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Going Naked into the Thorns: Consequences of Conducting an Environmental Audit Program

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GOING NAKED INTO THE THORNS: CONSEQUENCES OF CONDUCTING AN ENVIRONMENTAL AUDIT PROGRAM

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I. INTRODUCTION

It is an uncontested fact that federal and state enforcement agencies continue to devote increasing resources to the investigation and prosecution of corporate criminal environmental violations. In this day and age of budget cuts and hiring freezes, the United States Environmental Protection Agency (EPA) has re-

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1. Statistics released by the Environmental Crimes Section of the Department of Justice (DOJ) show dramatic increases in the number of environmental criminal indictments and pleas/convictions from fiscal year 1983 through August 1989. The dollar value of fines imposed, the total jail time and time of actual confinement have also demonstrated net positive increases during the same period. See 3 Corp. Crim. Liab. Rep. 27, 27-28 (1989).

(71)
ceived a Congressional mandate to increase the number of criminal investigators working on environmental violations. Despite these staff increases, both EPA and the United States Department of Justice (DOJ) recognize that it is still impossible to monitor the regulated public at all times. This is in part due to the countless number of businesses that comprise the environmentally regulated community and the limitless scope of regulated behavior.

Corporate self-policing, by necessity, must be part of any suc-

2. See Pollution Prosecution Act of 1990, Pub. L. No. 101-593, 104 Stat. 2962, Nov. 16, 1990, Title II, §§ 202-205. Section 202 requires the EPA Administrator to ensure that the number of criminal investigators assigned to the EPA Office of Criminal Investigation meet the following staffing levels:
   (1) 72 criminal investigators for the period October 1, 1991 through September 30, 1992;
   (2) 110 criminal investigators for the period October 1, 1992 through September 30, 1993;
   (3) 123 criminal investigators for the period October 1, 1993 through September 30, 1994;
   (4) 160 criminal investigators for the period October 1, 1994 through September 30, 1995; and
   (5) 200 criminal investigators for the period beginning October 1, 1995.

   In addition, for fiscal years 1991-1995, the Administrator must increase the number of support staff assigned to the Office of Criminal Investigations.

   The Pollution Prosecution Act of 1990 not only mandates the hiring of additional criminal investigators, but also requires the training of current and future federal and state enforcement employees. Section 204 of the Act requires that by September 30, 1991 the EPA Administrator establish a National Enforcement Training Institute within the Office of Enforcement. The purpose of the Institute is “to train Federal, State and local lawyers, inspectors, civil and criminal investigators and technical experts in the enforcement of the Nation’s environmental laws.” Id. § 204.

   Concomitantly, the EPA has placed increased emphasis on coordinating civil and criminal case management in Regional Offices, joining forces with the Federal Bureau of Investigation (FBI) and DOJ. See James M. Strock, Assistant Administrator for Enforcement, U.S. EPA, Enforcement Priorities for 1990, Materials Presented at American Bar Association White Collar Crimes 1990 Conferences at 3-4 (March 1, 1990) (on file with authors). To coordinate cases with the United States Attorney Office, EPA has also created, in each of its Regional Offices, the position of Regional Enforcement Coordinator. Id. As part of this cooperative effort, an agreement was signed on October 7, 1991, specifying the roles to be played by the EPA and FBI in criminal investigations. See Toxics L. Rep. (BNA) 709 (Nov. 6, 1991).

   Briefly, this agreement sets forth the procedures for ensuring a free exchange of information between the FBI and EPA during criminal environmental investigations. Also, EPA acknowledges that, while it has authority to initiate criminal investigations, an EPA case referral to the FBI vests operational control of the case with the FBI. EPA and the FBI may, however, mutually agree to joint operational control.

cessful environmental enforcement scheme. This principal is rec-
ognized by EPA, which in 1986 issued an Environmental Auditing
Policy Statement (EPA Audit Policy) encouraging the regulated
community to implement environmental audit programs. At long
last, in July 1991, the DOJ published its own policy statement,
describing the mitigating effects a strong corporate environmen-
tal audit policy may have on criminal prosecutorial decisions.5
These policies take on added significance for the regulated com-

However, both policies fall far short of the benefits to be
 gained by both the regulator and the regulated through a volun-
tary disclosure program. Such a program was envisioned by some
members of the regulated community as the “quid pro quo” they
should be given for their self-policing efforts. In general, such a
voluntary disclosure program would involve both the DOJ and
EPA, would be administered on a centralized basis leading to
more uniform civil, criminal and administrative enforcement de-
cisions, and would allow for global resolution of enforcement is-
sues. Such a system would also provide uniform detailed guidance
on how to perform an audit, how to make a disclosure, and what
could be expected in return. Comprehensive voluntary disclosure
programs of this nature already exist; examples are those cur-
rently managed by the Department of Defense (DOD) and the
Federal Aviation Administration (FAA).7

4. EPA Audit Policy supra note 3.
5. DOJ Policy Statement, supra note 3, at 1.
6. This trend includes the Clean Water Act (CWA) Reauthorization. For a
more detailed discussion of this phenomenon, see infra notes 30, 32-35 and ac-
companying text.
7. See The Department of Defense Voluntary Disclosure Program - A De-
scription of the Process, issued April 1990 [hereinafter DOD Disclosure Pro-
gram]; Federal Aviation Administration Compliance/Enforcement Bulletin No.
90-6, March 29, 1990.

The Department of Defense (DOD) Voluntary Disclosure Program is a
highly structured system of disclosure. First, the defense contractor wishing to
make a disclosure involving potential criminal and/or civil violations contacts
the Office of Assistant Inspector General for Criminal Investigations, Policy and
Oversight (AIG-CIPO). DOD Disclosure Program at 5. The AIG-CIPO then
makes a preliminary determination to accept or reject the disclosure into the
Voluntary Disclosure Program. Id. If the contractor has made a sufficient disclo-
sure of information, which depends in part on whether the government had
prior knowledge of the disclosed information, the AIG-CIPO will preliminarily
accept the matter into the program. Id. at 5-7. “[T]he contractor's continued
participation in the program is contingent on prompt execution of the standard
[Voluntary Disclosure Agreement], and compliance with both this agreement
and requirements issued by the Deputy Secretary of Defense.” Id. at 9. The
The purpose of this article is to examine the DOJ and EPA policies on environmental audits in the context of determining what, if any, incentives are offered to undertake such a corporate soul-baring program. This article will also determine how companies that decide to expose themselves to the government can retain some control over their fates and not stick themselves in the criminal “bramblebush.” In addition, we will discuss the benefits to be gained by both the regulator and the regulated by implementation of a voluntary disclosure program similar to that administered by the DOD.

II. THE MAKINGS OF AN ENVIRONMENTAL AUDIT PROGRAM

The exact parameters of any audit program will vary with the unique characteristics of the facility or transaction at issue. Initially, one faces the problem of getting experts from different fields to agree on how a company should shape an environmental contractor is then advised whether or not the matter has been accepted into or rejected from the program. Id. at 9-10.

The contractor is encouraged to conduct its own internal audit investigation and to submit a report describing the findings, and this report must be submitted within 60 days of initial disclosure. Id. at 10. The government may or may not conduct its own audit or investigation of the contractor. The government will, however, verify all information provided by the contractor’s internal report, a process is referred to as a “verification audit.” Id. at 11. The contractor’s cooperation in the government’s audit and investigation are regarded as essential. Id. Any civil damages or restitution payments are coordinated through the DOJ’s Civil Division. Id. at 14. The matter can be removed from the program “at any time during the verification process if” the disclosure is determined not to meet the program’s requirements, or the contractor violates the terms of the Voluntary Disclosure Agreement. Id. at 15. The matter is then officially closed after the investigation is completed, the amount of damages is determined and settled, and letters indicating the final outcome of any civil, criminal or suspension/debarment matters are submitted by the appropriate DOD authorities. Id. at 15-16.

8. There are obvious distinctions between those types of environmental assessments that this article will refer to as “audits,” and those that will be referred to as “compliance assurances.” Compliance assurances are a “systematic way of determining, attaining, and maintaining [plant-level] compliance with applicable environmental rules and regulations.” Malcom Weiss, U.S. Environmental Protection Agency, Issues of Confidentiality and Disclosure in Environmental Auditing, 2 (April 1984). In contrast, environmental auditing:

[1] the evaluation of such compliance assurance activities, designed to assure that these procedures are in place and working, and to produce an organized data base. An auditing system enables firms to identify and correct procedures which lead to noncompliance, and to minimize delays and costs resulting from a regulator’s identification of noncompliance. . . . It differs from a compliance assurance program primarily because of its evaluative and corrective capacity.

Id. (citations omitted). In a nutshell, environmental auditing ensures that a company’s compliance assurance programs are functioning as intended.
audit program. An example of potentially different viewpoints is the pairing of an engineer and an attorney: such conflicts only grow in complexity when a third point of view is presented, that of the company employee with fiscal responsibility.

The professional literature abounds with what might seem to be petty turf battles over the definition of a proper environmental audit program. In reality the battleground is not semantics, but rather profound philosophical differences. For instance, engineering consultants are inclined to see environmental assessments as a series of protocols, reports, manuals and computer databases. Lawyers, on the other hand, tend to focus on the legal implications of the information that the environmental audit program will generate, and will attempt to keep the substance of internal records, reports and protocols away from the prying eyes of federal, state, and local governmental entities, competitors, and citizens’ groups.

A good place to begin when describing environmental audit programs is with the 1986 EPA Audit Policy. Environmental self-auditing, according to this policy, is “a systematic, documented, periodic and objective review by regulated entities of facility operations and practices related to meeting environmental objectives.” This concept of environmental audits, however,

9. The nomenclature of environmental specialists is not yet standardized. It is not uncommon to find environmental programs going by a variety of rubrics with the distinction among them unclear or nonexistent. Audit, survey, compliance assurance, review, appraisal, and evaluation have all won a certain amount of currency. See, e.g., J. W. Moorman & L. S. Kirsch, Environmental Compliance Assessments: Why Do They, How to Do Them, and How Not to Do Them, 26 Wake Forest L. Rev. 97 (1990) [hereinafter Moorman & Kirsch] (citing J. Greeno et al., Environmental Auditing Fundamentals and Techniques 4 (2d ed. 1987)).

10. See, e.g., Frank J. Priznar, Trends in Environmental Auditing 20 Envtl. L. Rep. (Envtl. L. Inst.) 10,179 (1990); A. Ronald Baumer, Making Environmental Audits, CHEMICAL ENGINEERING 101, Nov. 1, 1982. Baumer fails to include corporate counsel as a member of the audit team, which is to be made up exclusively of chemical and mechanical engineers. Id. Failure to include counsel as an integral member of the audit team, however, will likely have an adverse effect on a corporation’s ability to keep the fruits of the audit privileged and confidential. Cf. David L. Russell, Managing Your Environmental Audit, CHEMICAL ENGINEERING 37, June 24, 1985 [hereinafter Managing Audit] (audit team should include counsel to insure that the “attorney-client privilege” will apply to protect sensitive matters, as well as a certified public accountant, engineers and plant managers). Russell is perhaps overly sanguine about the availability of the attorney-client privilege to protect the fruits of the audit—reason enough for corporate counsel to ensure that she insinuates herself into the audit process at an early stage, and holds tight the reins. Id. For a discussion of potentially applicable privileges, see infra notes 39-48 and accompanying text.


12. Id. at 25,006 (footnote omitted). The type of compliance audit de-
does not include any activities that are mandated by “law, regulation or permits.”

The EPA has identified seven elements of a successful environmental audit program. They are: (1) “explicit top management support for environmental auditing and commitment to follow-up on audit findings;” (2) “an environmental auditing function independent of audited activities;” (3) “adequate team staffing and auditor training;” (4) “explicit audit objectives, scope, resources, and frequency;” (5) “a process which collects, analyzes, interprets and documents information sufficient to achieve audit objectives;” (6) “a process which includes specific

scribed by the EPA is distinguishable from the environmental assessment performed as an adjunct to a real estate transaction, which is also commonly called an “audit.” Real estate environmental audits may involve little more than a site inspection, facility personnel interviews and a records review (often called a “Phase I” audit). This is followed, only if necessary, by sampling of air and waste water emissions, an asbestos determination, and a check for environmental contamination of soil and groundwater. See Douglass F. Rohrman & Michael J. Hoffman, Environmental Audits: Assessing Environmental Liability in Real Estate Transactions, Ill. B. J. 690 (Sept. 1989). A real estate environmental audit is not likely to focus on corrective actions since the ultimate goal is disposal of the property with a proper allocation of risk for the environmental conditions that were found to exist through the audit procedure.


14. Id. at 25,009. A written policy may demonstrate management support of such a program, which should pledge support not only for the audit program, but also for compliance with corporate policies, permit requirements, and federal, state and local statutes and regulations. EPA also suggests that there be “an explicit written commitment to follow-up on audit findings to correct identified problems and prevent their recurrence.” Id.

15. Id. The auditors should be without personal, financial or other conflicts of interest with the audited activity. Their status and organizational reporting responsibilities should “ensure objective and unobstructed inquiry, observation and testing.” Id.

16. 51 Fed. Reg. at 25,009. Auditors should take advantage of continuing education and training programs to maintain their competence. Id.

17. Id. The 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.” Id. The auditors should have access to the facility’s permits, pertinent regulations covering the facility’s activities, and the relevant checklists and protocols for the facility’s processes and procedures. There should be written procedures detailing how to plan the audit, how to define the scope of the audit, how to examine and evaluate the findings, how to communicate the findings, and how to conduct the follow-up. Id.

18. 51 Fed. Reg. at 25,009. In order to provide a sound basis for the audit’s conclusions, the information collected should be “sufficient, reliable, relevant and useful.” Id. There should be a periodic review of the means used to identify, measure, classify and report the information on which the auditors, in turn, will base their audit findings. The information gathering and review process should be conducted in such a fashion to maintain audit objectivity and meet audit goals. Id.
procedures to promptly prepare candid, clear and appropriate written reports on audit findings, corrective actions, and schedules for implementation;”¹⁹ and (7) “a process which includes quality assurance procedures to assure the accuracy and thoroughness of environmental audits.”²⁰

Inevitably, a thorough environmental audit will find violations or potential noncompliance situations, because one hundred percent compliance with all relevant environmental regulations is only theoretically possible, especially at complex, multi-process, multi-regulated facilities, and at companies with many geographically dispersed sites. In preparation for this reality, corporate counsel should ensure that, prior to instituting the audit program, there are procedures describing exactly who is to receive a copy of the audit report, as well as a clear commitment from within the corporate structure to deal with the audit findings.

The identification of the individuals who are to receive copies of the audit report is an important task. An audit report identifying a possible violation which finds its way to a vice president’s office may involve the recipient in an enforcement investigation, despite the fact that this particular individual may have no other source of knowledge regarding the issue. Generally, prosecutors will expend additional efforts to determine who was the highest ranking employee involved in the noncompliance situation²¹ by applying the “responsible corporate agent doctrine.”²² Employ-

¹⁹. Id. The procedures should ensure that the audit findings are communicated to appropriate managers at both the facility and corporate level who can evaluate the reports and correct the problems found. Id. Of particular importance for the subject matter of this article, procedures should also exist “for determining what internal findings are reportable to state or federal agencies.” Id.

²⁰. 51 Fed. Reg. at 25,009. This can be accomplished “through supervision, independent internal reviews, external reviews, or a combination of these approaches.” Id.

²¹. When corporations are prosecuted the highest ranking culpable corporate official is often indicted as well. See F. Henry Habicht II, The Federal Perspective on Environmental Criminal Enforcement: How to Remain on the Civil Side, 17 Envtl. L. Rep. (Envtl. L. Inst.) 10,478, 10,480 (1987). Of the 215 indictments secured by DOJ between October 1982 and September 1986, Habicht reports that 65 were against corporations, while 150 were against corporate officers, directors, or employees. Id.

²². The Supreme Court first articulated the general parameters of the “responsible corporate agent” doctrine in United States v. Dotterweich, 320 U.S. 277 (1943), a conviction of the president/general manager of a pharmaceutical company under the Food, Drug and Cosmetic Act, 21 U.S.C. §§ 301-392 (1972). Although the corporation itself was not convicted, Mr. Dotterweich was, for three counts of selling misbranded and adulterated drugs. His conviction was
ees who receive the reports should therefore be limited to those with a "need to know"—i.e., those with management or fiscal responsibility for the facility or both. This includes managers at both the facility and corporate level.

This is not to suggest that "ignorance is bliss" and that responsibility for compliance issues may be avoided by not receiving a copy of the audit report describing the issue. What you do not know can hurt you.23 There is a developing body of case law which holds corporate officers responsible for actions of which they may have had no direct knowledge under a charge of "reckless disregard" of the truth or a "conscious avoidance of the truth" standard.24 In addition, having the audit report reviewed premised upon his position within the pharmaceutical company, rather than any knowledge he may have had of the illegal transactions. The Court found that he was of a class of employees with "at least the opportunity of informing themselves of the existence of conditions imposed for the protection of consumers. . . ." 320 U.S. at 285. The Court otherwise gave little guidance on who would be a responsible corporate agent, describing as "too treacherous" any formula defining a "class of employees which stands in such a responsible relation." Id. Generally, though, "[t]he offense is committed . . . by all who . . . [have] a responsible share in the transaction which the statute outlaws. . . ." Id. at 284.

Because conviction as a "responsible corporate agent" is position-dependent rather than knowledge-dependent, application of the doctrine has been largely confined to crimes without a knowledge or intent requirement, or if the officer exercised a high degree of care in selecting and supervising his delegate. See generally John F. Seymour, Civil and Criminal Liability of Corporate Officers Under Federal Environmental Laws, Env't Rep. (BNA) 337, 341 (June 6, 1989) [hereinafter Seymour]. For the same reason, delegation of one's authority to another to ensure compliance with statutory mandates is no defense to prosecution as a responsible corporate agent. See United States v. Park, 421 U.S. 658, 670-73 (1974) (where, through a responsible corporate agent's managerial position, the statute at issue "imposes not only a positive duty to seek out and remedy violations, but also . . . to implement measures that will ensure that violations will not occur," criminal liability is not premised upon "conscious wrongdoing," and a failure to act is a sufficient basis for conviction). Accord United States v. Starr, 555 F.2d 512, 515 (9th Cir. 1976) (delegation of authority without follow-up to ensure that noncompliance was remedied is not a defense to criminal liability of responsible corporate agent). However, that the responsible corporate agent was "'powerless' to prevent or correct the violation" is a defense. Park 421 U.S. at 673 (citing United States v. Wiesenfeld Warehouse Co., 376 U.S. 86, 91 (1964)).

23. Indeed, Barry Hartman, Deputy Assistant Attorney General of the DOJ's Environment and Natural Resources Division, has been reported to have said that the DOJ has a strong prosecutorial interest in persons who ignore problems that are indicated by audits. The DOJ intends to prosecute persons who rely on their "willful blindness" to environmental problems as a shield from environmental liability. See DOJ Plans to Issue Policy Statement on Use of Corporate Environmental Audits, Env't Rep. (BNA) 484 (June 21, 1991).

24. Also known as "deliberate avoidance," "studied ignorance," or "the ostrich defense," courts have long acknowledged that deliberate avoidance of knowledge of an illegality by failure to investigate a situation is as bad as knowl-
by the appropriate people with fiscal and oversight responsibility will help validate the company's environmental audit program in the eyes of the DOJ and EPA.

As part of the corporate commitment to deal with the audit findings, a pre-determined program of dealing with such findings should be in place. First, a means for handling disagreements between the business and the audit team regarding audit results, interpretation or conclusions, or both, should be established.25 This should occur whether the audit is performed by an internal or external team.26 Second, mechanisms should be in place to

25. See Managing Audit, supra note 10, gives clear, practical advice for addressing such situations, which arise frequently enough to merit standard post-audit procedures, including:

1. Insist upon an exit interview between plant management, participating supervisory staff, and the audit team. Discuss the auditors' work, their findings, and what their report will contain.

2. Insist that the report be marked "Preliminary" until after the plant management and the company attorney have had a chance to review it and make written comments.

3. When the report is issued, read it at least twice. The first reading should be for overall impression; during the second, look for detail and fact. Determine not only what is said but also what is implied.

4. Challenge all unsupported statements and conclusions. Enforcement personnel and (less frequently, perhaps) consultants may sometimes make observations that are outside of their expertise or scope of work, and these unsupported comments can be interpreted as a legal notification that a particular situation exists. An unsupported statement can come back to haunt you.

5. Create a "positive-response paper trail" on all audit recommendations. The auditors will generally recommend specific areas for further investigation, which might include implementation of procedural controls or installation of equipment. Consider all of the recommendations seriously, and document the consideration — even if the documentation merely says that the plant has studied the audit report and has found that the technology to solve the problem does not exist. Make sure, however, that the engineering group has studied the recommendation and that it does support the conclusion.

6. Respond positively. It does little good if the paper trail of positive response does not result in specific actions. Procedural controls cost little to implement, and large capital projects can often be phased in. Translate the auditors' recommendations into the plant capital budget, and let others decide how much can be spent and on what.

Id.

26. The EPA Audit Policy acknowledges that "[a]udits can be conducted effectively by independent internal or third party auditors." 51 Fed. Reg. at 25,006. To maintain the independence of an internal audit team, auditors
ensure that the audit findings are not left to fester, tucked away in someone's filing cabinet, long forgotten. Such audit reports may later become the stereotypical "smoking gun" that every enforcement official dreams of finding. Audit findings should be dealt with, which includes not only rectifying situations reported, but also conducting additional tests or reviews when necessary, particularly if a dispute arises regarding the findings, interpretations or conclusions.27

III. MANDATORY VERSUS DISCRETIONARY ENVIRONMENTAL AUDIT PROGRAMS

Implicit in the above discussion is the fact that the creation of an audit program meeting EPA's standards involves a corporate commitment of both time and money. When one also takes into account the audit program's potential for creating a paper trail for the regulator, the obvious question from the company's perspective is "why perform an audit?" The purpose of this section is to discuss those occasions when environmental audit programs may be mandated by law or as part of an enforcement scheme, as should at least report through a separate chain of command. For example, to ensure independent and candid assessments, the members of the audit team should not have to critique their own bosses.

27. In the future, lawyers may be hesitant to advise clients as to what does or does not constitute an environmental violation due to a felony complaint filed in Solano County, California against eight defendants, including a San Francisco law firm and one of its associates. See California v. InFerGene Co., No. 096922, Cal. Mun. Ct., Solano County (May 30, 1991). In that case, one of the law firm's corporate clients was evicted from their rented warehouse at about the same time they were filing for bankruptcy. The associate wrote a letter to the client's landlord saying that the client could not remove the hazardous waste it left behind. The letter stated that the client claimed "no further interest" in the waste since a writ of possession was executed on behalf of the landlord and against the warehouse, and that the client could not pay to dispose of the waste as that would constitute a pre-petition claim, violating bankruptcy law. Ironically, it was the corporate client that contacted the California state environmental agency, which led to the local District Attorney's Office (DA's Office) getting involved. A Bankruptcy Judge ruled in May 1991 that the DA's office could prosecute the corporate client, the law firm and the associate. While all charges against the attorneys were eventually dismissed or withdrawn, the Solano County environmental prosecutor has stated that he may go to a county grand jury seeking new charges. See Susan Kostal, InFerGene Admits It Had Role in Dumping, S.F. DAILY J., Oct. 9, 1991, at 2.

While it has always been the case that a lawyer may be prosecuted for counseling a client to violate the law, the Solano County case instead sought to impose criminal liability for advice that was ostensibly given in good faith. The concern is that due to the lower standard of criminal intent necessary for environmental prosecutions, there may be additional prosecutions of lawyers for giving advice with which regulators may disagree. See 77 ABA J., at 16 & 18 (Sept. 1991) (further discussion of InFerGene case).
opposed to those situations when a company may still exercise its
discretion in developing a voluntary environmental audit pro-
gram. Section IV of this article addresses the question of "why"
by exploring what, if anything, is to be gained by instituting such
a program.

EPA believes there are "sound business reasons" for envi-
ronmental audit programs, which can serve "as a means of help-
ing regulated entities manage pollution control affirmatively over
time instead of reacting to crises."\(^{28}\) The EPA Audit Policy
stresses the voluntary nature of a corporate audit program and
EPA's intention, at least in 1986, when it issued its Audit Policy,
to *not* mandate auditing.\(^{29}\) Instead of requiring such programs,
EPA subtly points out that "ultimate responsibility for the envi-
ronmental 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."\(^{30}\) In other words, to avoid being
blindsided by application of the "responsible corporate agent"
doctrine and "conscious disregard" theories, corporate manage-
ment should seriously consider the institution of an environ-
mental audit program.\(^{31}\)

The voluntary nature of audit programs may be falling by the
wayside, as increasing numbers of businesses find themselves fac-
ing mandatory environmental audit program requirements. The
EPA Audit Policy sets forth EPA's intent to include environmental
audit program provisions in consent decrees when it believes an
audit program "could provide a remedy for identified problems
and reduce the likelihood of similar problems occurring in the
future."\(^{32}\)

Recent proposed legislation indicates Congress' attempts to
increase the number of occasions when audit programs will be
required. The Wofford Amendment to the Federal Omnibus Vio-
lent Crime Control Act of 1991 [Crime Control Act], approved by
the United States Senate in July 1991, would have authorized the
federal courts to require a corporation convicted of an environ-
mental offense to pay for an environmental compliance audit.
The audit would also have included recommendations to prevent

29. Id. at 25,007.
30. Id. at 25,006-07.
31. For a discussion of the responsible corporate agent doctrine, see *supra*
    note 24 and accompanying text.
32. 51 Fed. Reg. at 25,007 (footnote omitted).
future offenses, and the corporation would be required to comply with the recommendations.\textsuperscript{33} The House of Representatives, however, passed its own version of the Crime Control Act without the audit requirement, and the amendment has been deleted by a joint conference committee. As proposed, the Clean Water Act Reauthorization will require holders of National Pollutant Discharge Elimination System (NPDES) permits to implement audit programs to be conducted by “certified” firms, persons or organizations.\textsuperscript{34} The audits must “identify necessary steps and an appropriate schedule for improving the degree and extent of compliance,” and the audit reports will be made available to the public.\textsuperscript{35}

The relevancy of a discussion of the repercussions of performing an environmental audit increases when one recognizes this movement toward mandatory audit programs. However, the benefits to be gained by performing the mandatory audit and reporting discovered violations will decrease if the audit requirement carries with it a violation reporting requirement, or a direction that all such reports be turned over to EPA. The self-reporting will then not be viewed as voluntary.

IV. What is Gained by Conducting an Environmental Audit Program?

Regardless of whether an audit program is mandatory or voluntary, a legitimate question that will consistently arise is “what is to be gained by performing the audit?” This section discusses whether the audit reports may be protected from discovery and whether the environmental audit program may be used as a defensive tool by the corporation.

A. The Downside of Audits: Discoverability of Audit Reports

An integral part of any auditing or self-policing program is

\begin{itemize}
  \item \textsuperscript{34} Water Pollution Control Act of 1991, S. 1081, 102d Cong., 1st Sess., § 520 at 168. S. 1081 contemplates that certification will be granted for a ten year period under the auspices of an EPA administered program. Id. at 175.
  \item \textsuperscript{35} Id. Trade secrets and processes, along with operational and financial information protected under 18 U.S.C. § 1905 (regulating the disclosure of confidential information by public officers and employees), will remain confidential. S. 1081, 102nd Cong., 1st Sess., § 520 at 175 (citing 18 U.S.C. § 1905 (1984)).
\end{itemize}
the generation of a paper trail that may document potential environmental noncompliance. Such specific and detailed information would be invaluable to the government’s criminal prosecution of a corporation and its employees since documented noncompliance goes a long way toward proving the “general intent” requirement found in environmental statutes.36

The audit report is also likely to contain proprietary business information regarding finances, production processes and technology, or otherwise sensitive business information. The report may provide the factual basis for citizen suits, expose financial or trade secrets to competitors, or even sacrifice a valued employee’s Fifth Amendment privilege against compelled self-incrimination.37

Corporate counsel must deal with the issue of whether such potentially damaging information can be kept confidential even after a disclosure has been made to the government.38 Preliminary...

36. The current understanding of criminal provisions of federal environmental statutes is that they differ from most other crimes in that it is not necessary to demonstrate that the defendant had a specific intent to commit the offense; they are general intent crimes, and conviction is premised on the defendant’s knowledge or mere volitional conduct. Removing the specific intent requirement from environmental prosecution significantly decreases the burden on the prosecutor, since general intent may be proven merely by showing that a defendant was conscious of her actions, whereas specific intent is proven by showing not merely that she was conscious of her actions, but also that she knew her actions were illegal. Prosecutors have successfully argued that violations of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. 6900-6992k (1988), are general intent crimes. See, e.g., United States v. Dee, 912 F.2d 741 (4th Cir. 1990) cert. denied, — U.S. —, 111 S. Ct. 1307 (1991); United States v. Hoflin, 880 F.2d 1033 (9th Cir. 1989), cert. denied, 493 U.S. 1083 (1990); United States v. Johnson & Towers, Inc., 741 F.2d 662 (3d Cir. 1984), cert. denied, 469 U.S. 1208 (1985). See also United States v. Greer, 850 F.2d 1447 (11th Cir. 1988).

37. Such employees might then perceive themselves as no longer valuable, except perhaps as scapegoats, thus creating an incentive for them to turn their loyalties away from the company and toward the government. One commentator, however, has suggested that an audit mandated by statute or regulation may amount to direct government compulsion of self-incriminating testimony, thus tainting environmental criminal protections. See Edmund B. Frost, Voluntary Environmental Compliance Audit: A DOJ Policy Failure, Toxics L. Rep. (BNA) 499, 501-02 (Sept. 18, 1991). Note that while corporations themselves cannot benefit from the Fifth Amendment privilege, their employees can, creating an innate tension that the corporation should affirmatively attempt to defuse, not aggravate. See, e.g., Wilson v. United States, 221 U.S. 361, 383-85 (1911); Hale v. Henkel, 201 U.S. 43, 58 (1905).

38. Counsel will also want to protect the confidentiality of self-policing information because evidence of noncompliance may be used not only in criminal prosecutions by the government, but also in private actions under the citizen suits provisions allowable under most of the federal environmental statutes, in private toxic tort suits, and in civil or criminal actions brought by local governmental environmental enforcement authorities. Once disclosed to the federal...
rily, it appears that the privileges normally used by attorneys to protect client communications and internal investigations from disclosure, such as the attorney-client privilege and the attorney work-product doctrine, in most instances will not be available to protect an environmental audit or other technical, self-policing report.

1. Attorney-Client Privilege

The attorney-client privilege, which protects confidential communications between an attorney and her client, is the oldest acknowledged privilege. It arose at common law to ensure a free exchange of information that would enable the attorney to provide informed advice. Communications between corporate counsel and an employee, which occur for the purpose of counsel gaining information in order to provide legal advice to the corporation, are protected as part of the attorney-client privilege between the corporation and the lawyer. However, a company may see little need in involving counsel: in run-of-the-mill compliance assurance programs, and even many audits, the essential focus is often on an evaluation of existing processes and procedures, rather than on employee interviews. As a practical matter, counsel will normally not have the necessary expertise to conduct the detailed, technical questioning required in an audit. Nor will a company want to incur on a regular basis the additional costs associated with involving counsel in carrying out the audit procedures.

For these reasons, counsel may not be involved in compliance assurance or environmental auditing, so the privilege will not apply. Furthermore, by emphasizing technical issues on which counsel is unqualified to opine, the necessary nexus that the attorney-client privilege requires between an audit or compliance report and the rendering of legal advice may not be met.

40. Id. at 395.
even in audits that involve counsel. Another potential problem with the attorney-client privilege is that it does not preclude the employee from speaking to others about his conversation with the attorney, thereby breaching the confidentiality requirement. Additionally, even if counsel conducts the interviews, the audit report itself may not be covered by the attorney-client privilege since the privilege protects only communications, not underlying facts.

2. Work-Product Privilege

In order for the attorney work-product privilege to apply to an audit report and protect it from involuntary disclosure, the audit must have been conducted in anticipation of litigation, and the report must be generated by the attorney or one acting at the request and direction of the attorney. It will also be difficult to argue that a report generated as part of a regular audit program constitutes work performed in anticipation of litigation.

3. Critical Self-Evaluation Privilege

A relative newcomer to the field of privilege is the "critical self-evaluation privilege," which has been baptized under different names by different courts and commentators, each anxious to put their own spin on the subject. However, no matter what the name, courts have identified three core criteria required for application of this privilege: (1) the protected information must result from the claimant's critical self-evaluation; (2) there must be a strong public interest in preserving a free flow of the type of in-

41. Merely having an attorney on an environmental audit team will not necessarily bring an audit, even one involving employee interviews, within the attorney-client privilege if the attorney does not render legal assistance. See United States v. Chevron, No. 88-6681, 1989 U.S. Dist. LEXIS 12267 (E.D. Pa. Oct. 16, 1989) (attorney on audit team was merely business advisor; therefore audit report was not privileged).


44. The privilege does not cover documents prepared in the regular course of business, even if litigation "is already in prospect. . . ." Wright & Miller § 2024.

formation for which protection is sought; and (3) free flow of this information would be curtailed if left unprotected.46

This privilege has not yet been acknowledged in the environmental self-policing area, nor has it been recognized by most jurisdictions. Of particular importance for our analysis, courts generally do not recognize the privilege when the documents in question are sought by a governmental agency, a category that includes EPA.47 Due to the tenuous nature of this privilege, it cannot be relied upon as a means by which the audit report can be kept from discovery.

The foregoing discussion may suggest that maintaining the confidential character of internal self-policing reports is futile. This is certainly the case when the audit or compliance assurance process is designed without giving any thought to the possible availability of these privileges. By designing internal self-policing programs with the privileges in mind, however, the chance of keeping confidential information under cover should be significantly increased. Clients, nevertheless, should neither forget to put counsel in the loop, thereby losing the privilege, nor over-involve counsel in each facet of an audit, thereby compromising the EPA Audit Policy criterion that auditors be “independent.”48

B. Protections Provided by Agency Goodwill

The EPA has stated that “as a matter of policy, [it] will not

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The EPA "acknowledges [that] regulated entities need to self-evaluate environmental performance with some measure of privacy and encourages such activity." 51 Fed. Reg. at 25,007. However, the EPA has also expressed its opposition to any codification or formalization of a self-evaluation privilege. See Letter from James M. Strock, Assistant Administrator of EPA, to Representative Richard F. Mutzenbaugh, Chairman, House State Affairs Committee, Colorado (February 14, 1990) (opposing Colorado's attempt to codify the self-evaluation privilege).

47. See FTC v. T.R.W., Inc., 628 F.2d 207, 210 (D.C. Cir. 1980). Relying on a Second Circuit opinion issued in United States v. Noall, 587 F.2d 123 (2d Cir. 1978), the T.R.W. court found an additional reason to deny application of the privilege: the documents were sought by the government, via an FTC subpoena issued pursuant to the FTC's broad investigatory and subpoena powers. In the Noall case, the court had found that the self-evaluation privilege did not apply in response to an IRS production order. More recently, in United States v. Dexter, 132 F.R.D. 8 (D. Conn. 1990), the court held that there was no qualified privilege against disclosure of self-evaluative documents in a suit brought by EPA pursuant to the Clean Water Act (CWA), 33 U.S.C. §§ 1319(b), 1319(d), & 1321(b)(6)(B).

48. See supra note 15 and accompanying text.
routinely request environmental audit reports." The EPA will, however, request a report when it "determines it is needed to accomplish a statutory mission, or where the Government deems it to be material to a criminal investigation." The examples listed in the EPA Audit Policy describing situations in which EPA may request an audit report, or a portion thereof, emphasize the rather elusive power EPA claims to possess. The agency may request reports when "audits are conducted under consent decrees or other settlement agreements; when a company has placed its management practices at issue by raising them as a defense; or when state of mind or intent are a relevant element of inquiry, such as during a criminal investigation."51

In other words, there are no guarantees that EPA will not seek a copy of an audit report, or at the very least some selected portions. Furthermore, there are no guarantees that audit reports will not be sought by state enforcement agencies, or that they will be protected from disclosure in response to a discovery request raised during a citizen suit.53

49. 51 Fed. Reg. at 25,007. However, some environmental practitioners have reported "that audit documents are routinely seized by EPA criminal investigators whenever such documents are known or suspected to exist and may relate in some way to the ongoing investigation." James R. Moore, et al., Why Risk Criminal Charges by Performing Environmental Audits?, Toxics L. Rep. (BNA) 503 (Sept. 18, 1991).

50. 51 Fed. Reg. at 25,007.

51. Id.

52. While the DOJ Policy Statement applies only to criminal noncompliance situations, one would be hard-pressed to think of a situation where a federal civil/administrative noncompliance situation would not have at least the potential for involving a state criminal or civil issue.

53. Most of the major federal environmental statutes contain provisions allowing private parties to seek enforcement of the statute against noncomplying entities. The CWA, for example, states that, after giving sixty days notice to the EPA or the state agency implementing the NPDES permit program:

any citizen may commence a civil action on his own behalf-

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency . . . ) who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation.


The factual basis for citizen suits is often found exclusively in reports that regulated entities have filed with the government and to which the public may gain access, e.g., through a FOIA request. See supra note 38. For instance, NPDES permittees under the CWA are required by their permits to maintain Discharge Monitoring Reports (DMR's), which must be filed with the permitting agency. DMR's will chronicle permit violations that can form the basis of citizens' suits. See, e.g., Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc., 484 U.S. 49 (1980), remanded, 844 F.2d 170 (4th Cir. 1988), judgment rein-
The topic of "discoverability of the audit report" must include a discussion of when the audit findings should be reported to federal or state authorities. When a reporting violation is discovered, a failure to notify the proper agencies only increases the magnitude of the problem. As discussed below, in order to comply with the DOJ's new policies, the disclosure of a noncompliance situation must be made in a timely and complete fashion. The question that arises is this: after performing the self-policing function strongly supported by the regulatory authorities and creating the paper trail that reveals all the company's blemishes, and after the corporation has been stripped naked of all protections, what control does one have over how the government will use information which has been neatly compiled in the audit report?

C. Is There Credit for Self-Reporting?

While making no promises, the EPA Audit Policy provides two incentives for conducting audits and for reporting violations. First, facilities with a good compliance history, including audit programs, may be subject to fewer inspections. Second, when EPA is determining its response to a violation, it will take into account the company's efforts to avoid and correct problems.

On July 1, 1991 the long awaited DOJ pronouncement on the role to be played by environmental audit programs was issued in the form of a policy statement entitled "Factors in Decisions on Criminal Prosecutions for Environmental Violations in the Context of Significant Voluntary Compliance or Disclosure Efforts by the Violator" (DOJ Policy Statement). The purpose of the DOJ Policy Statement is to ensure that the DOJ exercises its discretion in a consistent fashion, and also to encourage self-auditing, self-policing and voluntary disclosure by the regulated community.

The specific factors described in the policy should be used by all United States Attorneys to determine whether and how to prosecute. Furthermore, the DOJ Policy Statement is clear on at


54. For instance, many environmental statutes impose civil penalties per day of violation. See, e.g., CWA § 309, 33 U.S.C. § 1319.

55. See infra text accompanying note 60. See also DOJ Policy Statement, supra note 3.

56. 51 Fed. Reg. at 25,007.

57. See DOJ Policy Statement, supra note 3.

58. See id. at 1-2.
least one point: it is unlikely that any one factor will be dispositive in this determination.59

When making environmental prosecutorial decisions, the DOJ will now judge a potential corporate criminal defendant’s conduct in the following four areas:

(1) Voluntary Disclosure - The company must disclose the potential violation in a voluntary, timely and complete manner. The DOJ will consider whether the disclosure is made promptly after the discovery; will determine both the quality and quantity of the information provided; will decide whether the information supplied substantially aided the government; and will determine whether the disclosure occurred before a government agency had knowledge of the situation. A disclosure will not be considered to be voluntary if it is required by law, regulation or permit.60

(2) Cooperation - The company or individual must be willing to make all relevant information, including the complete results of its investigation and all witnesses’ names, available to the government. The DOJ will consider the degree, timeliness, extent and quality of the cooperation exhibited by the disclosing entity.

(3) Preventive Measures and Compliance Programs - The DOJ will also consider “the existence and scope of any regularized, intensive and comprehensive environmental compliance program.” A company’s program should include the means to identify and prevent future noncompliance, and should be adopted in good faith and in a timely manner.61

59. See id.

60. Id. at 3. In addition to the continued movement towards mandating audits themselves, see supra notes 32-34 and accompanying text, many environmental statutes already impose a mandatory duty to report releases of pollutants to environmental regulators. See, e.g., CWA § 311, 33 U.S.C. § 1321(b)(2)(B)(5) (failure to report the discharge of oil or a hazardous substance to the appropriate agency is misdemeanor); Emergency Planning and Community Right-to-Know Act (EPCRA) § 325(b), 42 U.S.C. § 11045(b) (1988) (failure to report to the local Emergency Planning Committee the release of certain hazardous substances that will result in exposure of persons off-site is subject to civil, misdemeanor, and felony penalties); Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), § 103, 42 U.S.C. § 9603 (1988) (failure to notify the National Response Center of the release of hazardous substances is a felony, punishable by up to three years imprisonment for a first offense).

61. When applying this particular factor the DOJ will ask:
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 management audits, to evaluate, detect, prevent and remedy circumstances like those that led to the noncompliance? Were
(4) Additional Factors Which May Be Relevant - As part of this catch-all factor, the DOJ will look at the pervasiveness of the non-compliance at issue,\textsuperscript{62} the internal disciplinary action taken against those employees involved in the noncompliance,\textsuperscript{63} and subsequent compliance efforts made by the reporting entity.\textsuperscript{64}

One gap in the DOJ Policy Statement is whether some factors may be weighted more heavily than others in the DOJ's enforcement calculus. If we do not know how to answer these questions, it cannot fairly be said that DOJ has met its goal "of giv[ing] federal prosecutors direction concerning the exercise of prosecutorial discretion in environmental criminal cases and ensur[ing] that such discretion is exercised consistently nationwide."\textsuperscript{65}

Apparently the DOJ believes its laundry list of speculative questions that it will ask when evaluating a company's compliance program will assist counsel and management in developing a company's environmental audit program. It is arguable that this approach to providing information is also not in keeping with DOJ's stated goal, "to give the regulated community a sense of how the federal government exercises its prosecutorial discretion with respect to use of environmental audits and other procedures to assure compliance with applicable environmental laws and reg-

\begin{itemize}
\item Did the audit evaluate all sources of pollution (i.e., all media), including the possibility of cross-media transfers of pollutants?
\item Were the auditor's recommendations implemented in a timely fashion?
\item Were adequate resources committed to the auditing program and to implementing its recommendations?
\item Was environmental compliance a standard by which employees and corporate departmental performance was judged?
\end{itemize}

DOJ Policy Statement, \textit{supra} note 3, at 4-5.

\textsuperscript{62} When applying the "pervasiveness of noncompliance factor," DOJ will consider "the number and level of employees participating in the unlawful activities and the obviousness, seriousness, duration, history and frequency of non-compliance." \textit{Id.} at 5.

\textsuperscript{63} When applying the "internal disciplinary action" factor, DOJ will consider "whether there was an effective system of discipline for employees who violated company environmental compliance policies" and whether it established "an awareness in other employees that unlawful conduct would not be condoned." \textit{Id.}

\textsuperscript{64} When applying the "subsequent compliance efforts" factor, DOJ will consider the promptness and completeness of such efforts, "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." \textit{Id.} at 5-6.

\textsuperscript{65} DOJ Policy Statement, \textit{supra} note 3, at 1.
ulating." More actual guidance and less rhetoric would undoubtedly be useful to the regulated community.

The new DOJ Policy Statement also includes "illustrative examples," which are set forth to help provide guidance to both enforcement officials and the regulated community when evaluating criminal cases. It is important to note that the DOJ Policy Statement warns that even if a company meets all the criteria, there are no guarantees that the company will not be criminally prosecuted. In addition, the regulated community must bear in mind that the DOJ Policy Statement does not apply to civil enforcement actions, nor does it provide any protection whatsoever from state enforcement actions or from citizen lawsuits.

The significance of the DOJ Policy Statement should not be lost in a discussion of what it does not accomplish. The Policy Statement is a first step, one which took the DOJ five years to develop after EPA first published its final Audit Policy. It is still too early to determine whether the DOJ's theoretical guidelines will translate into concrete incentives for companies to institute environmental audit programs and to self-report potential violations. It is interesting to note that even before the issuance of the DOJ Policy Statement, Congress made a much stronger pronouncement in favor of environmental audit programs. In the October 1990 Conference Report for the Clean Air Act Amendments, Congress stated that the EPA Administrator and Attorney General should refrain from using information obtained during a voluntarily initiated environmental audit against the person conducting the audit to prove the "knowledge" element of the Clean Air Act Amendment's criminal provisions if such information is immediately transmitted to the proper authorities. Perhaps the

66. Id.
67. For a discussion of citizen lawsuits, see discussion supra at note 53.
68. S. 1081, 101st Cong. 2d Sess. (1990). Due to the significance of the exact Conference Report language on this issue, it has been set forth below in full:

Nothing in this subsection is intended to discourage owners or operators of sources subject to this Act from conducting self-evaluations or self-audits and acting to correct any problems identified. On the contrary, the environmental benefits from such review and prompt corrective action are substantial, and section 113 should be read to encourage self-evaluations and self-audits.

Owners and operators of sources are in the best position to identify deficiencies and correct them, and should be encouraged to adopt procedures where internal compliance audits are performed and management is informed. Such internal audits will improve the owners' and operators' ability to identify and correct problems before rather
DOJ will carry through with this thought when applying the DOJ Policy Statement and making prosecutorial decisions.

V. Disclosure at What Price?

Some commentators, in addition to EPA and DOJ officials, take the position that a central, formalized voluntary disclosure program for the environmental arena is not practical. Reasons given include the facts that there are too many regulated entities and too many potential violations for such a program to work, and that pressure would be created to submit routine matters to government regulators for dispensation.69

It may very well be that the additional costs of examining each small claim is not justified by the incremental social utility of the disclosure. These complaints beg the issue, however, because for the DOJ Policy Statement to apply in the first instance, there must have been a timely voluntary disclosure. A formal voluntary disclosure program, such as the one administered by the DOD,70 merely provides a framework within which to make the disclosure.

Since the DOJ Policy Statement is only in its infancy, it is still possible that the DOJ will apply it in much the same way as a voluntary disclosure program would operate. In the meantime, the corporate client is looking for the answers. With the environment now a high profile political issue,71 governmental enforce-

than after, government inspections and other enforcement actions are needed.

Voluntarily initiated environmental audits should be encouraged and, in the course of exercising prosecutorial discretion under the criminal provisions of subsection 113(c), the Administrator and the Attorney General of the United States should, as a general matter, refrain from using information obtained by a person in the course of a voluntarily initiated environmental audit against such person to prove the knowledge element of a violation of this Act if — (1) such person immediately transmitted or caused the transmission of such information to the Administrator or the State air pollution control authorities, as appropriate; (2) such person corrected or caused the correction of such violation as quickly as possible; and (3) in the case of a violation that presented an imminent and substantial endangerment to public health or welfare or the environment, such person immediately eliminated or caused the elimination of such endangerment to assure prompt protection of public health or welfare or the environment.

Id.

70. For a discussion of the merits of the Department of Defense's voluntary disclosure program, see supra note 7.
ment efforts are likely to increase at the same time as environmental regulations increase in both number and scope. Employees are concerned that they too, will become defendants in criminal enforcement actions as the courts apply a lower *mens rea* requirement for environmental crimes.\(^\text{72}\) Corporate officers do not want to provide a road map for the regulators, while at the same time they are concerned that what they do not know might hurt them. Environmental audits may be the answer, but at what price? For the company to have any hope of avoiding criminal prosecution, they must turn over not only the audit report itself, but also the names of employees responsible for the noncompliance situation, and must take appropriate disciplinary action against those employees.

How would a voluntary disclosure program help? First, it would require a commitment from both EPA and DOJ to participate in such a program and to support business’ self-policing and self-reporting efforts. A centralized function would need to be created to receive noncompliance reports. The hope would be that this would lead to uniform application of environmental regulations, something which is lacking today. The DOJ will never promise to grant amnesty for all businesses that self-report. However, as a practical matter, in order to encourage companies to implement compliance programs and perform self-policing functions, the DOJ should be hesitant to pursue criminal sanctions against those companies whose self-reporting is accepted into a voluntary disclosure program. A voluntary disclosure program involving both EPA and DOJ would also be a means by which to effect comprehensive settlements for potential noncompliance situations. Administrative, civil and criminal concerns could be dealt with all at the same time.

It is not unusual for clients, when faced with the decisions of whether to institute a self-policing program and/or whether to disclose a potential violation, to wonder whether their competitors are also incurring the costs of administering a compliance or audit program, and are also self-reporting. The concern is that even if the competitor is incurring the costs of an audit program, if they are not also disclosing noncompliance results, they are avoiding the burden of potential fines and penalties and are thereby gaining favor in the eyes of the regulator who is unaware

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\(^{72}\) For a further discussion of the lower *mens rea* requirement for environmental crimes, see *supra* note 36 and accompanying text.
A voluntary disclosure program is at least an attempt to put everyone on an even playing field. If modeled after the DOD program, it would require that companies become signatories to an agreement by which they commit to a self-policing program, and to self-reporting. From the government's perspective the program would lead to the discovery of what would otherwise be undetected noncompliance behavior. More importantly, it would lead to a stronger enforcement scheme, one actively involving corporate citizens.

There are, of course, foreseeable issues to be worked out. A settlement with EPA and DOJ may not reach the status of a comprehensive resolution because in the environmental arena, state regulatory agencies will also have jurisdiction over many compliance-related situations. It may be necessary, in order to prevent the program from being overwhelmed, to create separate programs for different types of violations or for the different industries involved. With regard to the former, issues could range from the disposal and storage of hazardous materials, to underground tanks, to wastewater treatment and to air emissions — all topics that cut across industry lines. As to the types of business covered by environmental regulations, the spectrum runs from the "mom and pop" corner grocery store with one gas pump, to waste haulers, to chemical manufacturers, to morticians, to hospitals and to research institutions.

To achieve the twin goals of self-policing and self-reporting, the government must recognize a basic fact of business life, which is that more and clearer guidelines must be built into the system in order to encourage companies to perform these self-regulatory functions. The DOJ Policy Statement is a starting point, and should be used as a stepping stone. It should not be the final word on these complex issues. It is currently reported that EPA is reviewing its Environmental Audit Policy Statement, and the regulated community hopes efforts there are being directed to more clearly defining the role of an environmental audit program and self-reporting.

73. For a discussion of the potential penalties for failure to report a violation, see supra notes 53-54 and accompanying text.