advantage is that these programs allow managers to achieve their goals in an efficient manner.<sup>290</sup> “Precisely because the regulations do not specify a complete and unbending set of requirements, managers will have to determine the optimal approach for themselves. Managers who are poorly informed, uninterested, or unimaginative will be unable to take advantage of the opportunities offered by such regulatory schemes, which rest on the premise that managers are engaged and inventive.”<sup>291</sup>

The government should consider these options in addition to mandatory auditing requirements. This process is still relatively new and developing policies that work will take time. The best method may vary with the regulation and with the type of corporation, especially considering the diversity within industries.

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285. The bubble policy allows an emissions increase from a new source if there is a corresponding decrease in emissions from an old source. See *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

286. See Herz, *supra* note 64, at 1260.

287. *Id.*

288. *Id.*

289. See *supra* notes 68-86 and accompanying text (discussing auditing helping companies to remain in compliance).

290. *Id.*

291. Herz, *supra* note 64, at 1260. Incentive programs reward effective managers because the more the emissions rate is reduced, the more profits can be made through the sale of these rights. This encourages emissions to be reduced as far as economically possible. *Id.* at 1261. “Incentive-based environmental regulatory schemes fall into two basic categories: (1) “pollution taxes” or per unit charges for emissions and (2) tradeable emission rights.” *Id.* at 1261 n.112.

## VIII. STANDARDIZATION OF AUDITING REQUIREMENTS AND PROCEDURES

As discussed above, environmental auditing has become a standard practice for many American companies. It has been estimated that one-half of the Fortune 500 companies conduct environmental audits.<sup>292</sup> As the use of environmental audits increase, the question arises as to how to evaluate the adequacy of these audits. In other words, should the EPA establish standards that each audit must meet or should all audits follow a set format? As of yet, neither government nor industry has agreed upon a standard. Several groups have formulated ideas as to what they want environmental audit standards to be.<sup>293</sup> Others have resisted standardization due to industry diversity. Such conflicting views makes the task of setting standards very difficult.

The Environmental Auditing Roundtable (EAR) is one of the most prominent organizations developing standards for auditing. The EAR, which represents approximately 100-150 organizations, claims to be dedicated to "furthering the development and professional practice of environmental, health, and safety auditing."<sup>294</sup> It has formulated some general standards which EAR members believe are necessary to conduct an effective audit.<sup>295</sup> These guidelines serve as an example of one type of standardized auditing process.

According to EAR, the auditor is crucial to the auditing process.<sup>296</sup> There are three basic qualities EAR believes an auditor must possess. First, the auditor must be proficient in conducting the audit and analyzing the results.<sup>297</sup> This means he must have "adequate qualifications, technical knowledge, training, and proficiency in the discipline of auditing to perform his assigned audit tasks."<sup>298</sup> Second, the auditor must exercise due care in performing

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292. David F. Sand & E. Ariane van Buren, *Environmental Disclosure and Performance: The Benefits of Standardization*, 12 CARDOZO L. REV. 1347, 1351 (1991).

293. The Environmental Auditing Roundtable has done extensive work formulating such standards. It has a large and active body of members which are concerned with auditing policies. ENVIRONMENTAL AUDITING ROUNDTABLE, STANDARDS FOR PERFORMANCE OF ENVIRONMENTAL, HEALTH, AND SAFETY AUDITS (1993).

294. *Id.*

295. *Id.*

296. *Id.*

297. *Id.*

298. *Id.*

the audit. This means he must “assur[e] accuracy, consistency, and objectivity in the performance of audits; us[e] good judgment in choosing tests and procedures; [develop] conclusions, and if necessary, recommendations; and prepar[e] reports.”<sup>299</sup> Finally, the auditor must be “objective and independent of the audit site and/or activity to be audited, free of conflict of interest in any specific situation, and not subject to internal or external pressure to influence their findings.”<sup>300</sup>

The EAR offers several elements necessary in actually conducting the audit. The objectives of the audit should be clear, specific, and consistent with the needs of the recipients.<sup>301</sup> Audits should be based on a set of systematic plans that “provide uniform guidance in audit preparation, field work, and reporting.”<sup>302</sup> Fieldwork should be properly planned, implemented, and supervised in order to encourage consistency and to achieve the objectives of the audit.<sup>303</sup> In addition, audits must have quality checks to maintain accurate results and to improve the auditing procedure.<sup>304</sup> Finally, all the work conducted during the auditing process must be fully documented.<sup>305</sup>

To complete the audit, the auditor must prepare a formal report which addresses the objectives of the investigation.<sup>306</sup> “Reports should clearly communicate information and findings in a timely manner to the intended recipients, and in sufficient detail and clarity to facilitate corrective action.”<sup>307</sup> An auditor may include his own opinion on the overall status of the facility if the opinion is consistent with the audit’s objectives.<sup>308</sup> The EAR standards also include a code of ethics.<sup>309</sup>

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299. *Id.*

300. *Id.*

301. *Id.*

302. *Id.*

303. *Id.*

304. *Id.*

305. *Id.*

306. *Id.*

307. *Id.*

308. *Id.*

309. The Code of Ethics includes both standards of professional conduct and proper conduct for members of the Environmental Auditing Roundtable. *Id.*

The EAR standards are general and nontechnical. These characteristics allow implementation over a wide variety of types of corporations.<sup>310</sup> Companies vary greatly on how they combine their environmental management program with their organizational structure. A more specific set of guidelines may prevent certain types of companies from achieving compliance.

The EAR standards have not been officially adopted, but many companies use them to model their own environmental auditing program. In addition, because the program is well known and favored by so many organizations, the EAR may have a good deal of influence with the EPA when the EPA renews its auditing policy.

Several other organizations have developed their own auditing standards. The National Standards Foundation is working with the Canadian Standards Association to produce a North American standard.<sup>311</sup> These organizations are using EAR's standards as a base and modifying them to incorporate documents from other environmental audit standards.<sup>312</sup>

Bill Yodis, the president of EAR who is also working with the other two groups, has stated that "[t]he hope, from a practitioner's point of view is that we'll get something useful out of this."<sup>313</sup> One of the most useful things that these guidelines could achieve, if uniformly adopted, is that audits would all be of a standardized quality. To take it a step further, auditors could be required to be certified through a certification board or process. Such a requirement would encourage similar results whether the auditors were appointed by the EPA or by a company.

## IX. CONCLUSION

Environmental auditing is now a widespread practice among the regulated community. Compliance with the elaborate scheme of environmental regulation requires near constant analysis of compliance by technical experts and attorneys. Unfortunately, there are still potential problems associated with performing audits. The

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310. *Id.*

311. *Environmental Auditing Standards Update*, 7 BUSINESS AND THE ENVIRONMENT 4 (July 1993).

312. *Id.*

313. *Id.*



lack of auditing standards, the often exorbitant cost of an audit, and the possibility that an audit may be a source of legal liability all stand as disincentives to environmental auditing. Industry and government should actively pursue universal standards for auditing as well as statutory privileges to protect auditing materials. Like other aspects of environmental law, auditing must be governed by clearer rules and more predictable standards.

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