THE ROLE OF COMPREHENSIVE ENVIRONMENTAL COMPLIANCE MANAGEMENT SYSTEMS IN THE TEXTILE AND CARPET INDUSTRY

HANDOUTS

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EPA Enforcement Memo

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF
ENFORCEMENT

January 12, 1994

MEMORANDUM

SUBJECT: The Exercise of Investigative Discretion

FROM: Earl E. Devaney, Director
Office of Criminal Enforcement

TO: All EPA Employees Working in or in Support of the Criminal Enforcement Program

I. Introduction

As EPA's criminal enforcement program enters its second decade and embarks on a period of unprecedented growth, this guidance establishes the principles that will guide the exercise of investigative discretion by EPA Special Agents. This guidance combines articulations of Congressional intent underlying the environmental criminal provisions with the Office of Criminal Enforcement's (OCE) experience operating under EPA's existing criminal case-screening criteria.[1]

In an effort to maximize our limited criminal resources, this guidance sets out the specific factors that distinguish cases meriting criminal investigation from those more appropriately pursued under administrative or civil judicial authorities.[2]

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[1] This guidance incorporates by reference the policy document entitled Regional Enforcement Management: Enhanced Regional Case Screening (December 3, 1990).

[2] This memorandum is intended only as internal guidance to EPA. It is not intended to, does not, and may not be relied upon to, create a right or benefit, substantive or procedural, enforceable at law by a party to litigation with the United States, nor does this guidance in any way limit the lawful enforcement prerogatives, including administrative or civil enforcement actions, of the Department of Justice and the Environmental Protection Agency.

Indeed, the Office of Criminal Enforcement has an obligation to the American public, to our colleagues throughout EPA, the regulated community, Congress, and the media to instill confidence that EPA's criminal program has the proper mechanisms in place to ensure the discriminate use of the powerful law enforcement authority entrusted to us.

II. Legislative Intent Regarding Case Selection

The criminal provisions of the environmental laws are the most powerful enforcement tools available to EPA. Congressional intent underlying the environmental criminal provisions is unequivocal: criminal enforcement authority should target the most significant and egregious violators.

The Pollution Prosecution Act of 1990 recognized the importance of a strong national environmental criminal enforcement program and mandates additional resources necessary for the criminal program to fulfill its statutory mission. The sponsors of the Act recognized that EPA had long been in the posture of reacting to serious violations only after harm was done, primarily due to limited resources. Senator Joseph I. Lieberman (Conn.), one of the co-sponsors of the Act, explained that as a result of limited resources, "... few cases are the product of reasoned or targeted focus on suspected wrongdoing." He also expressed his hope that with the Act's provision of additional Special Agents, "... EPA would be able to bring cases that would have greater deterrent value than those currently being brought."

Further illustrative of Congressional intent that the most serious of violations should be addressed by criminal enforcement authority is the legislative history concerning the enhanced criminal provisions of RCRA:

> [The criminal provisions were] intended to prevent abuses of the permit system by those who obtain and then knowingly disregard them. It [RCRA sec. 3008(d)] is not aimed at punishing minor or technical variations from permit regulations or conditions if the facility operator is acting responsibly. The Department of Justice has exercised its prosecutorial discretion responsibly under similar provisions in other statutes and the conferees assume that, in light of the upgrading of the penalties from misdemeanor to felony, similar care will be used in deciding when a particular permit violation may warrant criminal prosecution under this Act. H.R. Conf. Rep. No. 1444, 96th Cong., 2d Sess. 37, reprinted in 1980 U.S. Code Cong. & Admin. News 5036.

While EPA has doubled its Special Agent corps since passage of the Pollution Prosecution Act, and has achieved a presence in nearly all federal judicial districts, it is unlikely that OCE will ever be large enough in size to fully defeat the ever-expanding universe of environmental crime. Rather, OCE must maximize its presence and impact through discerning case-selection, and then proceed with investigations that advance EPA's overall goal of regulatory compliance and punishing criminal wrongdoing.

III. Case Selection Process[3]

The case selection process is designed to identify misconduct worthy of criminal investigation. The case selection process is not an effort to establish legal sufficiency for prosecution. Rather, the process by which potential cases are analyzed under the case selection criteria will serve as an affirmative indication that OCE has purposefully directed its investigative resources toward deserving cases.

This is not to suggest that all cases meeting the case selection criteria will proceed to prosecution. Indeed, the exercise of investigative discretion must be clearly distinguished from the exercise of prosecutorial discretion. The employment of OCE's investigative discretion to dedicate its investigative authority is, however, a critical precursor to the prosecutorial discretion later exercised by the Department of Justice.[4]

At the conclusion of the case selection process, OCE should be able to articulate the basis of its decision to pursue a criminal investigation, based on the case selection criteria. Conversely, cases that do not ultimately meet the criteria to proceed criminally, should be systematically referred back to the Agency's civil enforcement office for appropriate administrative or civil judicial action, or to a state or local prosecutor.

IV. Case Selection Criteria

The criminal case selection process will be guided by two general measures - significant environmental harm and culpable conduct.

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[3] The case selection process must not be confused with the Regional Case Screening Process. The relationship between the Regional Case Screening Process and case selection are discussed further at "VI.", below.

[4] Exercise of this prosecutorial discretion in all criminal cases is governed by the principles set forth in the Department of Justice's Principles of Federal Prosecution.

A. Significant Environmental Harm

The measure of significant environmental harm should be broadly construed to include the presence of actual harm, as well as the threat of significant harm, to the environment or human health. The following factors serve as indicators that a potential case will meet the measure of significant environmental harm.

Factor 1. Actual harm will be demonstrated by an illegal discharge, release or emission that has an identifiable and significant harmful impact on human health or the environment. This measure will generally be self-evident at the time of case selection.[5]

Factor 2. The threat of significant harm to the environment or human health may be demonstrated by an actual or threatened discharge, release or emission. This factor may not be as readily evident, and must be assessed in light of all the facts available at the time of case selection.

Factor 3. Failure to report an actual discharge, release or emission within the context of Factors 1 or 2 will serve as an additional factor favoring criminal investigation. While the failure to report, alone, may be a criminal violation, our investigative resources should generally be targeted toward those cases in which the failure to report is coupled with actual or threatened environmental harm.

Factor 4. When certain illegal conduct appears to represent a trend or common attitude within the regulated community, criminal investigation may provide a significant deterrent effect incommensurate with its singular environmental impact. While the single violation being considered may have a relatively insignificant impact on human health or the environment, such violations, if multiplied by the numbers in a cross-section of the regulated community, would result in significant environmental harm.

B. Culpable Conduct

The measure of culpable conduct is not necessarily an assessment of criminal intent, particularly since criminal intent will not always be readily evident at the time of case selection. Culpable conduct, however, may be indicated at the time of case selection by several factors.

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[5] When this factor involves a fact situation in which the risk of harm is so great, so immediate and/or irremediable, OCE will always cooperate and coordinate with EPA's civil enforcement authorities to seek appropriate injunctive or remedial action.

Factor 1. History of repeated violations.

While a history of repeated violations is not a prerequisite to a criminal investigation, a potential target's compliance record should always be carefully examined. When repeated enforcement activities or actions, whether by EPA, or other federal, state and local enforcement authorities, have failed to bring a violator into compliance, criminal investigation may be warranted. Clearly, a history of repeated violations will enhance the government's capacity to prove that a violator was aware of environmental regulatory requirements, had actual notice of violations and then acted in deliberate disregard of those requirements.

Factor 2. Deliberate misconduct resulting in violation.

Although the environmental statutes do not require proof of specific intent, evidence, either direct or circumstantial, that a violation was deliberate will be a major factor indicating that criminal investigation is warranted.

Factor 3. Concealment of misconduct or falsification of required records.

In the arena of self-reporting, EPA must be able to rely on data received from the regulated community. If submitted data are false, EPA is prevented from effectively carrying out its mandate. Accordingly, conduct indicating the falsification of data will always serve as the basis for serious consideration to proceed with a criminal investigation.

Factor 4. Tampering with monitoring or control equipment.

The overt act of tampering with monitoring or control equipment leads to the certain production of false data that appears to be otherwise accurate. The consequent submission of false data threatens the basic integrity of EPA's data and, in turn, the scientific validity of EPA's regulatory decisions. Such an assault on the regulatory infrastructure calls for the enforcement leverage of criminal investigation.

Factor 5. Business operation of pollution-related activities without a permit, license, manifest or other required documentation.

Many of the laws and regulations within EPA's jurisdiction focus on inherently dangerous and strictly regulated business operations. EPA's criminal enforcement resources should clearly pursue those violators who choose to ignore environmental regulatory requirements altogether and operate completely outside of EPA's regulatory scheme.

V. Additional Considerations when Investigating Corporations

While the factors under measures IV. A and B, above, apply equally to both individual and corporate targets, several additional considerations should be taken into account when the potential target is a corporation.

In a criminal environmental investigation, OCE should always investigate individual employees and their corporate[6] employers who may be culpable. A corporation is, by law, responsible for the criminal act of its officers and employees who act within the scope of their employment and in furtherance of the purposes of the corporation. Whether the corporate officer or employee personally commits the act, or directs, aids, or counsels other employees to do so is inconsequential to the issue of corporate culpability.

Corporate culpability may also be indicated when a company performs an environmental compliance or management audit, and then knowingly fails to promptly remedy the noncompliance and correct any harm done.[7] On the other hand, EPA policy strongly encourages self-monitoring, self-disclosure, and self-correction.[8] When self-auditing has been conducted (followed up by prompt remediation of the noncompliance and any resulting harm) and full, complete disclosure has occurred, the company's constructive activities should be considered as mitigating factors in EPA's exercise of investigative discretion. Therefore, a violation that is voluntarily revealed and fully and promptly remedied as part of a corporation's systematic and comprehensive self-evaluation program generally will not be a candidate for the expenditure of scarce criminal investigative resources.

VI. Other Case Selection Considerations

EPA has a full range of enforcement tools available - administrative, civil-judicial, and criminal. There is universal consensus that less flagrant violations with lesser environmental consequences should be addressed through administrative or civil monetary penalties and remedial orders, while the most serious environmental violations ought to be investigated criminally. The challenge in practice is to correctly distinguish the latter cases from the former.

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[6] The term "corporate" or "corporation", as used in this guidance, describes any business entity, whether legally incorporated or not.

[7] In cases of self-auditing and/or voluntary disclosure, the exercise of prosecutorial discretion is addressed in the Department of Justice policy document entitled "Factors in Decisions on Criminal Prosecutions for Environmental Violations in the Context of Significant Voluntary Compliance or Disclosure Efforts by the Violator" (July 1, 1991).

[8] See EPA's policy on environmental audits, published at 51 Fed. Reg. 25004 (July 9, 1986)

The case-selection factors described in this guidance should provide the foundation for the communication process that necessarily follows in the Regional Case Screening Process. This guidance envisions application of the case-selection factors first, to be followed by the recurring scrutiny of cases during the Regional Case Screening process.

The fundamental purpose of Regional Case Screening is to consider criminal enforcement in the greater context of all available EPA enforcement and environmental response options, to do so early (at the time of each case opening) before extensive resources have been expended; and to identify, prioritize, and target the most egregious cases. Regional Case Screening is designed to be an ongoing process in which enforcement cases are periodically reviewed to assess not only the evidentiary developments, but should also evaluate the clarity of the legal and regulatory authorities upon which a given case is being developed.[9]

In order to achieve the objectives of case screening, all cases originating within the OCE must be presented fully and fairly to the appropriate Regional program managers. Thorough analysis of a case using the case-selection factors will prepare OCE for a well-reasoned presentation in the Regional Case Screening process. Faithful adherence to the OCE case-selection process and active participation in the Regional Case Screening Process will serve to eliminate potential disparities between Agency program goals and priorities and OCE's undertaking of criminal investigations.

Full and effective implementation of these processes will achieve two important results: it will ensure that OCE's investigative resources are being directed properly and expended efficiently, and it will foreclose assertions that EPA's criminal program is imposing its powerful sanctions indiscriminately.

VII. Conclusion

The manner in which we govern ourselves in the use of EPA's most powerful enforcement tool is critical to the effective and reliable performance of our responsibilities, and will shape the reputation of this program for years to come. We must conduct ourselves in keeping with these principles which ensure the prudent and proper execution of the powerful law enforcement authorities entrusted to us.

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[9] The legal structure upon which a criminal case is built - e.g., statutory, regulatory, case law, preamble language and interpretative letters - must also be analyzed in terms of Agency enforcement practice under these authorities. Thorough discussion of this issue is beyond the scope of this document, but generally, when the clarity of the underlying legal authority is in dispute, the more appropriate vehicle for resolution lies, most often, in a civil or administrative setting.

DOT Guidelines

U.S. Department of Justice Guidance on Environmental Criminal Prosecution Factors Including Environmental Audits

(July 1, 1991)

FACTORS IN DECISIONS ON CRIMINAL PROSECUTION FOR ENVIRONMENTAL VIOLATIONS IN THE CONTEXT OF SIGNIFICANT VOLUNTARY COMPLIANCE OR DISCLOSURE EFFORTS BY THE VIOLATOR

I. Introduction

It is the policy of the Department of Justice to encourage self-auditing, self-policing and voluntary disclosure of environmental violations by the regulated community by indicating that these activities are viewed as mitigating factors in the Department's exercise of criminal environmental enforcement discretion. This document is intended to describe the factors that the Department of Justice considers in deciding whether to bring a criminal prosecution for a violation of an environmental statute, so that such prosecutions do not create a disincentive to or undermine the goal of encouraging critical self-auditing, self-policing, and voluntary disclosure. It is designed to give federal prosecutors direction concerning the exercise of prosecutorial discretion in environmental criminal cases and, to ensure that such discretion is exercised consistently nationwide. It is also intended to give the regulated community a sense of how the federal government exercises its criminal prosecutorial discretion with respect to such factors as the defendant's voluntary disclosure of violations, cooperation with the government in investigating the violations, use of environmental audits and other procedures to ensure compliance with all applicable environmental laws and regulations, and use of measures to remedy expeditiously and completely any violations and the harms caused thereby.

This guidance and the examples contained herein provide a framework for the determination of whether a particular case presents the type of circumstances in which lenience would be appropriate.

II. Factors to be Considered

Where the law and evidence would otherwise be sufficient for prosecution, the attorney for the Department should consider the factors contained herein, to the extent they are applicable, along with any other relevant factors, in determining whether and how to prosecute. It must be emphasized that these are examples of the types of factors which could be relevant. They do not constitute a definitive recipe or checklist of requirements. They merely illustrate some of the types of information which is relevant to our exercise of prosecutorial discretion.

It is unlikely that any one factor will be dispositive in any given case. All relevant factors are considered and given the weight deemed appropriate in the particular case. See *Federal Principles of Prosecution* (U.S. Dept. of Justice, 1980), Comment to Part A.2; Part B.3.

A. *Voluntary Disclosure*

The attorney for the Department should consider whether the person [1] made a voluntary, timely and complete disclosure of the matter under investigation. Consideration should be given to whether the person came forward promptly after discovering the noncompliance, and to the quantity and quality of information provided. Particular consideration should be given to whether the disclosure substantially aided the government's investigatory process, and whether it occurred before a law enforcement or regulatory authority (federal, state or local authority) had already obtained knowledge regarding noncompliance. A disclosure is not considered to be "voluntary" if that disclosure is already specifically required by law, regulation, or permit. [2]

B. *Cooperation*

The attorney for the Department should consider the degree and timeliness of cooperation by the person. Full and prompt cooperation is essential, whether in the context of a voluntary disclosure or after the government has independently learned of a violation. Consideration should be given to the violator's willingness to make all relevant information (includ-

[1] As used in this document, the terms "person" and "violator" are intended to refer to business and nonprofit entities as well as individuals.

[2] For example, any person in charge of a vessel or of an on shore facility or an offshore facility is required to notify the appropriate agency of the United States Government of any discharge of oil or a hazardous substance into or upon *inter alia* the navigable waters of the United States. Section 311(b)(5) of the Clean Water Act, 33 U.S.C. 1321(b)(5), as amended by the Oil Pollution Act of 1990, Pub. L. 101-380, §4301(a), 104 Stat. 485, 533 (1990).

ing the complete results of any internal or external investigation and the names of all potential witnesses) available to government investigators and prosecutors. Consideration should also be given to the extent and quality of the violator's assistance to the government's investigation.

C. *Preventive Measures and Compliance Programs*

The attorney for the Department should consider the existence and scope of any regularized, intensive, and comprehensive environmental compliance program; such a program may include an environmental compliance or management audit. Particular consideration should be given to whether the compliance or audit program includes sufficient measures to identify and prevent future noncompliance, and whether the program was adopted in good faith in a timely manner.

Compliance programs may vary but the following questions should be asked in evaluating any program: Was there a strong institutional policy to comply with all environmental requirements? Had safeguards beyond those required by existing law been developed and implemented to prevent noncompliance from occurring? Were there regular procedures, including internal or external compliance and management audits, to evaluate, detect, prevent and remedy circumstances like those that led to the noncompliance? Were there procedures and safeguards to ensure the integrity of any audit conducted? Did the audit evaluate all sources of pollution (*i.e.*, all media), including the possibility of cross-media transfers of pollutants? Were the auditor's recommendations implemented in a timely fashion? were adequate resources committed to the auditing program and to implementing its recommendations? Was environmental compliance a standard by which employee and corporate departmental performance was judged?

D. *Additional Factors Which May Relevant*

1. *Pervasiveness of Noncompliance*

Pervasive noncompliance may indicate systemic or repeated participation in or condonation of criminal behavior. It may also indicate the lack of a meaningful compliance program. In evaluating this factor, the attorney for the Department should consider, among other things, the number and level of employees participating in the unlawful activities and the obviousness, seriousness, duration, history, and frequency of noncompliance.

2. *Internal Disciplinary Action*

Effective internal disciplinary action is crucial to any compliance program. The attorney for the Department should consider whether there was an effective system of discipline for employees who violated company environmental compliance policies. Did the disciplinary system establish an awareness in other employees that unlawful conduct would not be condoned?

3. *Subsequent Compliance Efforts*

The attorney for the Department should consider the extent of any efforts to remedy any ongoing noncompliance. The promptness and completeness of any action taken to remove the source of the noncompliance and to lessen the environmental harm resulting from the noncompliance should be considered. Considerable weight should be given to prompt, good-faith efforts to reach environmental compliance agreements with federal or state authorities, or both. Full compliance with such agreements should be a factor in any decision whether to prosecute.

III. Application of These Factors to Hypothetical Examples[3]

These examples are intended to assist federal prosecutors in their exercise of discretion in evaluating environmental cases. The situations facing prosecutors, of course, present a wide variety of fact patterns. Therefore, in a given case, some of the criteria may be satisfied while others may not. Moreover, satisfaction of various criteria may be a matter of degree. Consequently, the effect of a given mix of factors also is a matter of degree. In the ideal situation, if a company fully meets all of the criteria, the result may be a decision not to prosecute that company criminally. Even if satisfaction of the criteria is not complete, still the company may benefit in terms of degree of enforcement response by the government. The following hypothetical examples are intended to illustrate the operation of these guidelines.

Example 1:

This is the ideal case in terms of criteria satisfaction and consequent prosecution leniency.

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[3]While this policy applies to both individuals and organizational violators, these examples focus particularly upon situations involving organizations.

1. Company A regularly conducts a comprehensive audit of its compliance with environmental requirements.

2. The audit uncovers information about employees' disposing of hazardous wastes by dumping them in an unpermitted location.

3. An internal company investigation confirms the audit information. (Depending upon the nature of the audit, this follow-up investigation may be unnecessary.)

4. Prior to the violations the company had a sound compliance program, which included clear policies, employee training, and a hotline for suspected violations.

5. As soon as the company confirms the violations, it discloses all pertinent information to the appropriate government agency; it undertakes compliance planning with that agency; and it carries out satisfactory remediation measures.

6. The company also undertakes to correct any false information previously submitted to the government in relation to the violations.

7. Internally the company disciplines the employees actually involved in the violations, including any supervisor who was lax in preventing or detecting the activity. Also, the company reviews its compliance program to determine how the violations slipped by and corrects the weaknesses found by that review.

8. The company discloses to the government the names of the employees actually responsible for the violations, and it cooperates with the government by providing documentation necessary to the investigation of those persons.

Under these circumstances Company A would stand a good chance of being favorably considered for prosecutorial leniency, to the extent of not being criminally prosecuted at all. The degree of any leniency, however, may turn upon other relevant factors not specifically dealt with in these guidelines.[4]

Example 2:

At the opposite end of the scale is Company Z, which meets few of the criteria. The likelihood of prosecutorial leniency, therefore, is remote. Company Z's circumstances may include any of the following:

1. Because an employee has threatened to report a violation to federal authorities, the company is afraid that investigators may begin looking at it. An audit is undertaken, but it focuses only upon the particular violation, ignoring the possibility that the violation may be indicative of widespread activities in the organization.

2. After completing the audit, Company Z reports the violations discovered to the government.

3. The company had a compliance program, but it was effectively no more than a collection of paper. No effort is made to disseminate its content, impress upon employees its significance, train employees in its application, or oversee its implementation.

4. Even after "discovery" of the violation the company makes no effort to strengthen its compliance procedures.

5. The company makes no effort to come to terms with regulators regarding its violations. It resists any remedial work and refuses to pay any monetary sanctions.

6. Because of the non-compliance, information submitted to regulators over the years has been materially inaccurate, painting a substantially false picture of the company's true compliance situation. The company fails to take any steps to correct that inaccuracy.

7. The company does not cooperate with prosecutors in identifying those employees (including managers) who actually were involved in the violation, and it resists disclosure of any documents relating either to the violations or to the responsible employees.

In these circumstances leniency is unlikely. The only positive action is the so-called audit, but that was so narrowly focused as to be of questionable value, and it was undertaken only to head off a possible criminal investigation. Otherwise, the company demonstrated no good faith either in terms of compliance efforts or in assisting the government in obtaining a full understanding of the violation and discovering its sources.

Nonetheless, these factors do not assure a criminal prosecution of Company Z. As with Company A, above, other circumstances may be present which

[4]For example, if the company had a long history of noncompliance, the compliance audit was done only under pressure from regulators, and a timely audit would have ended the violations much sooner, those circumstances would be considered.

affect the balance struck by prosecutors. For example, the effect of the violation (because of substance, duration, or amount) may be such that prosecutors would not consider it to be an appropriate criminal case. Administrative or civil proceedings may be considered a more appropriate response.

Other examples:

Between these extremes there is a range of possibilities. The presence, absence, or degree of any criterion may affect the prosecution's exercise of discretion. Below are some examples of such effects:

1. In a situation otherwise similar to that of Company A, above, Company B performs an audit that is very limited in scope and probably reflects no more than an effort to avoid prosecution. Despite that background, Company B is cooperative in terms of both bringing itself into compliance and providing information regarding the crime and its perpetrators. The result could be any of a number of outcomes, including prosecution of a lesser charge or a decision to prosecute the individuals rather than the company.

2. Again the situation is similar to Company A's but Company C refuses to reveal any information regarding the individual violators. The likelihood of the government's prosecuting the company are substantially increased.

3. In another situation similar to Company A's, Company D chooses to "sit on" the audit and take corrective action without telling the government. The government learns of the situation months or years after the fact.

A complicating fact here is that environmental regulatory programs are self policing: they include a substantial number of reporting requirements. If reports which in fact presented false information are allowed to stand uncorrected, the reliability of this system is undermined. They also may lead to adverse and unfair impacts upon other members of the regulated community. For example, Company D failed to report discharges of X contaminant into a municipal sewer system, discharges that were terminated as a result of an audit. The sewer authority, though, knowing only that there have been excessive loadings of X, but not knowing that Company D was a source, tightens limitations upon all known sources of X. Thus, all of those sources incur additional treatment expenses, but Company D is unaffected. Had Company D revealed its audit results, the other companies would not have suffered unnecessary expenses.

In some situations, moreover, failure to report is a crime. *See e.g.*, 33 U.S.C. §1321(b)(5) and 42 U.S.C. § 9603(b). To illustrate the effect of this factor, consider Company E, which conducts a thorough audit and finds that hazardous wastes have been disposed of by dumping them on the ground. The company cleans up the area and tightens up its compliance program, but does not reveal the situation to regulators. Assuming that a reportable quantity of a hazardous substance was released, the company was under a legal obligation under 42 U.S.C. §9603(b) to report that release as soon as it had knowledge of it, thereby allowing regulators the opportunity to assure proper clean up. Company E's knowing failure to report the release upon learning of it is itself a felony.

In the cases of both Company D and Company E, consideration would be given by prosecutors for remedial efforts; hence prosecution of fewer or lesser charges might result. However, because Company D's silence adversely affected others who are entitled to fair regulatory treatment and because Company E deprived those legally responsible for evaluating cleanup needs of the ability to carry out their functions, the likelihood of their totally escaping criminal prosecution is significantly reduced.

4. Company F's situation is similar to that of Company B. However, with regard to the various violations shown by the audit, it concentrates upon correcting only the easier, less expensive, less significant among them. Its lackadaisical approach to correction does not make it a strong candidate for leniency.

5. Company G is similar to Company D in that it performs an audit and finds violations, but does not bring them to the government's attention. Those violations do not involve failures to comply with reporting requirements. The company undertakes a program of gradually correcting its violations. When the government learns of the situation, Company G still has not remedied its most significant violations, but claims that it certainly planned to get to them. Company G could receive some consideration for its efforts, but its failure to disclose and the slowness of its remedial work probably mean that it cannot expect a substantial degree of leniency.

6. Comprehensive audits are considered positive efforts toward good faith compliance. However, such audits are not indispensable to enforcement leniency. Company H's situation is essentially identical to that of Company A, except for the fact that it does not undertake a comprehensive audit. It does not have a formal audit program, but, as a part of its

efforts to ensure compliance, does realize that it is committing an environmental violation. It thereafter takes steps otherwise identical to those of Company A in terms of compliance efforts and cooperation. Company H is also a likely candidate for leniency, including possibly no criminal prosecution.

In sum, mitigating efforts made by the regulated community will be recognized and evaluated. The greater the showing of good faith, the more likely it will be met with leniency. Conversely, the less good faith shown, the less likely that prosecutorial discretion will tend toward leniency.

IV. Nature of this Guidance

This guidance explains the current general practice of the Department in making criminal prosecutive and other decisions after giving consideration to the criteria described above, as well as any other criteria that are relevant to the exercise of criminal prosecutorial discretion in a particular case. This discussion is an expression of, and in no way departs from, the long tradition of exercising prosecutorial discretion. The decision to prosecute "generally rests entirely in [the prosecutor's] discretion." *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978).[5] This discretion is especially firmly held by the criminal prosecutor.[6] The criteria set forth above are intended only as internal guidance to Department of Justice attorneys. They are not intended to, do not, and may not be relied upon to create a right or benefit, substantive or procedural, enforceable at law by a party to litigation with the United States, nor do they in any way limit the lawful litigative prerogatives, including civil enforcement actions, of the Department of Justice or the Environmental protection Agency. They are provided to guide the effective use of limited enforcement resources, and do not derive from, find their basis in, nor constitute any legal requirement, whether constitutional, statutory, or otherwise, to forego or modify any enforcement action or the use of any evidentiary material. See *Principles of Federal Prosecution* (U.S. Dept. of Justice, 1980) p. 4; *United States Attorneys' Manual* (U.S. Dept. of Justice, 1986) 1-1.000.

[5]Although some statutes have occasionally been held to require civil enforcement actions, *see, e.g., Dunlop v. Bachowski*, 421 U.S. 560 (1975), those are unusual cases, and the general rule is that both civil and criminal enforcement is at the enforcement agency's discretion where not prescribed by law. *Heckler v. Chaney*, 470 U.S. 821, 830-35 (1985); *Cutler v. Hayes*, 818 F.2d 879, 893 (D.C. Cir. 1987) (decisions not to enforce are not reviewable unless the statute provides an "inflexible mandate").

[6]*Newman v. United States*, 382 F.2d 479, 480 (D.C. Cir. 1967).

EPA Policy on Environmental Auditing

EPA Policy on Environmental Auditing

(Published at 50 FR 46504, November 8, 1985; Revised 51 FR 25004, July 9, 1986)

ENVIRONMENTAL AUDITING POLICY STATEMENT

I. Preamble [Omitted]

II. General EPA Policy on Environmental Auditing

A. Introduction

Environmental auditing is a systematic, documented, periodic and objective review by regulated entities[1] of facility operations and practices related to meeting environmental requirements. Audits can be designed to accomplish any or all of the following: verify compliance with environmental requirements; evaluate the effectiveness of environmental management systems already in place; or assess risks from regulated and unregulated materials and practices.

Auditing serves as a quality assurance check to help improve the effectiveness of basic environmental management by verifying that management practices are in place, functioning and adequate. Environmental audits evaluate, and are not a substitute for, direct compliance activities such as obtaining permits, installing controls, monitoring compliance, reporting violations, and keeping records. Environmental auditing may verify but does not include activities required by law, regulation or permit (e.g., continuous emissions monitoring, composite correction plans at wastewater treatment plants, etc.). Audits do not in any way replace regulatory agency inspections. However, environmental audits can improve compliance by complementing conventional federal, state and local oversight.

The appendix to this policy statement outlines some basic elements of environmental auditing (e.g., auditor independence and top management support) for use by those considering implementation of effective auditing programs to help achieve and maintain compliance. Additional information on environmental auditing practices can be found in various published materials.[2]

Environmental auditing has developed for sound business reasons, particularly as a means of helping regulated entities manage pollution control affirmatively over time instead of reacting to crises. Auditing can result in improved facility environmental performance, help communicate effective solutions to common environmental problems, focus facility managers' attention on current and upcoming regulatory requirements, and generate protocols and checklists which help facilities better manage themselves. Auditing also can result in better-integrated management of environmental hazards, since auditors frequently identify environmental liabilities which go beyond regulatory compliance. Companies, public entities and federal facilities have employed a variety of environmental auditing practices in recent years. Several hundred major firms in diverse industries now have environmental auditing programs, although they often are known by other names such as assessment, survey, surveillance, review or appraisal.

While auditing has demonstrated its usefulness to those with audit programs, many others still do not audit. Clarification of EPA's position regarding auditing may help encourage regulated entities to establish audit programs upgrade systems already in place.

B. EPA Encourages the Use of Environmental Auditing

EPA encourages regulated entities to adopt sound environmental management practices to improve environmental performance. In particular, EPA encourages regulated entities subject to environmental regulations to institute environmental auditing programs to help ensure the adequacy of internal systems to achieve, maintain and monitor compliance. Implementation of environmental auditing programs can result in better identification, resolution and avoidance of environmental problems, as well as improvements to management practices. Audits can be conducted effectively by independent internal or third party auditors. Larger organizations generally

[1] "Regulated entities" include private firms and public agencies with facilities subject to environmental regulation. Public agencies can include federal, state or local agencies as well as special-purpose organizations such as regional sewage commissions.

[2] See, e.g., "Current Practices in Environmental Auditing," EPA Report No. EPA-230-09-83-006. February 1984; "Annotated Bibliography on Environmental Auditing." Fifth Edition, September 1985, both available from: Regulatory Reform Staff, PM-223, EPA, 401 M Street SW, Washington, DC 20460.

have greater resources to devote to an internal audit team, while smaller entities might be more likely to use outside auditors.

Regulated entities are responsible for taking all necessary steps to ensure compliance with environmental requirements, whether or not they adopt audit programs. Although environmental laws do not require a regulated facility to have an auditing program, ultimate responsibility for the environmental performance of the facility lies with top management, which therefore has a strong incentive to use reasonable means, such as environmental auditing, to secure reliable information of facility compliance status.

EPA does not intend to dictate or interfere with the environmental management practices of private or public organizations. Nor does EPA intend to mandate auditing (though in certain instances EPA may seek to include provisions for environmental auditing as part of settlement agreements, as noted below). 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, auditing should remain a voluntary activity.

III. EPA Policy on Specific Environmental Auditing Issues

A. Agency Requests for Audit Reports

EPA has broad statutory authority to request relevant information on the environmental compliance status of regulated entities. However, EPA believes routine Agency requests for audit reports[3] could inhibit auditing in the long run, decreasing both the quantity and quality of audits conducted. Therefore, as a matter of policy, EPA will *not* routinely request environmental audit reports.

EPA's authority to request an audit report, or relevant portions thereof, will be exercised on a case-by-case basis where the Agency determines it is needed to accomplish a statutory mission, or where the Government deems it to be material to a criminal investigation. EPA expects such requests to be limited, most likely focused on particular information needs rather than the entire report, and usually made where the information needed cannot be obtained from monitoring, reporting or other data otherwise available to the Agency. Examples would likely include situations where: audits are conducted under consent decrees or other settlement agreements; a company has placed its management practices at issue by raising them as a defense; or state of mind or intent are a relevant element of inquiry, such as during a criminal investigation. This list is illustrative rather than exhaustive, since there doubtless will be other situations, not subject to prediction, in which audit reports rather than information may be required.

EPA acknowledges regulated entities' need to self-evaluate environmental performance with some measure of privacy and encourages such activity. However, audit reports may not shield monitoring, compliance, or other information that would otherwise be reportable and/or accessible to EPA, even if there is no explicit 'requirement' to generate that data.[4] Thus, this policy does not alter regulated entities' existing or future obligations to monitor, record or report information required under environmental statutes, regulations or permits, or to allow EPA access to that information. Nor does this policy alter EPA's authority to request and receive any relevant information—including that contained in audit reports—under various environmental statutes (e.g., Clean Water Act section 308, Clean Air Act sections 114 and 208) or in other administrative or judicial proceedings.

Regulated entities also should be aware that certain audit findings may by law have to be reported to government agencies. However, in addition to any such requirements, EPA encourages regulated entities to notify appropriate State or Federal officials of findings which suggest significant environmental or public health risks, even when not specifically required to do so.

B. EPA Response to Environmental Auditing

1. General Policy

EPA will not promise to forgo inspections, reduce enforcement responses, or offer other such incentives

[3]An "environmental audit report" is a written report which candidly and thoroughly presents findings from a review, conducted as part of an environmental audit as described in section II.A., of facility environmental performance and practices. An audit report is not a substitute for compliance monitoring reports or other reports or records which may be required by EPA or other regulatory agencies.

[4]See, for example. "Duties to Report or Disclose Information on the Environmental Aspects of Business Activities." Environmental Law Institute report to EPA, final report, September 1985.

in exchange for implementation of environmental auditing or other sound environmental management practices. Indeed, a credible enforcement program provides a strong incentive for regulated entities to audit.

Regulatory agencies have an obligation to assess source compliance status independently and cannot eliminate inspections for particular firms or classes of firms. Although environmental audits may complement inspections by providing self-assessment to assure compliance, they are in no way a substitute for regulatory oversight. Moreover, certain statutes (e.g. RCRA) and Agency policies establish minimum facility inspection frequencies to which EPA will adhere.

However, EPA will continue to address environmental problems on a priority basis and will consequently inspect facilities with poor environmental records and practices more frequently. Since effective environmental auditing helps management identify and promptly correct actual or potential problems, audited facilities environmental performance should improve. Thus, while EPA inspections of self-auditied facilities will continue, to the extent that compliance performance is considered in setting inspection priorities, facilities with a good compliance history may be subject to fewer inspections.

In fashioning enforcement responses to violations, EPA policy is to take into account, on a case-by-case basis, the honest and genuine efforts of regulated entities to avoid and promptly correct violations and underlying environmental problems. When regulated entities take reasonable precautions to avoid noncompliance, expeditiously correct underlying environmental problems discovered through audits or other means, and implement measures to prevent their recurrence, EPA may exercise its discretion to consider such actions as honest and genuine efforts to assure compliance. Such consideration applies particular when a regulated entity promptly reports violations or compliance data which otherwise were not required to be recorded or reported to EPA.

2. Audit Provisions as Remedies in Enforcement Actions

EPA may propose environmental auditing provisions in consent decrees and in other settlement negotiations where auditing could provide a remedy for identified problems and reduce the likelihood of similar problems recurring in the future.[5] Environmental auditing provisions are not most likely to be proposed in settlement negotiations where:

- A pattern of violations can be attributed, at least in part, to the absence or poor functioning of an environmental management system; or
- The type or nature of violations indicates a likelihood that similar noncompliance problems may exist or occur elsewhere in the facility or at other facilities operated by the regulated entity.

Through this consent decree approach and other means. EPA may consider how to encourage effective auditing by publicly owned sewage treatment works (POTWs). POTWs often have compliance problems related to operation and maintenance procedures which can be addressed effectively through the use of environmental auditing. Under its National Municipal Policy EPA already is requiring many POTWs to develop composite correction plans to identify and correct compliance problems.

C. Environmental Auditing of Federal Facilities

EPA encourages all federal agencies subject to environmental laws and regulations to institute environmental auditing systems to help ensure the adequacy of internal systems to achieve, maintain and monitor compliance. Environmental auditing at federal facilities can be an effective supplement to EPA and state inspections. Such federal facility environmental audit programs should be structured to promptly identify environmental problems and expenditiously develop schedules for remedial action.

To the extent feasible, EPA will provide technical assistance to help federal agencies design and initiate audit programs. Where appropriate, EPA will enter into agreements with other agencies to clarify the respective roles, responsibilities and commitments of each agency in conducting and responding to federal facility enviornmental audits.

With respect to inspections of self-audited facilities (see section III.B.1 above) and requests for audit reports (see section III.A above), EPA generally will respond to enviornmental audits by federal facilities in the same manner as it does for other regulated entities, in keeping with the spirit and intent of Executive Order 12088 and the EPA *Federal Facilities Compliance Strategy* (January 1984), update forthcoming in late 1986). Federal agencies should, however, be aware that the Freedom of Information Act

[5] EPA is developing guidance for use by Agency negotiators in structuring appropriate environmental audit provisions for consent decrees and other settlement negotiations.

will govern any disclosure of audit reports or audit-generated information requested from federal agencies by the public.

When federal agencies discover significant violations through an enviornmental audit, EPA encourages them to submit the related audit findings and remedial action plans expeditiously to the applicable EPA regional office (and responsible state agencies, where appropriate) even when not specifically required to do so. EPA will review the audit findings and action plans and either provide written approval or negotiate a Federal Facilities Compliance Agreement. EPA will utilize the escalation procedures provided in Executive Order 12088 and the EPA *Federal Facilities Compliance Strategy* only when agreement between agencies cannot be reached. In any event, federal agencies are expected to report pollution abatement projects involving costs (necessary to correct problems discovered through the audit) to EPA in accordance with OMB Circular A-106. Upon request, and in appropriate circumstances. EPA will assist affected federal agencies through coordination of any public release of audit findings with approved action plans once agreement has been reached.

IV. Relationship to State or Local Regulatory Agencies

State and local regulatory agencies have independent jurisdiction over regulated entities. EPA encourages them to adopt these or similar policies, in order to advance the use of effective environmental auditing in a consistent manner.

EPA recognizes that some states have already undertaken environmental auditing initiatives which differ somewhat from this policy. Other states also may want to develop auditing policies which accommodate their particular needs or circumstances. Nothing in this policy statement is intended to preempt or preclude states from developing other approaches to environmental auditing. EPA encourages state and local authorities to consider the basic principles which guided the Agency in developing this policy:

- Regulated entities must continue to report or record compliance information required under existing statutes or regulations, regardless of whether such information is generated by an environmental audit or contained in an audit report. Required information cannot be withheld merely because it is generated by an audit rather than by some other means.

- Regulatory agencies cannot make promises to forgo or limit enforcement action against a particular facility or class of facilities in exchange for the use of environmental auditing systems. However, such agencies may use their discretion to adjust enforcement actions on a case-by-case basis in response to honest and genuine efforts by regulated entities to assure environmental compliance.

- When setting inspection priorities regulatory agencies should focus to the extent possible on compliance performance and environmental results.

- Regulatory agencies must continue to meet minimum program requirements (e.g., minimum inspection requirements, etc.)

- Regulatory agencies should not attempt to prescribe the precise form and structure of regulated entities' environmental management or auditing programs.

An effective state/federal partnership is needed to accomplish the mutual goal of achieving and maintaining high levels of compliance with environmental laws and regulations. The greater the consistency between state or local policies and this federal response to environmental auditing, the greater the degree to which sound auditing practices might be adopted and compliance levels improve.

Dated: June 28, 1986.

Lee M. Thomas,

Administrator

Appendix — Elements of Effective Environmental Auditing Program

Introduction: Environmental auditing is a systematic, documented, periodic and objective review by a regulated entity of facility operations and practices related to meeting environmental requirements.

Private sector environmental audits of facilities have been conducted for several years and have taken a variety of forms, in part to accommodate unique organizational structures and circumstances. Nevertheless, effective environmental audits appear to have certain discernible elements in common with other kinds of audits. Standards for internal audits have been documented extensively. The elements outlined below draw heavily on two of these documents: "Compendium of Audit Standards" (©1983, Walter Willborn, American Society for Quality Control) and "Standards for the Professional Practice of Internal Auditing" (©1981, The Institute of Internal Auditors,

Inc.). They also reflect Agency analyses conducted over the last several years.

Performance-oriented auditing elements are outlined here to help accomplish several objectives. A general description of features of effective, mature audit programs can help those starting audit programs, especially federal agencies and smaller businesses. These elements also indicate the attributes of auditing EPA generally considers important to ensure program effectiveness. Regulatory agencies may use these elements in negotiating environmental auditing provisions for consent decrees. Finally, these elements can help guide states and localities considering auditing initiatives.

An effective environmental auditing system will likely include the following general elements:

I. *Explicit top management support for environmental auditing and commitment to follow-up on audit findings.* Management support may be demonstrated by written policy articulating upper management support for the auditing program, and for compliance with all pertinent requirements, including corporate policies and permit requirements as well as federal, state and local statutes and regulations.

Management support or the auditing program also should be demonstrated by an explicit written commitment to follow-up on audit findings to correct identified problems and prevent their recurrence.

II. *An environmental auditing function independent of audited activities.* The status or organizational locus of environmental auditors should be sufficient to ensure objective and unobstructed inquiry, observation and testing. Auditor objectivity should not be impaired by personal relationships, financial or other conflicts of interest, interference with free inquiry or judgment, or fear of potential retribution.

III. *Adequate team staffing and auditor training.* Environmental auditors should possess or have ready access to the knowledge, skills, and disciplines needed to accomplish audit objectives. Each individual auditor should comply with the company's professional standards of conduct. Auditors, whether full-time or part-time, should maintain their technical and analytical competence through continuing education and training.

IV. *Explicit audit program objectives, scope, resources and frequency.* At a minimum, audit objectives should include assessing compliance with applicable environmental laws and evaluating the adequacy of internal compliance policies, procedures and personnel training programs to ensure continued compliance.

Audits should be based on a process which provides auditors: all corporate policies, permits, and federal, state, and local regulations pertinent to the facility; and checklists or protocols addressing specific features that should be evaluated by auditors.

Explicit written audit procedures generally should be used for planning audits, establishing audit scope, examining and evaluating audit findings, communicating audit results, and following-up.

V. *A process which collects, analyzes, interprets and documents information sufficient to achieve audit objectives.* Information should be collected before and during an onsite visit regarding environmental compliance*(1)*, environmental management effectiveness*(2)*, and other matters*(3)* related to audit objectives and scope. This information should be sufficient, reliable, relevant and useful to provide a sound basis for audit findings and recommendations.

a. *Sufficient* information is factual, adequate and convincing so that a prudent, informed person would be likely to reach the same conclusions as the auditor.

b. *Reliable* information is the best attainable through use of appropriate audit techniques.

c. *Relevant* information supports audit findings and recommendations and is consistent with the objectives for the audit.

d. *Useful* information helps the organization meet its goals.

The audit process should include a periodic review of the reliability and integrity of this information and the means used to identify, measure, classify and report it. Audit procedures, including the testing and sampling techniques employed, should be selected in advance, to the extent practical, and expanded or altered if circumstances warrant. The process of collecting, analyzing, interpreting, and documenting information should provide reasonable assurance that audit objectivity is maintained and audit goals are met.

VI. *A process which includes specific procedures to promptly prepare candid, clear, and appropriate written reports on audit findings, corrective actions, and schedules for implementation.*

Procedures should be in place to ensure that such information is communicated to managers, including facility and corporate management, who can evaluate the information and ensure correction of identi-

fied problems. Procedures also should be in place for determining what internal findings are reportable to state or federal agencies.

VII. *A process which includes quality assurance procedures to assure the accuracy and thoroughness of environmental audits.* Quality assurance may be accomplished through supervision, independent internal reviews, external reviews, or a combination of these approaches.

Footnotes to Appendix

(1) A comprehensive assessment of compliance with federal environmental regulations requires an analysis of facility performance against numerous environmental statutes and implementing regulations. These statutes include:

Resource Conservation and Recovery Act

Federal Water Pollution Control Act

Clean Air Act

Hazardous Materials Transportation Act

Toxic Substances Control Act

Comprehensive Environmental Response, Compensation and Liability Act

Safe Drinking Water Act

Federal Insecticide, Fungicide and Rodenticide Act

Marine Protection, Research and Sanctuaries Act

Uranium Mill Tailings Radiation Control Act

In addition, state and local government are likely to have their own environmental laws. Many states have been delegated authority to administer federal programs. Many local governments' building fire, safety and health codes also have environmental requirements relevant to an audit evaluation.

(2) An environmental audit could go well beyond the type of compliance assessment normally conducted during regulatory inspections, for example, by evaluating policies and practices, regardless of whether they are part of the environmental system or the operating and maintenance procedures. Specifically, audits can evaluate the extent to which systems or procedures:

1. Develop organizational environmental policies which: a. implement regulatory requirements: b. provide management guidance or environmental hazards not specifically addressed in regulations;

2. Train and motivate facility personnel to work in an environmentally-acceptable manner and to understand and comply with government regulations and the entity's environmental policy;

3. Communicate relevant environmental developments expeditiously to facility and other personnel;

4. Communicate effectively with government and the public regarding serious environmental incidents;

5. Require third parties working for, with or on behalf of the organization to follow its environmental procedures;

6. Make proficient personnel available at all times to carry out environmental (especially emergency) procedures;

7. Incorporate environmental protection into written operating procedures;

8. Apply best management practices and operating procedures, including "good housekeeping" techniques;

9. Institute preventive and corrective maintenance systems to minimize actual and potential environmental harm;

10. Utilize best available process and control technologies;

11. Use most-effective sampling and monitoring techniques, test methods, recordkeeping systems or reporting protocols (beyond minimum legal requirements);

12. Evaluate causes behind any serious environmental incidents and establish procedures to avoid recurrence;

13. Exploit source reduction, recycle and reuse potential wherever practical; and

14. Substitute materials or processes to allow use of the least-hazardous substances feasible.

(3) Auditors could also assess environmental risks and uncertainties.

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Status of Privilege of Environmental Audits

STATE ENVIRONMENTAL AUDIT PRIVILEGE LAWS, EFFECT ON ENFORCEMENT UNDERGOING EPA REVIEW

Information the Environmental Protection Agency expects to gather at a public meeting on environmental compliance audits and privileges proposed or enacted by various state legislatures will help it determine whether it needs to modify its existing audit policy, an agency official told BNA July 11.

According to a June 20 notice, EPA said the meeting was planned in part to review state efforts to pass legislation making information gathered through voluntary environmental audits privileged, or protected from disclosure, in various types of enforcement actions. The meeting, scheduled for July 27-28, will provide a forum for the agency to review the way self-evaluative materials are used in enforcement proceedings (25 ER 416).

Several states have already enacted privilege laws, and others are considering them. See accompanying chart, "Overview of Environmental Audit Privilege by State." The chart was prepared by John L. Wittenborn and Stephanie Siegel, Washington, D.C., counsel for the Coalition for Improved Environmental Audits and outlines state proposals and enactments to date.

The state audit privileges created by these state laws and legislative proposals are designed to respond to the disincentive to voluntary, company-initiated compliance programs that occurs when results of voluntary compliance audits are subject to disclosure and use in enforcement actions against the companies.

Determining Need For More Federal Incentives

EPA will hear testimony concerning such disincentives during the public meeting. Through such testimony, EPA said, it hopes to gather enough information to determine whether additional incentives are needed at the federal level to encourage audits, disclosure of audit findings, and prompt correction of environmental violations uncovered. The notice specifically requested information about successes and failures associated with its policy on environmental auditing, especially in the area of penalty mitigation. The policy was issued July 9, 1986 (17 ER 397).

Under that policy, EPA has encouraged the use of environmental auditing, but emphasized that "audit reports may not shield compliance information otherwise reportable or accessible to EPA." EPA also indicated that, while the policy is not intended to pre-empt states from developing other approaches, there should be consistency between state and federal audit policies.

States, however, have gone forward on their own to adopt various approaches to encourage audits and resolve conflicts over the use of audit results. The creation of an environmental audit privilege, which places limits on disclosure, is one of the strongest measures. Oregon, for example, provides for a qualified environmental audit privilege in any civil, criminal, or administrative action except under limited circumstances (ORS Section 468.963; 24 ER 1221). As the chart demonstrates, other states have adopted or are considering similar proposals.

Effect On Federal Law Enforcement Efforts

EPA has been opposed to state privilege laws for a number of reasons, including the fact that audit privileges may require "overfiling" of enforcement actions. EPA said it might have to step in and expend federal resources to pursue enforcement actions in cases that would have been a state responsibility had the state legislative restriction not served to prevent the state from acting on the audit results.

Ira R. Feldman, special counsel with EPA's Office of Compliance and chairman of the agency's auditing policy work group, told BNA July 11 that EPA is not bound by state audit privilege laws in enforcing violations of federal law, and may be in a position to enforce environmental violations that should be enforced by the states.

Feldman said EPA has received positive response from all circles concerning the public meeting. He said the meeting not only will give proponents of the audit privilege an opportunity to present evidence in support of broader use of the privilege, but also will address other compliance and enforcement issues. EPA will look at creative compliance options and consider a wide variety of opinions to determine whether EPA mechanisms and policy concerning self-evaluative programs and voluntary disclosure should be adjusted, Feldman said.

Stephanie Siegel, an attorney with Collier, Shannon, Rill & Scott, told BNA that states probably will not hold up on their legislation to await the outcome of the meeting. States have been working on their proposals for a while now, and EPA's policy statement on what they prefer that states do is not a mandate that states must follow, she said.

John Wittenborn, also with Collier Shannon, told BNA July 12 that EPA and private citizens would have a difficult time circumventing the state audit privilege laws in bringing enforcement actions.

Questions On Scope Of Protection

There are still questions on the scope of protection of these state audit privilege laws, however. First, a company that does business in different states may be subject to a suit by citizens that forum shop for the state that does not have such a law.

Second, because the federal law of privilege is governed by principles of common law, and federal courts have not yet adopted an audit privilege, EPA and private citizens or environmental groups who sue under federal citizen suit provisions may argue that the state law on privilege does not apply to their claims.

James T. O'Reilly, chairman of the coalition, said EPA could present this argument, but federal courts would be bound to apply the privilege law of the state in which it sits as long as there is no contradictory federal evidentiary standard. He also said his coalition seeks to create a privilege only for the internal recommendations and comments in the audits and that protection would not extend to the specific factual findings and numerical data.

Tom Lindley, an attorney in Portland, Ore., who supported passage of the Oregon law (24 ER 1221), told BNA July 12 that although federal courts have not recognized an audit privilege, such a privilege could be adopted soon if these courts follow recent state statutes and interpret subsequent court rulings as forming the common law for such a privilege. He also said he was pleased that EPA is holding the meeting, but added that he fears that the agency's prosecutorial mindset will lead it to prejudge the issue and stray from the broader goal of seeing the environmental audit privilege as a way to improve compliance and protect the environment.

A federal bill based on the Oregon law also may be proposed by Sen. Mark O. Hatfield (R-Ore), according to a member of the senator's staff. Such a bill would create a federal environmental audit privilege to cover particular federal environmental statutes that EPA would not be able to avoid, the staff member said.

The bill is still in the comments stage, and the senator will consider the results of the public meeting in fashioning his bill, the staff member said. The audit privilege would have the effect of allowing businesses to conduct audits directly through an environmental consultant instead of having to go through attorneys to preserve the information under the attorney-client privilege, according to the staff member.

OVERVIEW OF ENVIRONMENTAL AUDIT PRIVILEGE BY STATE

Issues:	FEDERAL	AZ[13]	CA	CO[14]	ID	IL	IN	KY	NY	NC	OH	OR[1]	PA	RI	VA
• Bill or Law?	Bill	Bill	Bill	Law[2]	Bill	Bill	Law[3]	Law[4]	Bill	Bill	Bill	Law	Bill	Bill	Bill
• Environmental Audit Report - Requires documents comprising environmental audit report to be prepared as a result of an environmental audit and labeled "Environmental Audit Report: Privileged Document."	Yes	No	Yes	No	Yes	Yes	Yes	Yes	Yes	No	Yes	Yes	Yes	Yes	Yes
• Waiver of Privilege - Expressly.	Yes	Yes	Yes	Yes	Yes	Not stated	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
- By implication.	Yes	Not stated	Not stated	Not stated	Not stated	Not stated	Yes	Yes	Yes	Not stated	Yes	Yes	Not stated	Not stated	Not stated
- By failing to file a petition for *in camera* review or hearing (# of days to file petition after filing or request for the environmental audit report).	Yes (30 days)	Not stated	Not stated	Not stated	Not stated	Yes (30 days)	Yes (30 days)	Yes (30 days)	Yes (30 days)	Yes (30 days)	Yes[5]	Yes (30 days)	Yes (30 days)	Yes (30 Days)	Yes (30 days)
- By introduction of any part of the environmental audit report by party asserting the privilege.	Yes	Not stated	Not stated	Not stated	No[6]	Not stated	Not stated	Yes	Yes	Not stated	Not stated[7]	Not stated	Not stated	Not stated	Not stated
• Privilege is lost if: - Asserted for fraudulent purpose.	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes[8]	Yes	Yes	Yes	Yes
- Material is not subject to the privilege.	Not stated	Not stated	Yes	Not stated	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
- Material shows evidence of non-compliance and efforts to achieve compliance were not promptly initiated and pursued with reasonable diligence.	Yes	Yes	Yes	Yes	Not stated	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
- In a criminal proceeding, the legal official has a (need, substantial need, compelling need, or compelling circumstances) requiring the otherwise unavailable information.	Yes	Yes	Not stated	Yes[9]	Not stated	No	Yes	Yes	Yes	Yes	Yes[9]	Yes	Not stated	Not stated	Not stated
• Burden of Proof - Party asserting the privilege has burden of proving privilege and reasonable diligence toward compliance.	Yes	Not stated	Yes	Yes[10]	Yes[10]	No[11]	Yes	Yes	Yes	Yes	Yes[12]	Yes	Yes	Yes	Yes
- Party seeking disclosure has burden of proving fraudulent purpose.	Yes	Not stated	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes[12]	Yes	Yes	Yes	Yes
- Legal official or party seeking disclosure has burden of proving conditions for disclosure.	Yes	Not stated	Not stated	Yes	Not stated	Yes	Yes	Yes	Yes	Yes	Yes[12]	Yes	Yes	Yes	Yes
• Provision for disclosure of only the portions of the environmental audit report relevant to the issues in the dispute.	Yes	Yes	Not stated	Not stated	Not stated	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
• Provision for the suppression of evidence when a party fails to comply with the review, disclosure, or use prohibitions.	Not stated	Not stated	Not stated	No	No	Yes	No	No	Not stated	Not stated	No	No	Yes	Yes	Yes

(1) Federal legislation modeled after the Oregon bill may be introduced in the Senate by Senator Hatfield.
(2) Effective June 1, 1994.
(3) Effective July 1, 1994.
(4) Effective July 15, 1994.
(5) 14 days for a criminal proceeding. The rules of civil procedure or the Court's instructions govern for civil proceedings.
(6) Waiver shall apply only to the portions of the Environmental Audit Report for which the privilege is specifically waived.
(7) Although privilege is not waived, the bill explicitly states that party asserting the privilege is barred from using any portion of the environmental audit report in both civil and criminal proceedings.
(8) Bill reads: "Asserted in bad faith."
(9) Privilege is also lost in civil proceedings for the same reason.
(10) Party asserting the privilege has the burden of proving a prima facie case.
(11) Party asserting the privilege has the burden of proving the privilege, but the adverse party has the burden of showing the lack of reasonable diligence toward compliance.
(12) Standard of review is stated as "preponderance of the evidence."
(13) Privilege extends to health and safety audits.
(14) Has provision for persons with knowledge of the environmental audit report cannot be compelled to testify about the report without the consent of the entity for which the audit was performed. To be repealed July 1, 1999.

Evidence

ENVIRONMENTAL AUDIT RESULTS PROTECTED BY SELF-EVALUATION PRIVILEGE, COURT SAYS

Documents produced by a company during an investigation of groundwater contamination are entitled to a qualified privilege from discovery under the doctrine of self-critical analysis, a federal district court in Florida held Sept. 20 in a case of first impression (*Reichhold Chemicals Inc. v. Textron Inc.*, DC NFla, No. 92-30393-RV, 9/20/94).

The public interest in environmental compliance is furthered by allowing companies to "candidly assess their compliance with regulatory and legal requirements without creating evidence that may be used against them by their opponents in future litigation," the U.S. District Court for the Northern District of Florida ruled.

"This case is of enormous significance because it marks the first time a federal district court has recognized the self-critical analysis privilege in an environmental context," according to William A. Ruskin, who represented the plaintiff Reichhold Chemicals Inc.

"The court accepted the argument that the public interest is better served by preserving the confidentiality of environmental self-audits," Ruskin said.

Analogy To Federal Rule 407

The self-critical analysis privilege is analogous to, and based on the same public policy considerations as Fed.R.Evid. 407, which excludes evidence of subsequent remedial measures, the court said. It protects a company against the "Hobson's choice" of either aggressively investigating accidents and thereby producing a self-incriminating record, or deliberately avoiding such a compilation and possibly leaving the contamination unabated.

The court observed a significant difference between pre-accident and post-accident analysis. Pre-accident analysis, which shows that a company weighed courses of action and chose the act that produced the contamination, is highly relevant and discoverable, the court said. However, the court said, the relevance of post-accident audits, if any, is outweighed by its highly prejudicial nature.

Audit Done Under Consent Agreement

In 1984, Reichhold Chemicals entered into a consent order with the Florida Department of Environmental Regulation in which it agreed to conduct an investigation and remediation of contaminated groundwater at its Pensacola industrial site.

When in 1992, seeking to recover its costs, the company filed suit under the Comprehensive Environmental Response, Compensation, and Liability Act against former owners of the site, the former owners sought to discover the results of the environmental investigation. Reichhold argued that the documents were protected from discovery by the self-critical analysis privilege.

The privilege first was enunciated in the medical malpractice field, when a plaintiff sought to discover peer review discussions following her husband's death. In *Bredice v. Doctor's Hospital Inc.*, 50 F.R.D. 249 (DC DC 1970), *aff'd without opinion*, 479 F.2d 920 (CA DC 1973), the court held that the retrospective review of treatments, which it said was valuable in improving health care, would be chilled if discussions were discoverable.

The *Bredice* privilege, although not universally recognized, has been extended to many other fields based on the same rationale, the court said. It also explained that the privilege is a qualified one that can be overcome in special circumstances and that a party claiming the privilege must meet a four-part test.

Despite these limitations, the court said it had "no difficulty concluding in the abstract that an entity's retrospective self-assessment of its compliance with environmental regulations should be privileged in appropriate cases." The court also found that the audit was not discoverable under Florida state law because where a federal suit involves issues of state and federal law, federal privilege law is controlling.

Reichhold Chemicals was represented by William A. Ruskin, then at Lord Day & Lord, Barrett Smith, and now with New York firm of Schulte, Roth & Zabel. Textron was represented by James M. Wilson of Wilson, Harrell and Smith of Pensacola, Fla. Other defendants opposing the motion were Ashland Oil Inc., Archer-Daniels-Midland Co., and Quantum Chemical Corp.

(Reichhold Chemicals Inc. v. Textron Inc., DC NFla, No. 92-30393-RV, 9/20/94).