Environmental Audits: Barriers, Opportunities and a Recommendation

Keith M. Casto
Tiffany Billingsley Potter

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I. Introduction

Regulated entities conduct "environmental audits" to comprehensively evaluate their facilities, operations and procedures in order to achieve compliance with applicable environmental regulatory requirements. Moreover, companies of all types and sizes increasingly emphasize international environmental standards. Certification to international environmental standards can help certifying companies avoid trade barriers and achieve environmental compliance. The present focus for most industries is on the ISO 14000 series of international environmental management standards, referred to as "ISO 14000."2

Although environmental audits may take many forms, the two most common are compliance audits and management audits. A compliance audit is an investigation by internal or external environmental specialists of a facility's compliance with applicable environmental laws and regulations and the identification of non-regulatory environmental liability risks. A management audit consists of reviewing the managerial risk control systems and procedures used by the corporation or facility to detect and remedy possible violations and potentially problematic environmental conditions.3 Often, a company voluntarily con-

1 The United States Environmental Protection Agency (EPA) defines "environmental audits" as "systematic, documented, periodic, and objective reviews by regulated entities of facility operations and practices related to meeting environmental requirements." EPA Environmental Auditing Policy Statement, 51 Fed. Reg. 25,004 (1986).

2 ISO 14000 is a series of environmental management standards that consist of voluntary standards and guideline reference documents addressing environmental management systems, environmental audits, eco-labeling, environmental performance evaluations, life cycle assessment and environmental standards for products.

ducts a management audit to review environmental compliance and risk control measures. Management auditing is often an integral part of an entity's overall environmental management system (EMS). An EMS that includes voluntary management auditing, such as that contemplated by the ISO 14000 standards, can be an effective means for a regulated entity to achieve long-term compliance through preventative environmental management.

Such preventative environmental management can be vitally important because, under the current "command and control" environmental regulatory scheme, violations of applicable regulatory requirements can result in severe legal sanctions such as penalties, fines, injunctions, government contract debarment for corporate offenders, and even incarceration and fines for individual corporate officers, directors, shareholders and employees. This increasing stringency, complexity and volume of regulatory requirements and enhanced penalties for criminalization of violations compel careful self-analysis by regulated entities in order to avoid liability for non-compliance.

Yet, at the same time, there is currently a strong disincentive to undertake environmental auditing because of the potential discoverability by government agencies and third parties of incriminating information and documents generated as a result of environmental audits, and the potential use of the information and documents in civil or criminal enforcement actions and civil tort or cost recovery litigation. Information generated by environmental audits may become self-incriminating evidence in a later governmental regulatory enforcement action addressing problems such as regulatory violations, releases of hazardous substances, failures to comply with permits, or historical contamination, even if the discovered violations are ultimately rectified prior to enforcement.

Environmental audits undertaken for the purpose of uncovering and correcting environmental, health and safety problems actually may increase the risk of civil litigation or criminal prosecutions. Audit results may prove constructive (or actual) prior knowledge of non-compliance, heightening the risk and magnitude of criminal liability under some environmental statutes. These potential disincentives for environmental auditing make the issues of environmental "audit privilege," or potential immunity resulting from the environmental audit process, timely and important. In fact, such protections relative to environmental audit results are one of the most hotly

4. The ISO standards have become an affirmative marketing benchmark for suppliers and manufacturers; eventually the ISO 14000 environmental standards may become an absolute condition precedent to participation in the global market. Moreover, voluntary compliance and performance audits may be required for certification under ISO 14000. For a discussion of ISO 14000, see Christopher L. Bell, ISO 14001: Application of International Environmental Management Systems Standards in the United States, 25 ENVT. L. REP. 10678 (1995).

5. In addition, environmental site assessments, a distinct form of environmental audits, represent an environmental evaluation focused on the presence of soil or groundwater contamination (rather than compliance with ongoing regulatory requirements). Environmental site assessments usually occur in connection with a transaction, such as the acquisition of property or the refinancing of a loan on real property, rather than as an ongoing process of self-evaluation. The primary driving force for the environmental assessment is the harsh liability scheme of strict, joint and several liability for owners of contaminated property pursuant to the Comprehensive Environmental Response Compensation and Liability Act, 42 U.S.C. § 9601 et seq. [hereinafter CERCLA] CERCLA imposes on all purchasers of real property the choice to investigate potential hazardous contamination, or risk the attendant liability. While CERCLA's liability scheme is harsh, the statute provides an affirmative defense for "innocent" purchasers of real property who have engaged in "all appropriate inquiry" into the condition of the property and have no reason to know of the contamination. The due diligence standard by which the "innocence" of a purchaser is measured is based on the facts and circumstances of each case. Thus, the environmental site assessment is part and parcel of every industrial and commercial real estate transaction.


debated issues arising from ISO 14000.  

Recently, environmental policy has begun to recognize the distinct benefits of encouraging voluntary environmental audits. This recognition has forced policy makers to address the tension between performance of audits and the legal/regulatory disincentives involved in disclosure of audit results. A number of states have also recognized the importance of encouraging environmental auditing by passing legislation that provides either some level of privilege for audit results, immunity for the audited entity, or both. Although similar federal legislation has been proposed, it has so far failed to be enacted into law.

These so-called “audit privilege statutes” recognize the shortcomings of traditional privileges of attorney-client, attorney work product and “critical self-analysis” in protecting the results of environmental audits. The statutes attempt to encourage environmental auditing through a combination of audit privilege and, in some cases, limited immunities.

The question arises whether an audit privilege against disclosure is the appropriate remedy to facilitate auditing, since dissemination of audit results is an inherent function of all types of environmental audits and EMSs. At the same time, real incentives must be provided for regulated entities who undertake voluntary environmental auditing as part of an EMS, and act upon the results of those audits to achieve and maintain compliance.

II. Federal Environmental Policies Regarding Environmental Audits

A. EPA Audit Policy

The Environmental Protection Agency (EPA or Agency) made its first official pronouncement on environmental auditing on July 8, 1986. This policy was clarified in July, 1994 and, again, in April, 1995. On December 22, 1995, EPA issued its final audit policy statement which became effective January 22, 1996. The policy’s stated goal is the “protection of human health and the environment by encouraging regulated entities to voluntarily discover, disclose, correct and prevent violations of federal environmental requirements.”

The policy attempts to achieve this goal by providing incentives in the form of a waiver of “gravity-based” penalties for violations of federal environmental requirements where the violations are discovered and disclosed through an environmental audit or an EMS. Under the policy, gravity-based penalties will be reduced 75 percent for voluntary discovery and prompt disclosure of violations, even if the violation is not discovered through an audit or a “compliance management system.”

In order to qualify for the EPA incentives for self-policing (e.g., a reduction in penalties), the regulated entity must establish that it satisfies the following nine conditions spelled out in section D of the policy:

9. Under ISO 14011, the purpose of the environmental audit is to evaluate the effectiveness of the company’s environmental management system. Such self-evaluation can generate particularly sensitive information relating to compliance with applicable regulatory requirements or evidence of misconduct or fault for purposes of private party litigation.


15. EPA’s current policy defines “environmental audit,” as in the 1986 policy, as “a systematic, documented, periodic and objective review of regulated entities of facility operations and practices related to meeting environmental requirements.” Id. see also 51 Fed. Reg. at 25006.

16. Incentives supra note 13 at 66707.
1. the violation must be discovered through "systematic discovery," namely (a) an environmental audit; or (b) an objective, documented, systematic procedure or practice reflecting the regulated entity's "due diligence"\footnote{See id. at 66710-11.} in preventing, detecting and correcting violations;

2. the discovery must not be legally mandated (e.g., it must not be an emissions violation detected through a continuous emission monitor, or a detected violation of the National Pollutant Discharge Elimination System (NPDES));\footnote{See id. at 66709.}

3. the disclosure must be prompt (i.e., within ten days, in writing);\footnote{See id.}

4. the discovery and disclosure must be independent of government or third party plaintiffs;\footnote{See id.}

5. correction of the violation must be made within sixty (60) days, or else the regulated entity must file notification that more than sixty (60) days are needed for corrections;\footnote{See id.}

6. there must be an agreement in writing to take steps to prevent a recurrence of the violation, which may include improvements in environmental auditing or due diligence efforts;\footnote{See id.}

7. there must be no "repeat violations" (i.e., the specific violation must not have occurred previously within the past three years at the same facility, or be a part of a pattern of federal, state, or local violations by the facility's parent organization which has occurred within the past five years);\footnote{See id.}

8. the violation must not be one which (a) resulted in serious actual harm or may have presented an imminent and substantial endangerment to human health or the environment; or (b) violated the specific terms of any judicial or administrative order or consent agreement;\footnote{See id. at 66707.} and

9. the regulated entity must cooperate with EPA by providing such necessary information and requested by EPA in investigating the violation, including any noncompliance problems related to the disclosure and any environmental consequences related to the violations.\footnote{See id.}

Under the policy, EPA retains full discretion to recover any economic benefit gained as a result of noncompliance in order to preserve a "level playing field" in which violators do not gain a competitive advantage over other compliant regulated entities.\footnote{See id. at 66708.} Notably, the policy provides that EPA may forgive the entire penalty for violations from entities which meet all of the above nine conditions of section D, and which, in the Agency's opinion, do not merit penalties due to the insignificant amount of economic benefit gained.\footnote{See id.}

In section C of the policy, EPA reiterates its practice of not recommending criminal prosecution of a regulated entity when knowledge of the violation is based on voluntary disclosure or when violations are discovered through audits and disclosed to the government before an investigation is already underway.\footnote{See id. at 66707.} This practice, however, is limited to "good actors," and does not apply, for example, to individuals where corporate officials are consciously involved in, or willfully blind to, violations or conceal or condone non-compliance.\footnote{See id.} Further, the regulated entity must satisfy all nine conditions of sec-
tion D of the policy in order to avoid being recommended for criminal prosecution. Therefore, when a company has met the conditions for avoiding a recommendation for criminal prosecution under the policy, the company also will not face any civil liability for gravity-based penalties because the same conditions for discovery, disclosure and correction apply in both cases.

The EPA final policy restates its oft-repeated policy that it will not request or use an environmental audit report to initiate a civil or criminal investigation of the entity. EPA retains the ability, however to seek the factual information which might go into such an audit report.

Importantly, too, in section F, EPA restates its firm opposition to statutory environmental audit privileges that, in EPA's opinion, "shield evidence of environmental violations and undermine the public's right to know." EPA also restates its opposition to "blanket immunities" for violations that reflect criminal conduct presenting serious threats or actual harm to health and the environment, and/or for violations which allow non-complying companies to gain economic advantage. EPA indicates that it will work with states to address provisions of state audit privilege or immunity laws that are inconsistent with the EPA policy. EPA expressly reserves the right, however, to take necessary actions to protect public health by enforcing violations of federal law. In the final policy, EPA "backed off" from its 1995 interim policy statement that it would scrutinize enforcement more closely (and increase enforcement) in states with audit privilege laws.

If a violation is discovered through a "systematic procedure or practice" that is not an audit (e.g., an EMS), the regulated entity will be asked to document how its program reflects the criteria for due diligence as defined in section B of the policy. EPA may require that a description of the regulated entity's due diligence efforts be made publicly available as a condition of penalty mitigation.

B. EPA's Criminal Enforcement Policy

On October 1, 1997, EPA's Office of Criminal Enforcement, Forensics and Training (OCEFT) published a memorandum discussing the principles guiding EPA's exercise of investigative discretion with respect to voluntarily disclosed potential criminal violations. The memorandum issued by the Director of OCEFT has three stated purposes (1) it is designed to parallel the nine conditions outlined in the Self-Policing Policy, (2) it explains how those conditions apply to criminal cases, and (3) it provides guidance for consistent consideration of requests for relief under the Policy.

Pursuant to the OCEFT policy, if a party requests relief for disclosure relating to potential criminal violations, that request is considered by OCEFT's Voluntary Disclosure Board. After considering the request and applying the OCEFT policy, the Board makes a recommendation to a Deciding Official for the violation. The Deciding Official then makes a final recommendation to the appropriate United States Attorney's Office.

31. See id.
32. See id. at 66708.
33. See id.; see also Memo from Steve Herman, Assistant Administrator, Confidentiality of Information Received Under the Agency's Self-Disclosure Policy (visited Apr. 13, 1999) <http://ies.epa.gov/oeca/sahmemo.html>.
35. See Incentives, supra note 13, at 66712.
36. See id.
37. Compare Incentives, supra note 13, at 66712 with Interim Policy, supra note 13 at 16878.
38. See Incentives, supra note 13, at 66711.
39. See id.
41. See id.
42. See id.
43. See id.
44. See id.
The OCEFT memo discusses each of the nine conditions contained in the EPA Self-Policing Policy and provides for the specific application of each condition in criminal cases. The OCEFT policy is substantially similar to the EPA Self-Policing Policy. Notably, however, the OCEFT policy provides for consideration of "any good faith disclosure" made before a criminal investigation is started, not just those reported pursuant to an "environmental audit" or a "due diligence" program. In addition, the OCEFT policy clarifies that, if an entity claims a privilege applies to protect information contained in an audit or due diligence program, the privilege must be asserted in good faith.

C. Draft Sentencing Guidelines

In November, 1993, the United States Sentencing Commission promulgated its "Draft Corporate Sentencing Guidelines for Environmental Violations." When finalized, these guidelines will be used by the federal judiciary in imposing sentences on convicted defendants by the United States Attorneys in fashioning plea bargains. In order to avoid aggravation of the "base offense level," an organization must document the existence of some form of program or other organized effort to achieve and maintain compliance. Conversely, to establish a basis for aggravation of the base offense level, the prosecution has the burden of demonstrating that "the organization substantially failed to implement a program or other organized effort to achieve and maintain compliance." The proposed guidelines move beyond the policy statements of EPA and the Department of Justice (DOJ) to describe in detail the specific components of a "minimum" corporate environmental compliance program.

One of the mitigating factors under the guidelines is a "commitment to environmental compliance," which includes the following elements:

1. Management attention to compliance;
2. Integration of environmental policies, standards and procedures;
3. Auditing, monitoring, reporting, and tracking system;
4. Regulatory expertise, training and evaluation;
5. Incentive to compliance;
6. Disciplinary procedures;
7. Continuing education and improvement;
8. Additional innovative approaches.

More specifically, with respect to auditing systems, the organization must design and implement systems and programs designed to ensure that: (1) facilities comply with applicable environmental regulations; (2) facilities or specific operations that present a significant risk to the environment are continuously monitored on-site; (3) an internal reporting system is instituted which allows employees to notify appropriate personnel of potential non-compliance; (4) a system is instituted which tracks responses to identified compliance issues; and (5) there are continual independent evaluations of compliance in operations with a history of non-compliance, or where the organization reasonably believes a potential problem exists.

45. See id.
46. See id.
47. See id.
49. Sentencing Guidelines, supra note 48, at § 9Cl.2(a).
50. Id. at § 9Cl.1(l).
51. Compare Sentencing Guidelines, at § 9DL1 with Incentives, supra note 13, at 66710 (defining of "environmental audit" and "due diligence")
53. See id.; see also Definition of Corporate Compliance Called Major Strength of Draft Guidelines, Env't Rep. (BNA) at 1356 (November 26, 1993).
Under Part F of the Sentencing Guidelines, a court may require, as a condition of probation, that a convicted organization develop an auditing program, acceptable to the court and reviewable by the government, "to detect and prevent future violations." If the organization fails to submit an acceptable program, the court may hire experts at the defendant's expense to develop such a program. Such experts must be allowed by the organization to have access to whatever information is necessary to create such a program.

Upon approval of the auditing program by the court, the defendant organization must notify its employees and shareholders, as well as the public, of its "criminal behavior" and the terms of the auditing program. The defendant must also make periodic reports to the court regarding its progress in implementing the approved auditing program, including any subsequent civil or criminal enforcement actions or investigations.

In order to monitor the defendant's compliance with the auditing program, the defendant may be required to submit to third party examination of its books and records, inspection of its facilities, testing and monitoring of its operations, and regular or unannounced interviews of its employees as the court deems necessary. The costs of such monitoring activities must be borne by the defendant organization. Reports by the outside experts on such monitoring activities must be filed with the court and furnished to the public. Finally, a defendant may be required to submit to a financial audit of its books, including how it disburses its funds.

D. Department of Justice Policy

In July 1991, DOJ released a criminal enforcement policy entitled "Factors in Decisions on Criminal Prosecutions for Environmental Violations in the Context of Significant Voluntary Compliance or Disclosure Efforts by the Violator." The purpose of the policy is to ensure that criminal prosecutions do not "undermine the goal of encouraging critical self-auditing, self-policing and voluntary disclosure." The policy considers favorably corporate offenders that implement compliance programs and adhere to practices of critical self-auditing and voluntary disclosure.

The policy sets out three broad mitigating factors to guide United States Attorneys in their exercise of discretion: (1) voluntary disclosure of environmental violations, (2) cooperation with the government's investigation, and (3) implementation of preventative measures and compliance programs. The policy also lists additional relevant factors, including the pervasiveness of non-compliance, the existence of effective internal disciplinary action, and the subsequent implementation of compliance and remedial efforts.

Finally, DOJ policy does not specify the minimum components of a compliance program, but gives examples of the components of successful compliance programs as follows: (1) institutional policy to comply with environmental law, (2) regular internal and external audits of compliance, (3) procedures to safeguard integrity of audits, (4) multimedia evaluation of compliance, (5) timely implementation of auditor's recommendations, (6) dedication of adequate company resources, (7) effective auditing and site assessment occupational and environmental health April-June 1993 at 173.

54. Sentencing Guidelines, supra note 48, at § 9F1.3(d).
55. See id.
56. See id.
57. See id.
58. See id.
59. See id.
60. See id.
61. See id.
62. Id.; see also Keith M. Casto, International Environ-
mental Auditing and Site Assessment. Occupational and Environmental Health April-June 1993 at 173.
64. Id.
65. DOJ Memo supra note 63.
66. See id.
67. See id.
tive system of disciplining employees; and (8) a corporate policy of rewarding employees' contribution to environmental compliance.68

III. President Clinton's Reinvention of Government

The Clinton Administration has initiated a number of proposals designed to implement a new environmental management system which represents an alternative to the traditional "command and control" and "end-of-pipe" approaches that, since 1970, have dominated environmental regulation and enforcement. The Administration recognized that while traditional approaches have yielded results, these results have been obtained at the cost of creating a massive regulatory system that, at times, was unreasonably prescriptive, inflexible and expensive.

On March 16, 1995, the Clinton Administration introduced a series of proposals aimed at "reinventing environmental regulation" so as to align economic incentive, environmental goals and technological innovation, in such a way as to have economic growth improve, rather than diminish, environmental quality.69 These proposals are based on "clear and measurable national goals" and implementing performance standards, with sufficient accompanying flexibility, that industry can determine the means for achieving those goals and standards.70 EPA intends to achieve this flexibility through indemnity and site specific variability rather than through a "one size fits all" approach.71 The environmental proposals set forth twenty-five high priority actions for reinventing regulation and fourteen other significant actions to reinvent environmental regulation. Three of the most significant proposals, in terms of environmental auditing, are discussed below.

A. Project XL

The most notable Clinton Administration program, designed to provide alternative performance-based strategies for meeting environmental requirements, is "Project XL."72 Project XL is designed to provide a limited number of companies73 the opportunity to demonstrate environmental excellence and leadership by creating agreements between EPA and designated companies that specify environmental performance standards beyond existing regulatory requirements.74 In other words, the agreement becomes the new set of environmental standards under which the designated company operates. The company then is relieved from complying with the law and need only comply with the terms of the contract.75 These contract terms then become federally enforceable in lieu of existing legal requirements of applicable environmental law.76

The initiative is expressly intended to provide more flexibility for those "good actors" and environmental leaders that have developed creative, practical ways of achieving superior environmental protection at their facilities.77 The participants are selected on the basis of: (1) environmental results; (2) cost savings and paperwork reduction; (3) stakeholder support; (4) innovation/multimedia pollution prevention; (5) transferability; (6) feasibility; (7) monitoring, reporting and evaluation; and (8) shifting of risk burden.78

With regard to the monitoring, reporting

68. See id.


70. See id.

71. See id.

72. For information on Project XL, see Project XL (visited Apr. 13, 1999) <http://yosemite.epa.gov/xl/xl_home.nsf/all/homepage>.

73. Project XL is currently limited to fifty pilot projects. As of April 1998, seven pilot programs had been implemented and twenty-one projects were being developed. See XL At a Glance (visited Apr. 13, 1999) <http://yosemite.epa.gov/xl/xl_home.nsf/all/xl_glance>.


75. See id. at 27284.

76. See id.

77. See id. at 27283.

78. Id. at 27287.
and evaluation criterion, program participants must identify and implement a method for communicating information about the project (including performance data) to stakeholders in a form that is easily understood. Projects must have clear and measurable objectives and requirements so that EPA and the public can evaluate the success of the project and enforce its terms. Project XL thus envisions a significant level of environmental auditing which is evaluated (and made public) as part of a particular "project." The ultimate strategy for the project is embodied in an enforceable document that contains provisions that allow EPA, the state, and the community to monitor progress toward achieving results.

Because Project XL is still in the early stages, the legal implications are largely unknown. For example, Project XL should reduce paperwork burdens for participating companies, but it is unclear whether there will be any manner of prosecutorial discretion, or any immunity for participants. Further, it is still unknown what response EPA or DOJ will have to violations of the Project XL "contract" discovered, for example, through an environmental audit. Presumably DOJ would then bring a breach of contract action against the participant based upon the agreement.

B. Common Sense Initiative

Alongside the Clinton Administration's proposals are a number of EPA programs that are intended to implement the President's proposals, but also represent additional reforms within the existing federal statutory framework. These programs are all part of EPA's "Common Sense Initiative."

The Common Sense Initiative takes a multimedia, industry specific consensus approach to environmental protection and seeks to replace the traditional pollutant-by-pollutant approach with a more flexible industry-by-industry approach. The Common Sense Initiative's stated objectives are:

1. Provide incentives for going beyond compliance
2. Provide incentives for voluntary audits
3. Provide incentives for pollution prevention
4. Encourage life cycle management strategies
5. Establish small business assistance centers
6. Encourage environmentally responsible transition for businesses that want to phase out operations
7. Encourage mechanisms to enhance customer/supplier partnerships
8. Consolidate emergency response plans
9. Establish community information networks
10. Identify performance-based alternatives to existing permitting approaches
11. Develop and streamline relevant and accessible reporting and information access
12. Develop a simplified and consolidated reporting format for all programs
13. Encourage electronic reporting
14. Develop more meaningful and accurate measurements of environmental performance

The specific actions to implement these objectives are being developed through a "multi-stakeholder" consultation process so as to develop as much up front consensus and support as possible. Six subcommittees have been organized around six industrial sectors: electronics and computers, iron and steel, petroleum refining, printing, metal finishing, and automobile manufacturing.


81. For information on the Common Sense Initiative, see Common Sense Initiative (visited Apr 13, 1999) <http://www.epa.gov/commonsense/>.

83. See Regulatory Reinvention (XL) Pilot Projects, supra note 74 at 27 286 (emphasis added)

Generally, the Common Sense Initiative is evaluating opportunities for improvement in the areas of regulation compliance, permitting, pollution prevention, reporting and environmental technology. The Common Sense Initiative uses a consensus approach; each of the six subcommittees has approximately twenty-five individuals representing the viewpoints of industry, EPA, the states, environmental justice and labor organizations. Each of these subcommittees is developing a plan covering a broad spectrum of activities. Importantly, these activities include reporting requirements and public access to data.

C. Environmental Leadership Program

In June, 1994, EPA created the Environmental Leadership Program (ELP) for so-called "model" companies. EPA will use ELP to "recognize and reward companies that lead the way in environmental management." Two of the stated benefits to regulated participants are: (1) an opportunity for facilities to inform and directly participate in EPA's effort to reassess its environmental auditing policy; and (2) to allow industry to participate in discussions of other policy modifications and incentives that could help facilities overcome barriers to self-monitoring and compliance efforts. In order to participate in the ELP, however, facilities must have environmental management and auditing programs and must be willing to disclose the results of their audits.

According to EPA, the ELP allows facilities to identify ways to streamline the reporting requirements and reduce compliance inspections without sacrificing environmental and public health protection. Facilities will use innovative management techniques such as environmental auditing and pollution prevention to reduce the burden of paperwork and inspections of facilities, while enhancing compliance with existing environmental laws. In return for their participation, facilities will receive public recognition and a limited grace period in which to correct any violations during the course of the pilot projects.

With regard to the disclosure of audit results, EPA indicates that it is interested in examining how disclosure of audit results could improve the public's confidence in and acceptance of industry's self-monitoring efforts, and how disclosure could help facilitate the flow of information to the personnel responsible for implementing audit recommendations. Facilities participating in the ELP must demonstrate a willingness to disclose, in some manner, the results of their audits.

As with Project XL, the legal implications of the ELP for participants is somewhat unclear, particularly regarding how EPA will respond to future violations voluntarily revealed and corrected pursuant to the ELP.

IV. California EPA Environmental Audit Policy

On July 8, 1996, the California Environmental Protection Agency (Cal/EPA) released its latest audit policy known as the "Unified Cal/EPA Policy on Incentives for Self-

85. See id.
86. See id.
87. See id.
88. See id.

92. See EPA Environmental Leadership Program, supra note 90, at 32062.
93. See id.
94. See id.
95. See id. at 32063.
96. See id.
Evaluation" (Unified Policy). This audit policy represents a significant change from Cal/EPA's 1993 audit policy, and incorporates most of the major principles found in the EPA audit policy.

The stated purpose of the Unified Policy is to encourage regulated entities to discover, voluntarily disclose, correct and prevent violations of federal, state and local environmental requirements. The policy is expressly intended to guide settlement in both administrative and civil judicial enforcement actions. The central component of the policy, of course, is waiver of gravity-based or the punitive portion of penalties for violations of environmental requirements where nine stated conditions are met, and where such violations are discovered through "due diligence efforts" or an environmental audit. The policy indicates that such voluntary efforts play a critical role in protecting human health and the environment by identifying, correcting and ultimately, preventing violations.

Under the Unified Policy, Cal/EPA will reduce gravity-based penalties for violations of environmental requirements by 75 percent where eight of the nine stated conditions are met, even if violations are not discovered through an audit or "due diligence" program. In addition, Cal/EPA, at its discretion, may reduce the gravity-based penalties by up to an additional 15 percent as a credit for investment in "pollution prevention" programs.

Cal/EPA expressly reserves the right to collect any economic benefit that may be earned as a result of non-compliance, even where companies meet all other conditions of the policy, except in instances where Cal/EPA determines that the economic benefit component may be insignificant. Thus, Cal/EPA's "incentive" for self-evaluation is mere penalty mitigation, as opposed to immunity. In order to take advantage of the incentives provided in the policy, the following nine conditions must be met: (1) systematic discovery, (2) voluntary discovery, (3) prompt disclosure (i.e., within ten working days), (4) discovery and disclosure independent of government or third parties, (5) correction and remediation "as expeditiously as possible," (6) prevention of recurrence, (7) no repeat violations, (8) no resultant serious or imminent harm, and (9) cooperation.

Cal/EPA will not recommend to the DOJ or other prosecuting authority that criminal charges be brought against a regulated entity where it determines that the nine conditions are satisfied, so long as the violation does not demonstrate: (1) a prevalent management philosophy or practice that condones environmental violations; or (2) high level corporate officials' or managers' conscious and knowing involvement in, or willful blindness to, violations. Also, Cal/EPA restates its policy of not routinely requesting audits to initiate civil or criminal investigations.

The Unified Policy is, in many respects, similar to the final EPA audit policy. Cal/EPA expressly attempted to make the new audit policy consistent with the EPA audit policy. There are, however, some significant differences between the two audit policies. Perhaps the most striking difference is the "Cal/EPA fee-for-service audit/"due diligence review, which Cal/EPA will perform for regulated entities to help them determine whether

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98. Compare Unified Policy, supra note 97, with Incentives, supra note 13, at 66705

99. See Unified Policy, supra note 97 at 5

100. See id

101. See id at 7

102. See id

103. See id at 8

104. See id at 4

105. See id at 7

106. See id at 11-18

107. See id at 8

108. See id at 10
their due diligence programs or EMSs conform to the definitions set forth in the Cal/EPA audit policy. Presumably, the intended advantage for the regulated entity is that it would know in advance of discovery of any violations whether it meets the definitional requirements of the policy. Cal/EPA, however, has made clear that this particular portion of the policy is not a guarantee of immunity. Given this lack of immunity, it is questionable whether sufficient incentive exists to compel entities to seek a due diligence review. Put more frankly, why would any regulated entity open itself up to such an intrusive procedure when appropriate safeguards are not provided—and pay for the procedure?

In order for a regulated entity to enjoy the benefits of the Unified Policy, it must disclose a significant amount of potentially quite sensitive documentation and other information with regard to environmental violations. For example, condition 3 of the policy requires that the entity give Cal/EPA prompt notice (within ten working days) of the violation; the disclosure must be in writing and generally will be made publicly available pursuant to the Public Records Act. With regard to correction of violations (condition 5), where Cal/EPA finds it appropriate, it shall require that the regulated entity enter into a publicly available written agreement. Moreover, with regard to condition 9, concerning “cooperation,” the entity must provide such information as is considered necessary and requested by Cal/EPA to determine the applicability of the policy.

The Unified Policy expressly indicates that it will not seek documents subject to the attorney-client privilege. Under the policy, and as discussed below, however, a regulated entity may still be compelled to produce sensitive documents which may otherwise be protected by the “critical self-analysis” privilege, or even the “attorney work product” doctrine.

V. Securities and Exchange Commission Regulations on Disclosure of Environmental Liabilities and Non-Compliance

One often overlooked policy relating to environmental disclosures is the Securities and Exchange Commission’s (SEC or Commission) policy regarding disclosure of environmental liabilities. As the SEC steps up enforcement of these policies, and as companies perform more thorough environmental self-analysis, particularly pursuant to ISO 14000, closer attention must be paid to 10-K environmental disclosures and their implications.

Specific SEC environmental disclosure obligations are contained in regulation S-K, which sets forth standard disclosure requirements applicable to the content of the non-financial statement portions of filings under the Securities Act of 1933 and the Securities Exchange Act of 1934. Three provisions of regulation S-K have particular significance for issuers that are subject to potential environmental liability risks. Regulation S-B, which applies to small business issuers, incorporates these three provisions of regulation S-K without substantive change.

Item 101 of regulation S-K requires an issuer to provide a general description of its business. It also requires specific disclosure of the material effects that compliance with federal, state and local environmental laws may have upon the capital expenditures, earnings, and competitive position of the issuer.

Item 103 of regulation S-K requires that the issuer disclose any material, pending legal proceeding including specified proceedings arising under federal or state environmental laws. Any such proceedings known to be contemplated by governmental authorities must be disclosed. Moreover, the manage-
ment discussion and analysis provisions of regulation S-K, item 103, require management to discuss the issuer's historical results and its future prospects. Obviously, item 103 would compel management to discuss the significant implications of environmental laws on future operations of the issuer.

The SEC staff accounting bulletins (SAB-92) under Topic 5, "Miscellaneous accounting for disclosure of loss contingencies," and Topic 10, "Presentation of liabilities for environmental costs," deal with disclosure of environmental liability costs on company balance sheets. Perhaps the most controversial aspect of these staff accounting bulletins is the view of the Commission staff that, for the vast majority of situations, contingent liabilities should be displayed on the face of the balance sheet separately from amounts claimed for recovery from insurance carriers or other third parties.

There have been few administrative proceedings involving the SEC's environmental disclosure requirements, and enforcement regarding these requirements has historically been fairly lax. The question arises for any particular company making such a disclosure whether internal investigations (e.g., audits) are needed to assist in making decisions regarding disclosure of environmental liabilities. Another question is whether the audits themselves will contribute to developing information which must be revealed pursuant to SEC regulation. If so, protection for such information is a significant concern.

SAB-92 can probably compel disclosure of environmental information found by an audit that would otherwise be protected by an audit privilege or "audit immunity." This is particularly true given that the SEC is apparently poised to heighten scrutiny of 10-K filings related to environmental liabilities.

VI. Confidentiality of Environmental Audit Findings and Recommendations

Although government policy generally encourages voluntary environmental self-auditing and self-correction, few provisions provide privileges or immunities protections for self-auditing entities. As a result, perhaps the most important issue surrounding environmental audits is the extent to which disclosure of audit findings and conclusions can be compelled or must be disclosed. Often this issue arises out of regulatory agency enforcement actions. The importance of protection from disclosure is heightened in light of EPA and other programs discussed above. As discussed below, the traditional bases for privilege offer little comfort that the results of environmental audits meet all of the concerns regarding disclosure of environmental audits.

A. Common Law Privileges

The traditional bases for protection under common law are the attorney-client privilege, and the attorney work product doctrine. In addition, a third privilege, called the "self-evaluation privilege," has recently developed. As will be discussed, none of these privileges meet all of the concerns regarding disclosure of environmental audits.

1. Attorney-Client Privilege

The attorney-client privilege is premised on the social policy of encouraging full, frank and open discussions between clients and counsel. The corollary to this premise is that the right of disclosure and adverse use would discourage such communications, and thereby undermine effective advocacy. In the environmental regulatory context, the invocation of the attorney-client privilege can facilitate society's interest in compliance with applicable regulatory requirements by encouraging rigorous and critical self-evaluation.

In order to invoke the privilege, an environmental audit must take place within the scope

120. See id.


122. See id. at 32844.


124 See id. 
of the attorney-client privilege, under which the regulated corporation seeks legal advice as the client of the attorney.\textsuperscript{125} Therefore, an audit must be initiated upon the advice of counsel, and must be conducted under the supervision and control of an attorney, as either in-house counsel or outside counsel.\textsuperscript{126}

Notably, there is a slight edge given to the use of outside counsel in invoking the privilege because of the perception that in-house counsel may be functioning in the capacity of business advisor rather than counsel. In \textit{United States v. Chevron}, the District Court held that environmental compliance status reports sent to in-house counsel were not covered by the privilege because the attorney did not act in the "capacity of an attorney" but rather "as, for example, a business advisor."\textsuperscript{127} In order to qualify for the privilege, the primary purpose for the privilege must be to "gain or provide legal assistance."\textsuperscript{128} In contrast to \textit{Chevron}, in \textit{Olen Properties Corp. v. Sheldahl, Inc.},\textsuperscript{129} the District Court prevented discovery of an environmental audit memorandum (and letters and notes regarding the same) prepared by in-house environmental managers at the direction of in-house counsel. Although the brief opinion provides no analysis, the court indicated that it relied upon the attorney-client privilege, the "joint defense" privilege,\textsuperscript{130} and the attorney work product doctrine in finding the materials were all privileged.\textsuperscript{131}

Once the information is developed and obtained upon the advice and under the supervision and control of counsel, the privilege, of course, is not lost by mere disclosure to outside experts retained to assist counsel in conducting the audit. In fact, typically the audit is actually performed by non-attorney, environmental and management system consultants. What is essential, however, is that such experts act directly under the direction and control of counsel.\textsuperscript{132}

It bears emphasis that, even though all of the elements of the privilege are met, factual information discovered through the audit may not be protected from disclosure.\textsuperscript{133} By way of example, raw environmental analytical data may not be protected from disclosure, but interpretations, recommendations and conclusions may be protected.

A further critical element of the privilege involves waiver by disclosure to third parties. The privilege is lost to the extent of the disclosure to third parties not within the attorney-client relationship.\textsuperscript{134} Therefore, disclosure must be on a strictly "need to know" basis.

Finally, the communications must not be made for the purpose of committing a tort or crime.\textsuperscript{135} The purpose must relate to corrective action and remediation of known or anticipated problems, and not merely for developing a shield to prevent disclosure of sensitive, liability-producing information. While it can be difficult to discern one precise motivation for conducting an audit, persistent and extensive environmental non-compliance over a protracted period of time may suggest the lack of a remedial motive for the audit, and thus compel disclosure. Contrast this limitation with that of the attorney work product doctrine (discussed below), which requires that the materials are prepared in anticipation of litigation.

2. Attorney Work Product Doctrine

The attorney work product doctrine is, in some respects, broader and, in other respects,
more limited in its protection of information than the attorney-client privilege. The work product doctrine covers the thoughts, impressions, opinions, conclusions, legal theories and beliefs of an attorney, even if not derived from communications between the client and the attorney.136 The “work product” itself is protected as opposed to the “communications.”137 For example, witness statements and interview notes obtained pursuant to an environmental audit may be protected under the attorney work product doctrine, even though potentially not protected by the attorney-client privilege, if the one interviewed is not the “client.”

On the other hand, there are specific limitations on the invocation of the work product doctrine that narrow, and perhaps even eliminate, its utility relative to the environmental audit. First, the protection afforded may be disregarded where nondisclosure would create “undue hardship.”138 This would most likely apply to factual information generated by the audit, which is also generally not protected by the attorney-client privilege. “Opinion work product,” which probably would include the ultimate findings, conclusions, and recommendations of the auditors, is probably the only information which might arguably be given “absolute” attorney work product protection from disclosure if all the other elements of the doctrine are satisfied.139

Second, the materials must be prepared in anticipation of litigation.140 In the environmental regulatory context, this usually means in anticipation of an enforcement action, a cost recovery action, or a toxic tort case. For work product materials to be protected, an enforcement action or some other proceeding need not have already commenced, but must at least be “fairly foreseeable” and “imminent.”141 Therefore, materials generated for mere “litigation avoidance” will not be protected, since virtually any document could be included. Instead, it must appear that there is some existing violation of applicable regulatory requirements, and that enforcement action is “fairly foreseeable” and “imminent” as a result of such violation.142

Ironically, to invoke the work product doctrine, the primary purpose of the audit must be to aid in the legal defense of the client and not for some other business objective, such as ensuring environmental compliance with regulations.143 This raises a potential conflict between invocation of the attorney-client privilege and the work product doctrine. To invoke the attorney-client privilege, the purpose of the audit must be to assist in preparing a defense to liability in an enforcement action or other litigation. Perhaps the most prudent course of action may be to cite both objectives. Under either theory, counsel must be the direct supervisor and in control of the audit.144

Even if all the other elements of the work product doctrine are satisfied, environmental audit materials will not be protected if produced in the “ordinary course of business.”145 Thus, once a corporation embarks on a systematic, regular environmental auditing program, the protection afforded by the doctrine will be lost. Stated otherwise, the price of being a good corporate citizen in developing an ongoing environmental audit program is the loss of that protection, although it is arguable that the attorney-client privilege may still apply. The more routine, regular, systematic, and integrated into the corporate culture the environmental audit becomes, the less likely it is that there

137. See Hickman, 329 U.S. at 511.
138. See Fed. R. Civ. P. 26(b)(3); see also Hickman, 329 U.S. at 509-10.
141. See Terrell E. Hunt & Timothy A. Wilkins, Environmental Audits and Enforcement Policy, 16 HARv. ENVTL. L. REV 365, 384 (1992)
142. See id
143. See United States v. Gulf Oil Corp., 760 F.2d 292, 296-97 (Temp Emer Ct App 1985)
144. See Casto, supra note 126, at 175
145. See Gulf Oil, 760 F.2d 292 at 297
will be protection under either theory. The mere presence of counsel, whether in-house or outside, will not overcome the presumption that the environmental audit is as much a management tool as cost accounting or financial auditing, rather than liability avoidance. Contrast this with EPA's policy on environmental audits, which, while expressly encouraging this type of systematic audit, provides no protection from disclosure for the results of any such audit.

3. Self-Evaluation Privilege

Several courts have recognized a “critical self-analysis” privilege in an effort to encourage internal self-criticism. For example, in Bredice v. Doctors Hospital, a medical malpractice suit, the plaintiff's motion for discovery of certain staff meeting notes that might bear on the issue was denied based on the hospital's assertion that disclosure would chill the internal self-criticism that would help to improve the quality of health care. A number of other courts have either determined that the needs of the party seeking discovery counter-balance the benefits of protecting audit information, or have refused to recognize this privilege at all.

In Webb v. Westinghouse Electric Corp., the court stated the following conditions for application of the self-critical analysis privilege: (1) the materials must have been prepared pursuant to government requirements; (2) the materials must be subjective or evaluative; and (3) the policy interest secured by withholding the documents clearly outweighs the need of a party seeking the documents. The privilege appears, however, to be based solely on the discretionary power of the court to recognize an “overwhelming public interest,” which predominates over the countervailing need to conduct discovery. Some courts have rejected the critical self-evaluation privilege on the grounds that assertions of privilege resting in vague “public interest” considerations are invalid as against specific declarations of policy.

In Reichhold Chemicals, Inc. v. Textron, Inc., the District Court for the Northern District of Florida upheld the “self-critical analysis privilege” for an environmental audit on public policy grounds. The Reichhold court focused on the importance of permitting regulated entities to candidly assess compliance with regulatory or legal requirements without generating evidence that could be used against them in future litigation. The court opined that such critical self-evaluation fosters the compelling public interest in compliance with regulatory requirements. Candid self-evaluation is critical to remediating or improving adverse environmental conditions or violations because:

The privilege protects an organization or individual from the Hobson's Choice of aggressively investigating accidents or possible regulatory violations, ascertaining the cause and results, and correcting any violations or dangerous conditions, but thereby creating a self-incriminating record that may be evidence of liability, or deliberately avoiding making a record on the subject (and possibly leaving the public exposed to danger) in order to lessen the risk of civil liability.

The Reichhold court analogized this privilege to the exclusion of so-called remedial measures

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148. See id. at 251.
151. See id. at 434.
152. See id. at 433.
154. 157 F.R.D. 522 (N.D. Fla 1994)
155. Id. at 524.
156. See id.
157. Id.
embodied in Rule 407 of the Federal Rules of Evidence. The court also relied upon the 1968 Fifth Circuit decision in Southern Railway Co. v. Lanham, which held that retrospective investigations of railway accidents are immune from discovery on the public policy grounds of encouraging accident investigations to prevent further accidents.

Finally, the Reichhold court adopted the following criteria from the Ninth Circuit case of Dowling v. American Hawaii Cruise, Inc. in applying the privilege:

1. the information must result from critical self-analysis;
2. the public must have a strong interest in preserving the free flow of the type of information sought;
3. the information must be of a type whose flow would be curtailed if discovery were allowed; and
4. the document must have been prepared with the expectation that it would be kept confidential, and it has, in fact, been kept confidential.

It bears particular emphasis that the privilege recognized in Reichhold is a qualified privilege and can be abrogated if the party requesting discovery can demonstrate “extraordinary circumstances” or “special need.” It is possible that a regulatory body’s interest in reviewing the results of environmental audits for determining on-going compliance would constitute such special need.

A number of states have reacted to the inadequacies of these traditional privileges by enacting legislation that extends self-evaluation type privileges to information contained in voluntarily prepared environmental audit reports.

B. State Statutory Privileges and Immunities

In response to the concerns regarding protection for environmental audits, at least twenty-two states have enacted, and several other states have considered, laws which specifically provide varying degrees of protection for environmental compliance audit results and/or immunities from civil and criminal action. Alaska, Arkansas, Colorado, Idaho, Illinois, Indiana, Kansas, Kentucky, Michigan, Minnesota, Mississippi, Montana, New Hampshire, New Jersey, Ohio, Oregon, South Carolina, South Dakota, Texas, Utah, Virginia and Wyoming have all enacted laws which grant some degree of protection for environmental compliance audits.

As an example, Oregon’s law (the first such legislation) provides a qualified privilege for environmental audit reports, but compels companies to correct the problems discovered during such environmental audits by requiring response or remediation for the privilege to attach. Importantly, the Oregon law gives a company the opportunity to rectify environmental concerns discovered during an audit without fear that its audit reports will be used against it in state civil or criminal actions. At the same time, the Oregon law does not allow the privilege to attach if the environmental audit reveals that the operation is not in compliance with an environmental requirement and the company did not reasonably act to correct the discovered problem.

Another example is New Hampshire’s law which provides immunity from any penalties for violating environmental laws as long as the entity reports the violation promptly (within thirty days) of discovery, initiates corrective and remedial actions, and satisfies other audit privilege laws. See also John-Mark Stensvaag, The Fine Print of State Environmental Audit Privileges, 16 UCLA J. ENTTL L & POL’Y 69, 77-80 (1997/1998) Mia Anna Mazza, Comment, The New Evidentiary Privilege for Environmental Audit Reports Making the Worst of a Bad Situation, 23 ECOLOGY L.Q. 79, 82 (1996)

158. Id.
159. 403 F.2d 119, 131 (5th Cir. 1968).
160. 971 F.2d 423, 426 (9th Cir. 1992).
162. See Appendix A regarding state environmental
statutory criteria. As discussed previously, EPA has generally frowned on these types of state protections because they tend to be inconsistent with EPA's policy of "voluntary auditing" that is disclosed to the public.

VII. Conclusion and Recommendation

Protections regarding the results of voluntary environmental audits continue to be vitally important to regulated entities. Such protections become critical in light of the ISO 14000 Standards and other factors which contemplate broad-based, routine and voluntary environmental auditing as part of a company's EMS. Performing such voluntary audits should not increase the risk of enforcement or liability for regulated entities—this would be a clear disincentive to useful and valuable self-evaluation.

EPA's audit policy statements encourage voluntary environmental auditing, yet offer little in the way of real protections for those entities that undertake such voluntary audits. EPA's policy focuses chiefly on penalty reduction and criminal enforcement leniency as "incentives," rather than positive inducements, such as limited immunity.

In recognition of the concerns over protection for audit results, a number of states have enacted legislation providing privileges for certain voluntary environmental audits and limited immunity stemming from the results of such audits. The primary stated purpose for privileges and immunities, in all of these laws is the encouragement of voluntary environmental audits.

Yet, even the privileges provided in states with audit protection laws can be easily vitiated. Also, the common law privileges offer little in the way of protection for environmental audit results. Although the privilege for the audit results may provide some limited protection for those entities that "come clean" with regard to environmental compliance, the privilege itself offers little in the way of real and positive incentive to perform voluntary environmental audits as part of a larger EMS.

Moreover, the EPA's audit policy specifically states opposition to state privilege provisions and reserves EPA's right to enforce violations of federal environmental law. This makes the case for providing a uniform, concrete inducement for entities to establish an EMS all the more compelling. This inducement must offer a real reward for "environmental good citizens" who employ environmental management standards, including self-auditing and self-correction.

Clearly, there are legitimate concerns over granting blanket immunity to entities, which, through their audits, can reveal serious violations of environmental laws and regulations. Particularly for an entity willing to strive for employing a comprehensive EMS, however, some level of immunity relative to audit results, particularly when discovered violations are self-corrected, presents little risk of undeterred/unpunished environmental non-compliance.

The authors recommend that EPA, in conjunction with the states, execute a concrete, enforceable EMS Implementation Program. The EMS Implementation Program should be divided into two phases. In Phase I, EPA should provide regulated entities with the option of entering into a contract that would provide for reduced penalties in exchange for the implementation of a comprehensive EMS. Phase I should be offered only for a limited period of time, e.g., two years, during which time regulated entities could implement an EMS, report and correct any violations, and, in exchange, pay a reduced penalty which is limited by an overall cap. In addition, we recommend that this phase also include a temporary immunity to both corporations and individuals (e.g., corporate officers and directors), for the imposition of criminal penalties and incarceration, except in those cases where willful intent to violate a law or regulation is proven.

Phase II should be an open-ended offer to contract with EPA for reduced penalties and limited immunity when a violation is discovered pursuant to an environmental audit or


167. See Incentives, supra note 13, at 66712
due diligence program, regardless of whether the audit was part of a larger EMS. While the offer to contract should be open-ended, the contract period should be limited to a sixty or ninety day period, during which time the regulated entity would be required to disclose and correct any discovery of a violation. The terms of such a contract could be consistent with EPA's Audit Policy, but would have the advantage of being enforceable.

The EMS Implementation Program could be designed similar to the EPA's Compliance Audit Program Initiative under section 8(e) of the Toxic Substances Control Act (TSCA), referred to as the "TSCA CAP." The TSCA CAP was implemented to encourage companies to comply with TSCA section 8(e), which requires chemical manufacturers to report information relating to substances that present a risk to the environment. Companies were given the option to enter into a contractual relationship with EPA that called for reduced penalties and a penalty cap in exchange for the implementation of a comprehensive audit program to identify information required to be reported under TSCA section 8(e). The TSCA CAP proved highly successful. One hundred and twenty-three companies participated in the program and thirty-four reported no violations. The remaining eighty-nine companies disclosed 11,000 studies to EPA which were previously withheld in potential violation of TSCA. These 11,000 studies outnumber the studies submitted to EPA since 1978.

Although the TSCA CAP was applicable to only a small portion of the regulated industry, the EMS Implementation Program should include the entire regulated industry. In addition, it should cover violations of any and all environmental laws and regulations.

While this proposal may seem radical, we believe that a radical solution is needed to remedy the consequences of a command and control environment. An EMS Implementation Program would provide regulated entities with the opportunity to implement a comprehensive EMS without fear of excessive civil and criminal penalties. Moreover, the two year period would provide regulated entities with an opportunity to correct any major violations that are discovered which often take longer than sixty or ninety days to correct.

Once an EMS is implemented, the regulated entity, in most cases, should be able to detect and prevent future violations of laws and regulations. In those situations, however, where an EMS cannot prevent a violation, routine auditing should result in the quick discovery and correction of future problems.

171. See Audit Policy Update, supra note 169.
172. See id.
## Appendix A

<table>
<thead>
<tr>
<th>State</th>
<th>Voluntary Disclosure</th>
<th>Privilege Lost If:</th>
<th>Burden of Proof</th>
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</thead>
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<tr>
<td></td>
<td>Immunity or reduction in penalties</td>
<td>When violation disclosed to third parties</td>
<td>Asserted for fraudulent purposes</td>
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1 Rebuttable presumption.
2 Privilege waived/audit material disclosed if party asserting has not implemented environmental management standards.
3 Part of the Minnesota "Environmental Improvement Program."
4 Compliance can be demonstrated by institution of environmental management standards including phased schedule of actions.
5 The privilege only applies in agency proceedings against the regulated entity.