Penn State Environmental Law Review

Volume 4 | Number 2 Article 10

5-1-1995

The EPA 1994 Public Meeting: Legislative Answers to the Auditing Quandary

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THE EPA 1994 PUBLIC MEETING: LEGISLATIVE ANSWERS TO THE AUDITING QUANDARY

I. Introduction

As the world's environmental problems intensify and public awareness grows, environmental regulations have increased in complexity, number, and scope.[1] This conundrum has expanded to the point where many businesses and other regulated entities fear that full and continuous compliance with environmental laws is impossible.[2] The practice of environmental self- auditing has been lauded as a cost-effective tool for promoting public safety and securing regulatory compliance.[3] Now, however, companies confront a new fear of having their corporate self-audits used against them by the federal government in civil, administrative, and criminal enforcement actions.[4] The threat of jail sentences and substantial corporate fines serve as disincentives to corporations conducting environmental audits - audits beneficial to both public safety and governmental compliance.

The dynamics of a recent conference sponsored by the Environmental Protection Agency (EPA or Agency) is the focal point of this Comment.[5] On July 27-28, 1994, the EPA held a public meeting to consider the "need for reinforcing or modifying the Agency's existing policy on environmental auditing" and "advances in the field of auditing since 1986."[6] The meeting served not only as a productive catalyst for candid dialogue between the public and private environmental sectors, but also as a springboard for proposed legislative solutions.

A panelist at the recent EPA meeting noted that through encouraging the exposure of environmental audits, one lets "the sound light of public scrutiny shine on our activities affecting natural resources, health, and safety."[7] The compromise lies then in how to properly illuminate and rectify questionable business activities without permanently scorching the corporate skin. Part I of this Comment simply defines and outlines the importance of environmental auditing. Part II examines the auditing problem from an historical perspective. Part III analyzes various proposals advanced and developed at the recent 1994 EPA public meeting. This Comment proposes turning to existing legislative auditing solu-

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[1]*Transcript of EPA Public Meeting on Auditing*, EPA Air Docket (No. C-94-01/IV-F-01), at 26 (July 27, 1994) [hereinafter *Transcript*] (Frank Friedman, author of *Trends in Corporate Environmental Management*, testified, "None of us who have been involved in these programs from their inception would have anticipated, for example, the complexity and scope of the Clean Air Act Amendments of 1990").

[2]A survey of the nation's top legal officials showed that two thirds of those surveyed indicated that their businesses had operated "at least some time in the past year, in violation of federal or state environmental laws." Also, nearly 70% of those surveyed felt that total compliance with environmental regulations was unachievable. Mariane Lavell, *Environmental Vise: Law and Compliance,* NAT'L L.J. Aug. 30, 1993, at S-1.

[3]Environmental Auditing Policy Statement, 51 Fed. Reg. 25004, 25005 (1986). [hereinafter "EPA"].

[4]Elisabeth M. Kirschner, *Self-Incrimination Remains Major Problem With Environmental Audits*, CHEM & ENVTL. NEWS, Aug 5,1994, at 13, 16.

[5]Notice of Public Meeting on Auditing, 59 Fed. Reg. 31914 (1994). [hereinafter "Public Meeting"].

[6]*Id.* at 31914-31915.

[7]*Transcript*, at 77-78 (testimony of Joan Bavaria, panelist from the *Coalition for Environmentally Responsible Economies). The Coalition for Environmentally Responsible Economies* contains many of the national environmental groups like National Audubon Society, National Wildlife Federation, Sierra Club, U.S. Public Interest Research Group, AFL-CIO, Interfaith Center on Corporate Responsibility, and New York City Employees Retirement System.

tions in Part IV as partial models for creating an acceptable compromise between agency, corporate, and public auditing interests.[8] Only through coupling statutory safe harbors with corporate accountability can an equitable solution to the environmental auditing debate emerge.

II. The Importance of Environmental Audits

An environmental audit, as characterized by the EPA's 1986 policy statement, is a structured examination of a product line, corporation, or facility. Specifically, EPA defines it as "a systematic, documented, periodic and objective review by regulated entities . . . related to meeting environmental requirements."[9] A recent Colorado statute addressing environmental audits defines an audit to mean "any document, including any report, finding, communication . . . related to and prepared as a result of a voluntary self-evaluation that is done in good faith."[10]

For the corporate manager, environmental auditing over time conserves finances. For governmental agencies, effective corporate self-auditing saves time and resources. For local communities, early detection and correction of corporate environmental problems promotes both safety and the common good.

Environmental auditing is important to corporations not just for the long-term financial savings. When corporations evaluate and police themselves, other ample rewards emerge including:

> i. Management peace of mind that they are familiar with the environmental status of operations in the corporation,
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> ii. Fast communications for prompt corrective action,
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> iii. Heightened awareness at all management levels of regulatory requirements and best practices, and
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> iv. Demonstration to employees and the public of the company's environmental ethic.[11]

Almost 70% of the nation's corporate legal officials feel that increased attention to environmental issues could improve the long-term profitability of their corporations.[12] Typical audit results reveal spill prevention plans that are not up to date, damaged containment dikes that might leak, and air emission source inadvertently excluded from inventory sent to the regulatory agency.[13]

The environmental audit is endorsed by government agencies as well. While the EPA does not intend to mandate auditing, it "clearly supports auditing to help ensure the ad-

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[8]Oregon, Kentucky, Indiana, and Colorado are the first four states to enact audit privilege legislation that provides corporations which disclose environmental audits with safe harbors from enforcement activities.

[9]EPA, *supra* note 3, at 25006.

[10]COLO. REV. STAT. ANN. § 13-25-126.5 (1994).

[11]Letter from Ralph Rhodes, Director of Health, Safety, and Environmental Audit, *Allied Signal,Inc.*, to Brian P. Riedel, Office of Compliance, *U.S. Environmental Protection Agency*, 2 (July 27, 1994) (on file with *EPA Office of Air and Radiation Docket and Information Center)* [hereinafter "Rhodes letter"].

[12]Lavell, *supra* note 2.

[13]Rhodes letter, *supra* note 11, at 4.

equacy of internal systems to achieve, maintain, and monitor compliance."[14] When corporations find environmental problems, correct them, and move towards full compliance with regulations, agencies expend less money, time, and resources. Rather than simply reacting to environmental crises, "environmental auditing has developed for sound business reasons . . . as a means of helping regulated entities manage pollution control over time.[15] The Pennsylvania Department of Environmental Resources (DER) expresses similar sentiments when it praises environmental audits as "a responsible and effective means to ensure compliance with . . . environmental laws."[16]

Perhaps local communities and the public interest provide the strongest justification for corporate auditing practices. Effective auditing practices not only prevent environmental accidents but "can lead to higher levels of overall compliance and reduced risk to human health."[17] Communities in increasingly larger numbers express support of environmental auditing and its role in promoting public health.[18] Safeguarding public welfare and safety through environmental auditing proves to be a cost-efficient means of promoting the common good.

While corporations, governmental agencies, and the public sector have reason to appreciate the importance of environmental auditing, substantial policy issues have significantly hindered and continue to block auditing implementation.[19] Most notably, corporations fear that their self-audits will be used against them in debilitating civil, administrative, and criminal proceedings.[20] This fear has contributed not only to the development of controversial legislative solutions, but to a growing trend of disenchantment with environmental auditing policies themselves.[21]

III. The History of the Environmental Auditing Problem

Prior to the 1970's and the environmental revolution, few environmental managers practiced or developed auditing in the corporate community.[22] Later, larger companies, equipped with the financial and technical support to sustain an audit program, began practicing environmental auditing after suffering the debilitating costs of environmental acci-

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[14]Restatement of Policies Related to Environmental Auditing, 59 Fed. Reg. 38455, 38456 (1994) [hereinafter "Restatement"].

[15]*Id.*

[16]*Transcript, supra* note 1, at 25 (testimony of Dave Gallogly, Esq., Office of Chief Counsel, *Pennsylvania DER*).

[17]Restatement, *supra* note 14.

[18]The Good Neighbor Project for Sustainable Industries has worked in over 50 local communities in the past three years promoting environmental justice. The groups they assist include: People Concerned About Methyl Isocyanate, Citizens for A Better Environment, the West County Toxic Coalition, and a community labor refinery tracking committee in Philadelphia focused currently on Sun Oil. The Project strongly endorses effective environmental auditing and the corporate accountability which accompanies it. *Transcript, supra* note 1, at 84 (testimony of Sanford Lewis, Director, *The Good Neighbor Project for Sustainable Industries). See also,* Lavell, *supra* note 2, at 5-3. The National Law Journal survey of top corporate officials asserts that more than 50% said that pressure from community activists had affected their companies' conduct.

[19]Kirschner, *supra* note 4, at 14.

[20]T.E. Hunt & T.A. Wilkins, *Environmental Audits and Enforcement Policy,* 16 HARV. ENVTL. L. REV. 2 (1992).

[21]M.H. Levin et al., *Discovery and Disclosure: How to Protect Your Audit Report,* ENVIRONMENT REPORTER, Jan. 7, 1994, at 1606.

[22]*Transcript, supra* note 1, at 43 (testimony of Ralph Rhodes, Director of Health, Safety, and Environmental Audit, *Allied Signal, Inc.*).

dents.[23] The EPA "in the early days of auditing . . . had a great impact on the audit process."[24] The Agency served as a clearing house for the best auditing practices of the time, and "promoted the use of the environmental audit . . . particularly within government facilities."[25]

With the passage of time, the EPA and its state enforcement agencies have placed an "increasing emphasis on environmental compliance through added regulation, added enforcement, and enhanced fines and penalties."[26] As environmental regulations increased in complexity and compliance became an unascertainable goal, civil, criminal, and administrative enforcement measures became more stringent.[27] Environmental law "is no longer a black box you add on at the end" of management decision-making, notes one general counsel in a recent National Law Journal Survey.[28] "It is moving away from mere compliance towards a time when a company that doesn't build environmental safety into its products will no longer be able to compete."[29]

Environmental self-audits have emerged as important tools for the responsible, proactive company. In recent years companies have shied away from conducting audits, however, because of the risk of their self-evaluative documents being used against them in debilitating enforcement measures.[30]

> Government agencies may seek audit results during investigations preceding enforcement actions. Private groups may seek disclosure during discovery in citizen suits or toxic tort litigation. Audit reports containing damaging admissions can be a 'smoking gun,' giving the government evidence needed to obtain a criminal conviction.[31]

The only protection available to managers came in the form of "technical and narrowly construed evidentiary privileges."[32] If a corporate self-audit could fit under the purview of the attorney-client privilege or the work product doctrine, [33] it could be immune from the debilitating grasp of enforcement agencies. These measures, however, have proved to be costly and ineffective corporate solutions to the problem of protecting environmental audits.[34]

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[23]Large companies emerged, and still remain, easier targets from the standpoint of enforcement agencies. Not only are the environmental transgressions of small companies often more difficult to ascertain, but small businesses typically generate less revenue from environmental fines.

[24]*Transcript, supra* note 1, at 44 (testimony of Ralph Rhodes, Director of Health, Safety, and Environmental Audit, *Allied Signal, Inc.*).

[25]*Id.*

[26]Thomas Lindley and Jerry Hodson, *Environmental Audit Privilege: Oregon's Experiment,* BNA ENVTL. REP., Oct. 29, 1993, at 1221.

[27]*Id.*

[28]Lavell, *supra* note 2, at 5-1.

[29]*Id.*

[30]*Transcript, supra* note 1, at 44 (testimony of Ralph Rhodes, Director of Health, Safety, and Environmental Audit, *Allied Signal, Inc.*).

[31]Levin et al., *supra* note 21, at 1606.

[32]Levin et al., *supra* note 21, at 1607.

[33]E. Epstein & M. Martin, *The Attorney-Client Privilege and the Work-Product Doctrine,* (ABA Section of Litigation 2d ed. 1989).

[34]*Id.*

The emergence of environmental audit privilege legislation characterizes a final controversial trend in the auditing debate. States in the past year have enacted laws that protect a company's environmental audit as privileged information when the corporation "voluntarily performs an audit."[35] The EPA submits that this legislation has gone too far, and encourages the blockage of such legislative attempts. Herein lies the auditing stalemate.

IV. The EPA Public Meeting on Auditing

In the face of growing disenchantment with environmental auditing policy, the July 1994 EPA Public Meeting on Environmental Auditing strove to "address perceived problems relating to auditing and self-disclosure."[36] In an attempt to reassess the EPA's current policy, the meeting considered "the need for reinforcing or modifying the Agency's existing policy."[37] The meeting drew over 60 participants from corporations, enforcement agencies, and the public sector who expressed opinions and presented solutions to the auditing quandary. The first four states to enact auditing privilege legislation presented their statutory solutions. For the first time in the history of the auditing debate, governmental agencies, corporations, and the public sector united in an effort to compromise. In order to examine advantages and disadvantages of recent environmental auditing proposals, this Comment investigates the auditing issue through different perspectives.

A. From the Standpoint of Agency[38]

While our rivers no longer catch fire and the air we breathe is cleaner, the Environmental Protection Agency (EPA) acknowledged that "the past 25 years have also left us with a complex and unwieldy scheme of . . . regulations and increasing conflict and gridlock."[39] The EPA faced the dubious task of easing this gridlock at the Public Meeting on Environmental Auditing as members of the corporate, government, and public sectors offered solutions to the auditing debate.[40] Its challenge was to balance agency commitment to a strong enforcement program with the desire to assist corporations in their struggle to comply with tough, but necessary, environmental regulations.[41]

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[35]Kirschner, *supra* note 4, at 14.

[36]Public Meeting, *supra* note 5, at 31914.

[37]*Id.*

[38]EPA did not stand alone as it considered the auditing question from the standpoint of the government sector. The Environmental Auditing Roundtable (EAR) is a professional organization dedicated to furthering the development and professional practice of environmental, health, and safety auditing. The EAR offers its services to EPA to assure continued dialogue with professionals engaged in the practice of auditing. It assisted the EPA in preparing for the 1994 Public Meeting on Environmental Auditing by gathering data concerning current auditing practices, trends and developments in the field, and private sector surveys on the effect of enforcement policies on self-evaluation and disclosure in the regulated community. *See* Memorandum from the Environmental Auditing Roundtable to Brian P. Riedel, Office of Compliance, *U.S. Environmental Protection Agency*, 7 (July 28, 1994) (on file with *EPA Office of Air and Radiation Docket and Information Center*).

[39]*Transcript, supra* note 1, at 8 (testimony of Steven Herman, Assistant Administrator, *EPA).*

[40]Public Meeting, *supra* note 5, at 31915.

[41]Beyond the context of the public meeting, Administrator Browner integrates the auditing debate into a larger common sense initiative. The initiative involves scrutinizing corporations and communities in a holistic fashion. It involves "a shift from pollutant-by-pollutant approaches to industry-by-industry approaches....making it easier to prevent pollution, instead of shifting it from air to water, or water to land." Likewise, the effort of bringing together officials at all levels, environmental groups, industry leaders, and the public to develop the most cost effective means for protecting the environment reflects Browner's commitment to the initiative. *Transcript, supra* note 1, at 1.

The EPA considered rewriting the regulations encouraging auditing, or conversely treating audits as privileged information excluded from enforcement actions.[42] The dichotomy between enforcement and compliance assistance intensified as the EPA contemplated "reinforcing or modifying . . . existing auditing policy."[43] The Agency's perspective was threefold: (1) to promote environmental auditing practices, (2) to insure a regulatory framework that penalizes recalcitrant regulated entities, and (3) to discourage legislation which creates a "self-evaluative" privilege for audit reports.[44]

Since the EPA seeks to encourage corporate self-audits through compliance assistance, the agency will not "routinely request environmental audit reports" to be used against companies in enforcement proceedings.[45] The Agency does reserve the right, however, to request audit reports or relevant portions on a case by case basis when: (1) the audit is relevant to a criminal investigation,[46] (2) the audit is conducted under settlement consent decrees or other required proceedings, or (3) a company cites its environmental management practices as a defense.[47] Utilizing compliance assistance to encourage corporate self-auditing allows the EPA to help corporations avoid breaking the law without invoking formal enforcement measures.[48]

A formal enforcement program, however, emerges as an essential tool for achieving the EPA's broader goal of compliance with environmental regulations. The agency reaffirmed its commitment to strong enforcement measures that both protect companies that comply with the law, and "come down hardest on those who neglect to comply in order to gain a competitive advantage . . . and burden society in terms of human health and environmental cleanup."[49] Components of an enforcement presence include criminal sanctions, harsh monetary penalties, and injunctive relief requiring "violators to correct environmental wrongs."[50] Guidelines promulgated by the Department of Justice[51] and recent Federal Sentencing Guidelines[52] insure that the increasingly aggressive trend towards stricter environmental enforcement will continue.[53] From the agency perspective, this trend is a positive one.[54]

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[42]*Transcript, supra* note 1, at 9 (testimony of Steven Herman, Assistant Administrator, *EPA*).

[43]Public Meeting, *supra* note 5, at 31914.

[44]*Id.*, at 31914.

[45]Restatement *supra* note 14, at 38456.

[46]Corporations assert that "this category alone undercuts EPA's policy of encouraging audits, since potential criminal liability is a major reason many environmental managers remain loath to conduct or commission audits." Levin et al., *supra* note 21, at 1606.

[47]Public Meeting, *supra* note 5, at 38457.

[48]For example, the agency advocates offering companies technical advice, teaching compliance seminars, and completing on-site compliance assessments as additional ideas for promoting compliance without resorting to formal enforcement measures. *Transcript, supra* note 1, at 6 (testimony of Steven Herman, Assistant Administrator, *EPA*).

[49]*Id.* at 7.

[50]*Id.*

[51]U.S. Dep't of Justice, United States Department of Justice Manual, *Factors In Decisions On Criminal Prosecutions For Environmental Violations In The Context Of Significant Voluntary Compliance Or Disclosure Efforts By the Violator,* (1991).

[52]*U.S. Sentencing Commission: Corporate Sentencing Guidelines for Environmental Violations*, tit. 5, Ch. 11, 5-11.301A (July 1, 1991).

[53]While the EPA does not intend to mandate auditing, another EPA enforcement trend has been "in certain instances the EPA includes provisions for environmental auditing as part of settlement agreements." Public Meeting, *supra* note 5, at 38456; *See also, Audit Requirement in Penalty Settlement Signals New EPA Theme*, INSIDE EPA, Aug. 27, 1993, at 12.

[54]From the corporate perspective, the net result is that "companies cannot expect government to voluntarily refrain from using audit results against them in either criminal prosecutions or civil enforcement actions." Levin et al., *supra* note 21, at 1607.

The EPA's enthusiasm for a strong enforcement policy causes the Agency to consistently oppose legislation which creates a "self-evaluative" privilege for audit reports.[55] The Agency encouraged the four states that have enacted privilege statutes (Colorado, Indiana, Kentucky, and Oregon) to justify their controversial legislation at the public meeting.[56] The EPA continues to oppose the legislative privilege approach principally because of the risk of weakening state enforcement programs, the imposition of unnecessary transaction costs and delays in enforcement actions, and the potential increase in the number of situations requiring the expenditure of scarce Agency resources.[57]

The Pennsylvania DER expresses similar misgivings, suggesting that privilege legislation would not only weaken its own enforcement authority, but threaten public health and safety.[58] In short, "self-evaluative" privilege legislation threatens the enforcement framework and provides no solution to the auditing quandary.

From the Agency perspective, environmental auditing policy is sustained through a delicate combination of enforcement and compliance assistance efforts. While the EPA encourages auditing practices, it also recognizes the important role that a strong enforcement policy plays in achieving the highest possible level of corporate compliance.[59] While EPA representatives considered differing proposals in their effort to reassess the auditing policy and gather empirical data, testimony advocating "self-evaluative" privilege legislation was met with strong opposition on the agency front.

B. Public Interest Perspective[60]

While the public sector agreed that environmental auditing serves the common good, panalists representing the public interest also emerged as strong opponents of proposed privilege legislation.[61] Instead, corporate accountability coupled with a strengthening of enforcement regulations rested at the cornerstone of public interest proposals.[62] Public interest advocates considered the scenario of the recalcitrant company, masking environmental abuses behind convenient statutory safe harbors.[63] As business representatives

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[55]*EPA Asks States to Put Off Legislation Making Audits Privileged*, DAILY ENVIRONMENT REPORT, June 15, 1994, at a-10; *See also, EPA Asks States To Postpone Laws Protecting Corporate Self-Audits*, INSIDE EPA, June 24, 1994, at 17.

[56]Public Meeting, *supra* note 5, at 38459.

[57]*Id.*

[58]Memorandum from David A. Gallogly, Office of Chief Counsel, *Pennsylvania Dept. of Environmental Resources*, to the *U.S. Environmental Protection Agency*, Public Meeting on Environmental Auditing (July 28, 1994) (on file with *EPA Office of Air and Radiation Docket and Information Center*); *See also,* Letter from Robert W. Shavelson, Executive Director, *Atlantic States Legal Foundation*, to Carol Browner, Administrator *U.S. Environmental Protection Agency*, (Aug. 11, 1994) (on file with *EPA Office of Air and Radiation Docket and Information Center*) (urging EPA not to expand privilege protection of environmental audits).

[59]*Transcript, supra* note 1, at 6 (testimony of Steven Herman, Assistant Administrator, *EPA).*

[60]While the public interest representatives emerged as the most underrepresented group at the meeting, their response through memorandum and letters was significant. Some environmental groups expressed concern about the lack of public interest testimony at the EPA public meeting on auditing.

Letter from Brian Andreja, Chairperson, *Sierra Club*, to Brian P. Riedel, Office of Compliance, *Environmental Protection Agency*, 4 (July 26, 1994) (on file with *EPA Office of Air and Radiation Docket and Information Center).*

[61]*Transcript, supra* note 1, at 7.

[62]Memorandum from John Williams, *Washington State Department of Ecology*, to the *Environmental Protection Agency*, Public Meeting on Environmental Auditing (July 26, 1994) (on file with *EPA Office of Air and Radiation Docket and Information Center).*

[63]*Transcript, supra* note 1, at 9.

expressed cautious skepticism towards enforcement agencies, groups representing the public interest exhibited similar doubts towards the corporate sector.

Representatives of public interest made clear that "to many in the environmental community . . . privilege laws will look like environmental backlash rather than a positive, proactive environmental program."[64] Privilege legislation undermines the enforcement authority of the state.[65] If corporations achieve safe harbors that excuse abuses, abuses will increase. Presenters proposed examining existing state privilege programs[66] and blocking the expansion of such programs, an idea to with the EPA concurred.[67]

Other public interest proposals hinged on the concept of corporate accountability. Presenters proposed encouraging, even mandating, environmental audits and public disclosure.[68] If a voluntary disclosure or privilege programs were enacted, the public interest presenters urged corporations to narrowly define the protected audit by adding an accompanying audit verification protocol.[69] Presenters urged managers to take the data from its raw form and "contextualize the audit report in terms of the company's own history, the industry, its peer group, and in the context of an ideal world."[70] Only with corporate cooperation and accountability can public audits and disclosures function effectively.

Accordingly, public interest advocates urged caution in granting safe harbor privileges to corporations,[71] citing the scenario of the recalcitrant bad actor company.[72] A company could ignore environmental problems revealed by self-audits and hide behind privilege legislation to escape just enforcement measures.[73] Public interest presenters note that industry is not monolithic and "as long as there are human beings, there will be excellent managers and recalcitrant managers . . . The stakes are way too high to assume good intentions on the part of all managers."[74] Panelists propose offering an incentive to corporations in the form of reduced penalties for self-reported violations and increasing stake-

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[64] *Transcript, supra* note 1, at 10 (testimony of Sanford Lewis, Director, *The Good Neighbor Project for Sustainable Industries*).

[65] *Id.*

[66] *Id.* at 84.

[67] *EPA Asks States To Postpone Laws Protecting Corporate Self-Audits,* INSIDE EPA, June 24, 1994, at 16.

[68] *Transcript, supra* note 1, at 13.

[69] *Id.*

[70] *See supra* text accompanying note 1.

[71] *Transcript, supra* note 1, at 7 (testimony of Sanford Lewis, Director, *The Good Neighbor Project for Sustainable Industries*) (Lewis asks, "People who have been exposed to the chronic emissions of the chemical industry, where is their safe harbor? People who live in the shadow of the Rhone-Poulenc Plant in Institute, West Virginia, where there's five times the amount of methyl isocyanate stored in the plant as were involved in the Bhopal accident. Where's the safe harbor for that community?. . . Talk of more privilege for corporations is not going to go over well in the local communities that I work in.").

[72] *Id.* at 9 (Lewis cites Coors Brewing Co. as a recalcitrant bad actor example, claiming "Coors had hired a contractor to determine the extent of their toxic plume of contaminated ground water, and then they made the belated decision to divulge information about the contaminated solvent problem underneath . . . their disclosure of some internal studies was calculated to preempt the local CBS television stations' upcoming plan to blow the whistle on them . . . prompted by a citizens group getting the information."); *see also* Letter from Scott B. Smith, Director, Environmental, Health and Safety Policy, *Coors Brewing Co*, to Brian P. Riedel, Office of Compliance, *Environmental Protection Agency*, 4 (July 26, 1994) (on file with *EPA Office of Air and Radiation Docket and Information Center*) (Coors Brewing Co. denies any recalcitrant actions.).

[73] *Transcript, supra* note 1, at 75.

[74] *Id.* at 74 (testimony of Joan Bavaria, panelist from the *Coalition for Environmentally Responsible Economies*).

holder involvement in the audit process.[75]

From the public interest perspective, the growing trend of aggressive civil and criminal enforcement against companies that violate environmental laws[76] should intensify, not diminish. Corporations must be held accountable when they fail to comply with environmental regulations, no matter how complex the regulations may appear.[77] Public interest presenters warned of safeguarding against both the recalcitrant bad actor company which ignores internal violations and privilege legislation which would allow that company to "anticipate an enforcement action and disclose the audit to have immunity."[78]

C. From the Standpoint of Corporations[79]

The corporate sector largely recognizes environmental auditing as a key element in any proactive environmental business management system.[80] Acknowledging that auditing "provides a primary means for management to evaluate the effectiveness of its systems operations," corporate presenters stressed that audits also enhance corporate communication, aid in operations risk assessment, and determine compliance with environmental regulations.[81] Audits aid "company profitability and business survival, not to mention avoidance of personal liability for corporate officials or irreparable damage to public and community relations."[82] Corporate presentations were dominated by the risk that self-audits would be used against companies in criminal enforcement actions or by prosecutors and private plaintiffs to expand liability.[83]

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[75]The public interest perspective acknowledges the value of stakeholder involvement when "the stakeholder is actually . . . involved in the external audit of the company . . . where there is a stakeholder oversight body. They would have their own independent experts that determine the scope the audit will have." *Transcript, supra* note 1, at 89 (testimony of Sanford Lewis, Director, *The Good Neighbor Project for Sustainable Industries*).

[76]Memorandum from Earl E. Devaney, Director, Office of Criminal Enforcement, U.S. *EPA*, to Advisory Working Group on Environmental Sanctions, U.S. Sentencing Commission (April 9, 1993) (on file with *EPA Office of Air and Radiation Docket and Information Center*).

[77]The Clean Air Act, for example, as amended in 1990, is implemented by 60,000 to 80,000 pages of regulations. Frank Friedman, former vice president for environmental affairs at Occidental Petroleum, recalls estimating that "in just four plants in Texas there were 140,000 points at which the company will have to measure 'fugitive emissions' to comply with the law — for a total of 4 million to 7 million pieces of data . . . Try arguing for 100% compliance with those kind of numbers." *Environmental Vise: Law and Compliance*, NAT'L L.J. Aug. 30, 1993, at S-1.

[78]*Transcript, supra* note 1, at 91; *See also,* Letter from Carolyn Hartman, Staff Attorney, *U.S. Public Interest Group*, to Carol Browner, Administrator, *U.S. Environmental Protection Agency* 1 (Aug. 10, 1994) (on file with *EPA Office of Air and Radiation Docket and Information Center*) (The Research Group expressed strong opposition to corporate voluntary disclosure privilege.).

[79]The corporate sector emerged as the most represented group at the meeting. Attendees included representatives from Allied Signal, American Automobile Manufacturers, AT&T, Associated Oregon Industries, Ciba-Geigy Corporation, Coors Brewing Co., Diamant Boart, Inc., Duke Power Co., Edison Electric Institute, General Electric, Indiana Manufacturers Assoc.,International Paper Co., Litton Industries, Inc., Martin Marietta. Inc., Pacificorp, The Gates Corporation, U.S. Council for International Business and WMX Technologies. *List of Attendees, EPA Public Meeting on Environmental Auditing*, EPA Air Docket (No. C-94-01/II-B-1), at 1 (July 27, 1994).

[80]Rhodes letter, *supra* note 11, at 3; *See also*, Memorandum from Corneilius C. Smith, *ENVIRON Corp., U.S. Sub-Tag on Auditing*, to the *Environmental Protection Agency*, Public Meeting on Environmental Auditing 3 (July 27, 1994) (on file with *EPA Office of Air and Radiation Docket and Information Center*).

[81]*Transcript, supra* note 1, at 28 (testimony of Kevin Kimmel, *General Physics Corp.*).

[82]Levin et al., *supra* note 21, at 1606.

[83]Memorandum from Earl E. Devaney, Director, *Office of Criminal Enforcement*, EPA, to All EPA Employees Working in Support of the Criminal Enforcement Program, *EPA* 7 (Jan. 12, 1994) (on file with *EPA Office of Air and Radiation Docket and Information Center*).

In response to the risk of audit-imposed enforcement measures, [84] the corporate sector advocated altering enforcement policy. It proposed that the federal government give specific assurance that self-audits would not be admissible as evidence in enforcement cases or clearly define terms of admissibility.[85] While many acknowledged that one hundred percent corporate compliance with regulations was unlikely, presenters nevertheless proposed altering the audit process itself in order to achieve greater compliance.[86] The strongest corporate proposals, however, emerged as variations on the legislative privilege theme.[87] From the corporate standpoint, privilege legislation was heralded as both a desirable and necessary auditing solution.[88]

The corporate sector expressed great concern with the current trend of utilizing self-audits in increasingly aggressive civil and criminal enforcement measures.[89] Presenters advocated that the federal government alter its enforcement policy because although both the EPA and the U.S. Department of Justice have rhetorically extolled the value of environmental audits, *neither agency has taken steps to ensure audit confidentiality*. Instead, they have protected prosecutorial discretion first, leaving the fate of audit reports to individual prosecutors or circumstances.[90]

While the corporate sector acknowledged "the extremely important role" enforcement plays and would not expect enforcement to decline, it proposed that government agencies distinguish between companies who audit and those who fail to initiate health and safety programs.[91] Corporate presenters proffered that the federal government restrict the EPA's discretion to request self-audit reports.[92] Significantly, there has been "a growing recognition in the enforcement community that strengthening compliance programs . . . .is one of the most promising tools we have to decrease incidence of corporate crime."[93]

In accordance with this recognition, the corporate community advocated proposals for altering the audit process itself. The overall approach, presenters asserted, must be "co-

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[84]R. Darnell, *Environmental Criminal Enforcement and Corporate Environmental Auditing:Time for a Compromise*, 31 Am. Crim. L. Rev. 1 (1993); *See also, U.S. Sentencing Commission: Draft Corporate Sentencing Guidelines for Environmental Violations*, EPA Air Docket No. C-94-01/VIII-4, at 2 (Nov 16, 1993).

[85]*Transcript, supra* note 1, at 27 (testimony of Kevin Kimmel, *General Physics Corp.*).

[86]*Id.* at 29.

[87]*Id.* at 53 (testimony of Brian Rindt, *Rindt-McDuff Associates*).

[88]A statement sponsored by The Gates Corporation eloquently outlines the benefits of environmental privilege legislation from the corporate perspective. *See* Letter from Frank P. Prager, Corporate Counsel, *The Gates Corporation*, to Ira R. Feldman, Office of Compliance, *Environmental Protection Agency*, (July 25, 1994) (on file with *EPA Office of Air and Radiation Docket and Information Center*).

[89]A recent National Law Journal Survey asserts that 65% of legal officials surveyed believed that federal plans for sentencing in environmental crimes cases doe not give a fair break to violators who have made good faith efforts to comply with the law. Only 30% thought that full compliance with the matrix of U.S. and state environmental laws was possible. One third attested to "difficulties in meeting the Securities and Exchange Commission's regulations on disclosing environmental liabilities to investors." Lavell, *supra* note 2, at 3.

[90]Levin et al., supra note 21, at 1606.

[91]*Transcript, supra* note 1, at 124 (testimony of Steve Ramsey, Vice President of Corporate Environmental Programs, Compliance Management Group, *General Electric*).

[92]*Id.*

[93]The U.S. Sentencing Commission's policy is premised in part on the belief that rigorous compliance programs foster crime control. The Commission desires to work with the EPA in promoting sound compliance - related auditing practices if those efforts are coordinated and supported by empirical data. *Id.* at 44 (testimony of Judge Williams W. Wilkins, Jr., 4th Cir. Ct. App. and Chairman of the U.S. Sentencing Commission).

herent, consistent, and coordinated."[94] Four key factors emerged as essential elements of the proposed audit change:

1. The auditor must be independent from the activity audited in order to assure the objectivity of the assessment.

2. The auditor must be properly qualified to evaluate the proceedings.

3. Management support is essential for promoting an atmosphere of openness and problem solving.

4. The regulatory agency which impacts the audit environment must support the audit process by promulgating concise corporate guidelines and expectations.[95]

The corporate sector also urged the EPA to clarify its position with regard to penalty reduction incentives when a company voluntarily discloses an environmental violation.[96] From a corporate perspective, self-evaluation privilege legislation emerged as the best solution to the auditing debate.[97]

In order to protect corporate self-audits from being used against companies in debilitating enforcement proceedings, the corporate sector strongly advocates the establishment of a safe harbor self-evaluation privilege at the federal level.[98] The privilege would protect a company's self-audit, encourage voluntary disclosure of corporate environmental problems, and shield the company from harsh civil, criminal, and administrative enforcement measures.[99] The proposed privilege would contain three components:

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[94]*Id.*

[95]In addition to these basic propositions, corporate presenters urged audits to be scheduled on a periodic basis, conducted using objective evidence, and evaluated according to the degree of compliance with a set of established criteria. *Id.* at 31 (testimony of Kevin Kimmel, *General Physics Corp.*).

[96]The current standards for defining when disclosure is appropriate remain far from clear. The EPA's present authority to request an audit report or related disclosure is 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, *supra* note 3, at 25007.

[97]It is important to note that a minority of regulated entities diverged from the majority corporate perspective to advocate a hands-off position. The minority asserted that the development of a legislative self-evaluation privilege was not necessary to the long term viability of environmental auditing. While they "would certainly not turn down an offer of self-evaluation obtained in the course of an audit," the EPA does not really need to promulgate additional auditing regulations or guidelines. *Rhodes, supra* note 11, at 7; *See also* Memorandum from Pacificorp to the U.S. Envronmental Protection Agency, Public Meeting on Environmental Auditing 1 (July 27, 1994) (on file with *EPA Office of Air and Radiation Docket and Information Center*) (recommending that no change be made to existing environmental auditing policy).

[98] Levin et al., *supra* note 21, at 1606.

[99]Letter from Gary S. Rice, *Duke Power Co.*, to Ira R. Feldman, Office of Compliance, *Environmental Protection Agency*, 3 (Aug. 5, 1994) (on file with *EPA Office of Air and Radiation Docket and Information Center*) (advocating audit privilege and simple safe harbor provision).

1. In order to take advantage of the safe harbor privilege, the company's environmental audit should be part of a comprehensive environmental management program.[100]

2. In order to take advantage of the safe harbor privilege, the company's environmental audit should be conducted by qualified, certified specialists.[101]

3. In order to take advantage of the safe harbor privilege, the company's offending behavior shall not pose an immediate threat to life and health, have occurred in bad faith, or have resulted from a willful violation.[102]

From the corporate standpoint, a safe harbor legislative privilege would not only provide a substantial auditing incentive to companies, but would propel them towards the "highest possible level of compliance with environmental regulations."[103] Corporate presenters note that a privilege safe harbor would likely prompt companies that have failed to audit in the past to develop comprehensive auditing programs.[104]

While the corporate sector advocates altering present enforcement policy and changing the criteria of environmental audits themselves, self-evaluation privilege legislation emerges as its strongest proposal. Perhaps the implementation of such legislation would assist in achieving a higher level of environmental compliance. The other alternative is that the proposed legislation would cripple enforcement agencies, block investigations, and "stifle the free flow of information."[105]

D. The State Legislative Solutions

The first four states to recently enact legislative "self-evaluative" solutions to the auditing problem are Oregon, Indiana, Kentucky, and Colorado.[106] Asked by the EPA to "present documentary justification" of their legislation,[107] the States chose an explanatory rather than defensive approach.[108] Because the statutes are recently enacted, the Judiciary has not yet commented. Empirical data reveals, however, that 81% of corporate representatives surveyed in privilege legislation states said they were more likely to conduct an internal audit as a result of the new state law.[109] The States proposed that the EPA consider

[100]The notion of viewing a corporation's environmental role in a holistic, comprehensive manner reflects a growing trend towards establishing an environmental "industry ecology". This concept strives to identify feedback loops within a company and between companies in an effort to locate environmental problems. *See Transcript, supra* note 1, at 26 (testimony of Sanford Lewis, Director, The Good Neighbor Project for Sustainable Industries).

[101] *Transcript, supra* note 1, at 53 (testimony of Brain Rindt, President, *Rindt-McDuff Associates*).

[102]*Transcript, supra* note 1, at 128 (testimony of James O'Reilly, Corporation Counsel, Proctor & Gamble, Coalition for Improved Environmental Audits, *Protor & Gamble*).

[103]*See supra* text accompanying note 96.

[104]In the past larger corporations have spearheaded the development of auditing programs, while small business has lacked the necessary financial resources and technology.

[105]Kirschner, *supra* note 4, at 16.

[106]Ten other states have taken recent legislative initatives. These are Arkansas, Idaho, Illinois, Kansas, Minnesota, Mississippi, Texas, Utah, Virginia, and Wyoming. BNA, *Environment Library on CD: CD News* (June 1995).

[107]Public Meeting, *supra* note 5, at 31914.

[108]Transcript, *supra* note 1, at 17.

[109]*Id.*, at 7.

the concept of privilege legislation in a more positive light, encourage State models to proliferate throughout the nation, and support congressional enactment of a national auditing privilege.

i. *The Oregon Solution*

The nation's first "self-evaluative" legislation, Oregon's Environmental Audit Privilege[110] permits "a regulated entity to generate audit documentation without fear that the documentation can be easily obtained by state enforcement agencies . . . as long as certain conditions are met (like the initiation of corrective action)."[111] Since the privilege legislation only extends to the information in the audit report and not to the environmental violation itself, an enforcement agency's authority to pursue and enforcement action remains intact.[112] Oregon's provision was heralded by an overwhelming consensus in that state. Presenters concisely and convincingly expressed the merits of their creation.

Oregon representatives stressed that the privilege does not create a mechanism for hiding or shielding nonaudit documentation through designation as an environmental audit report.[113] The statute provides that mere discovery of noncompliance without promptly taking appropriate efforts to achieve compliance will also not give rise to the privilege.[114] Finally, the privilege can be thwarted in the case of a compelling criminal prosecution.

Advocates of Oregon's legislation asserted that present corporate audits are substantially better than before Oregon's law went into effect for four reasons.[115] According to Oregan legislators, lawyers are no longer needed to shield documentation under the attorney-client privilege or work product doctrine; second, now that environmental audits no longer rest behind a veil of secrecy, audits occur with greater frequency, accuracy, and yield more comprehensive results;[116] third, the privilege legislation has spawned more efficient processes for rectifying noncompliance in the form of requisite checklists, directives, and guidelines;[117] fourth, the Oregon's legislation attempts to motivate corporate officials has resulted in higher compliance with environmental regulations.[118] Legislative

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[110]OR. REV. STAT. § 468.963 (1993).

[111]*Transcript, supra* note 1, at 3 (testimony of James M. Whitty, Legislative Representative, *Oregon Industries*).

[112]*Id.*

[113]Opposers of privilege legislation asserted that a recalcitrant company could conceal prior environmental abuses and later label them part of an audit report (thus protected by privilege legislation). The Oregon law requires the labeling of the words "Environmental Audit Privilege" to appear on each document for which the privilege is claimed. This protects against "after-the-fact audit designations of unprotected documents." *Id.*

[114] OR. REV. STAT. *supra* note 110.

[115]*Transcript, supra* note 1, at 13 (testimony of James M. Whitty, Legislative Representative, *Oregon Industries*).

[116]*Id.*

[117]Letter from Fred Hanson, Director, *Oregon Dep't.of Environmental Quality,* to Steve Herman, Assistant Administrator, Office of Enforcement and Compliance Assurance, *U.S. Environmental Protection Agency*, Public Meeting on Environmental Auditing 1 (July 27, 1994) (on file with *EPA Office of Air and Radiation Docket and Information Center*) (heralding the merits of environmental "self-evaluative" legislation; especially its corporate rectification provision).

[118]Others would ask where the recalcitrant bad actor company fits into the sceniario. Where are the provisions in the event the corporation fails to move with reasonable diligence towards environmental compliance or to properly rectify the situation? Memorandum from Brian Andreja, Political Committee Chairperson, *Sierra Club*, to Brian Riedel, Office of Compliance, *U.S. Environmental Protection Agency*, Public Meeting on Environmental Auditing 4 (July 27, 1994) (on file with *EPA Office of Air and Radiation Docket and Information Center*) (opposing the passage of al environmental "self-evaluative" legislation).

representatives note that these factors also emerged in an atmosphere of great support and consensus.

Presenters proffered that the Oregon Environmental Audit Privilege functions as a strong motivating force, encouraging regulated entities to spend money on compliance. They asserted that a cheaper audit is an audit more likely to occur, especially if the fear element of incurring debilitating fines and criminal sanctions has been removed.[119] Presenters insisted that the privilege legislation does not sacrifice corporate accountability or "emasculate an enforcement agency's authority to pursue and enforcement action."[120] Advocates of the Oregon privilege legislation concluded that the benefits of greater corporate compliance achieved with environmental laws under the audit privilege far outweighs the risks of allowing the EPA to retain an unfettered right of access to audit reports.[121]

ii. *Indiana & Kentucky Provisions*

Both Kentucky's environmental audit privilege[122] and Indiana's environmental audit privilege[123] emulate Oregon's attempt. Presenters of the Indiana audit privilege stressed that audit legislation in Indiana is justified, "the mechanism not without precedent, our state's authority absolute, and the increase in compliance among Indiana businesses guaranteed."[124] In both states, the court performs the same screening function of lifting the audit privilege in the case of a compelling criminal prosecution.[125] The basic presumptions outlined in the Oregon example above apply in Kentucky and Indiana as well.[126] Representatives from the Kentucky and Indiana legislature concluded by proposing that the current enforcement structure emphasizing harsh penalties is not effective in bringing companies into first-time compliance and establishing a working relationship for future improvement.[127] They asserted instead that audit privilege legislation should be accepted as "a primary tool for determining and responding to corporate compliance needs."[128] The effectiveness of the tool has yet to be tested in court, however.

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[119]Of course the legislative safe harbor privilege applies only to the contents of the audit report. A corporation could still be exposed to harsh enforcement proceedings the violation itself. *Transcript, supra* note 1, at 14 (testimony of James M. Whitty, Legislative Representative, *Oregon Industries*).

[120]*Id.*, at 11.

[121] Lindley and Hodson, *supra,* note 26, at 1224.

[122] KY. REV. STAT. ANN § 224.1 (1994).

[123] IND. CODE ANN § 13-10-3-4-1 (1994).

[124]*Transcript, supra* note 1, at 3 (testimony of Blake Jeffery, Director of Environmental Affairs, *Indiana Manufacturers' Assoc.*).

[125]*Id. See also* Memorandum from the Kentucky Chamber of Commerce, to Brian Riedel, Office of Compliance, *U.S. Environmental Protection Agency*, Public Meeting on Environmental Auditing 4 (July 27, 1994) (on file with *EPA Office of Air and Radiation Docket and Information Center*) (regarding provisions of Kentucky's Environmental Audit Privilege Law).

[126]*Id.*

[127]However, the governmental and public sectors may assert that harsh penalties do check the disastrous impact of repeat offenders - while audit privilege legislation fails to thoroughly address the issue.

[128]*Transcript, supra* note 1, at 3 (testimony of Blake Jeffery, Director of Environmental Affairs, *Indiana Manufacturers' Assoc.*).

iii. *Colorado's Movement Towards Compliance*

While the audit privilege portion of Colorado's legislative solution to the auditing debate is very similar to that of Oregon, Kentucky, and Indiana, the voluntary disclosure component of Colorado's law makes it unique and controversial.[129] As the only state in the country to embrace such a provision, Colorado legislators first explained why the legislation was passed. They next illustrated how the provision functions and outlined the merits of their legislative proposal.[130]

Colorado legislators recognized the difficulty companies have in achieving compliance with environmental regulations "one hundred percent of the time."[131] While an audit privilege provides some incentives for compliance, the voluntary disclosure component is important when a company in the interest of public safety and health, "finds an area of noncompliance and wants to report it."[132] The voluntary disclosure component evolved in response to corporate fear and distrust of approaching the EPA or other state regulatory agency with instances of noncompliance.[133] When a company feels it wants to disclose an environmental transgression as it approaches compliance, it confronts potentially significant penalties if it reports . . . .or they can choose to not report."[134] Colorado's provision for voluntary disclosure facilitates the free flow of information by making it "easier for companies to disclose . . . companies know what to expect if they disclose."[135] Advocates of the Colorado proposal note that neither the EPA nor the Dept. of Justice Guidelines provide such certainties.[136]

In illustrating how the legislation functioned, presenters emphasized that the Colorado voluntary disclosure provision[137] does not provide blanket immunity to corporations.[138] In order for a company to safely and voluntarily disclose an instance of environmental noncompliance under the Colorado provision, four requirements must be met:[139]

1. The company must provide prompt notification after they discover an instance of noncompliance,

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[129]John Brinkley, *EPA Rejects Colorado's New Law,* ROCKY MOUNTAIN NEWS, July 28, 1994, at A1.

[130]*Transcript, supra* note 1, at 101 (testimony of Cynthia Goldman, *Colorado Assoc. of Commerce and Industry*). Cynthia Goldman is the author and lead negotiator for CACI of Colorado's Self Evaluation Privilege and Voluntary Disclosure Law.

[131]Lavell, *supra* note 2, at 5-1.

[132]Transcript, supra note 1, at 100 (testimony of Cynthia Goldman, *Colorado Assoc. of Commerce and Industry*).

[133]Letter from Michael Feeley, Colorado Senate Minority Leader, *Colorado Senate*, to Ira R. Feldman, Special Counsel, Office of Compliance, *U.S. Environmental Protection Agency*, Public Meeting on Environmental Auditing 1 (July 25, 1994) (on file with *EPA Office of Air and Radiation Docket and Information Center*) (discussing the origin and purpose of the Colorado environmental audit privilege and voluntary disclosure provisions; Senate Bill 94-139).

[134]*Transcript, supra* note 1, at 103 (testimony of Cynthia Goldman, *Colorado Assoc. of Commerce and Industry*).

[135]*Id.*

[136]*See supra* text accompanying note 76.

[137]COLO. REV. STAT. ANN. § 224.01-040 (1994).

[138]S. Res. 139, 59th Cong., 2d Reg. Sess., 1994 Colorado Laws 1.

[139]A "voluntary self-evaluation" means a self-initiated assessment, audit, or review, not otherwise expressly required by environmental law, that is performed by any person or entity, for itself, either by an employee or employees employed by such person or entity who are assigned the responsibility of performing such assessment, audit, or review or by a consultant engaged by such person or entity expressly and specifically for the purpose of performing such assessment, audit, or review to determine whether such person or entity is in compliance with environmental laws. S. Res. 139, 59th Cong., 2d Reg. Sess., 1994 Colorado Laws 2.

2. The instance of noncompliance must be identified as a result of a voluntary self evaluation,[140] which means they have already been trying to come into compliance with environmental laws[141] and regulations,

3. The instance of noncompliance must be corrected within two years, and

4. The company must cooperate with the Colorado Department of Public Health and Environment.[142]

If these four requirements are met, there is a rebuttable presumption that the disclosure is voluntary, and no administrative, civil, or criminal negligence penalties can be assessed.[143] Presenters note that if the disclosure is required by a permit or order, it cannot be voluntarily disclosed under the Colorado provision. Also, penalties for intentional, knowing, or reckless criminal activities are available under this law. Colorado legislators concluded by urging the EPA "to give us an opportunity to prove that our legislation is an effective method of encouraging environmental compliance."[144]

Compliance emerges as a key element of Oregon, Kentucky, Indiana, and Colorado's legislative auditing solutions. At the public meeting, advocates of privilege laws proposed taking the environmental auditing debate one step further. All states with privilege legislation, as well as Colorado's voluntary disclosure component, require companies *to come into compliance with environmental laws and regulations in order to be able to take advantage of the incentives and protections that are provided in these laws.* When analyzing environmental compliance as it relates to the auditing quandary, it is this point which rests at the cornerstone of the "self-evaluative" legislation proposals.

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[140]*Transcript, supra* note 1, at 105 (testimony of Cynthia Goldman, *Colorado Assoc. of Commerce and Industry).*

[141]*Id.*

[142]*Id.* at 106.

[143]Opponents of the Colorado provision may ask, however, how the legislation defines and an "intentional, knowing, or reckless" criminal activity? They express concern at this perceived loophole for the recalcitrant bad actor company. What prevents a corporation that intentionally fails to comply with cumbersome and complex environmental regulations from reaping the protection benefits of a voluntary disclosure privilege clause?

[144]*Transcript, supra* note 1, at 109 (testimony of Cynthia Goldman, *Colorado Assoc. of Commerce and Industry*); *See also* Memorandum from Scott B. Smith, Director, Environmental, Health and Safety Policy, *Coors Brewing Co.*, to Ira R. Feldman, Special Counsel, Office of Compliance, *U.S Environmental Protection Agency*, Public Meeting on Environmental Auditing, (July 26, 1994) (on file with the *EPA Office of Air and Radiation Docket and Information Center)* (regarding the benefits resulting from the enactment of Colorado's Self-Evaluation Privilege/Disclosure Legislation).

V. Proposition

The 1994 Public Meeting on Environmental Auditing functioned not only as a productive catalyst for meaningful change in the environmental auditing debate, but served as a springboard for proposed controversial legislative solutions. While merit exists in all the perspectives presented, distinctive costs and benefits are clear.

The EPA's task of balancing its commitment to a strong enforcement program with the desire to assist corporations in complying with environmental regulations is admittedly one of Heraculean proportions. And though the Agency's efforts in promoting discussion are admirable, perhaps the Augean stable of the environmental auditing debate, emerges as a monstrosity too filthy for the EPA to clean alone. If the present environmental policy remains, tensions between the corporate sector and enforcement agencies will only augment.

The public interest proposal flows as one solution to the auditing quandry. The other springs from the statutory proposals of legislators. The two must combine in order to resolve the auditing debate.

While state legislators advocating self-evaluative privilege statutes have reason to praise their new provisions, the public interest sector raises an important point with regard to the loopholes available to recalcitrant bad actor companies. Though the present statutory proposals require a company to comply with environmental laws before reaping the benefits of privilege legislation, the proposals fail to adequately define the terms of this compliance. Colorado's voluntary disclosure provision perhaps comes the closest as it mandates a two year compliance deadline. Yet is a two year period a time frame feasible for all corporations in all situations? This failure opens significant loopholes for recalcitrant corporations. Only by coupling present statutory safe harbor privilege legislation with new provisions for increased corporate accountability does an equitable solution to the environmental auditing debate arise.

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