Environmental Audit Policy

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ENVIRONMENTAL AUDIT POLICY

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I. INTRODUCTION

The complexity of environmental regulations has outpaced even the most sophisticated environmental lawyers and engineers. The chemical industry looks to the legal profession for guidance and advice in complying with a tapestry of laws and rules which today rival the Tax Code in length and complexity. The peculiar progression of environmental compliance has created the need to assess facilities before advising clients of the possible impact of relevant regulations on them. Indeed, assessments are now an invaluable prerequisite to the professional advice needed by industry for compliance and/or remediation. Moreover, these audits make good business sense because they reduce violations and thereby reduce penalties. At the same time, audits improve the environment and provide data for management that can help in the strategic

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1. See Stephen Mansfield & Everett Seymour, Phase I Environmental Assessments After the ASTM Standards, 1 J. ENVTL. L. & PRAC. 18, Sept./Oct. 1993 (advancing that “[t]he legal and factual complexity of . . . [environmental audits] may require not only that an environmental consultant perform an assessment . . . but that the businessman and the lawyer become actively involved in deciding what unusual or complex risk issues should be addressed.”).

2. See James R. Arnold, Disclosure of Environmental Liabilities To Government Agencies and Third Parties, CA47 ALI-ABA 381, 383 (Oct. 12, 1995) (remarking on the growing significance of environmental audits). See also Michael Baram, The New Environment for Protecting Corporate Information, 25 ENVTL. REP. (BNA) 545, 545 (July 22, 1994) (articulating that the new corporate culture “involves extensive auditing of hazardous activities and products, using the findings to correct and prevent regulatory violations and minimize liability risks”).
planning process. Yet, these very same assessments and audits can, sometimes, provide the government with notice of non-compliance and the means for sanctioning regulated industries for violations of environmental laws and regulations.

An environmental audit is a mechanism that businesses utilize to reduce the risk of failing to comply with environmental rules and regulations. Such a mechanism facilitates an understanding of the regulatory environment in which the business operates and identifies those areas where additional attention or alternative approaches are needed.

To use this tool effectively, however, one must first ascertain the goals of conducting an environmental audit. Goals must be matched with the type of business involved. A business must also recognize that undertaking an audit is not without risk. This Article will focus on the different types of environmental audits that are available for businesses, will identify the pros and cons of conducting an audit, and will provide guidance for designing an environmental audit program. This Article will conclude with a discussion of the growing trend towards providing some form of privilege for environmental audits.

II. ENVIRONMENTAL AUDITS

The goals of an environmental audit dictate the type of audit and the level of detail required in that audit. A business usually undertakes an environmental audit to establish a compliance profile, to address plant processes and efficiency, and, more often than not, to identify or test some potential improvements in these processes. A


4. See Paula C. Murray, *The Environmental Self-Audit Privilege: Growing Movement in the States Nixed by EPA*, 24 Real Estate L.J. 169 (Fall 1995). The author points out that corporations are concerned that environmental audits may provide a paper trail for regulatory agencies to follow in investigating criminal culpability and assessing costly clean-up fines, *id.* at 169, but warns the regulated community to view the environmental audit as an integral part of corporate policy. *Id.* See also John T. Kolaga, *Are Environmental Audit Reports Protected by Legal Privilege?* 9 Nat. Resources & Env't 54 (Winter 1995).
business may also conduct an audit in anticipation of a sale or a change in use or ownership of the company or of the company's facilities.

The Environmental Protection Agency ("EPA") defines an environmental audit as a "systematic, documented, periodic and objective review [ ] by regulated entities of facility operations and practices related to meeting environmental requirements." Thus, an audit is essentially a mechanism by which a company gathers information about its operations. An audit reveals how a company or its facilities may impact the environment and human health. It also identifies the company's risk of liability for failing to comply with applicable rules and regulations. Hence, the audit includes both incriminatory and exculpatory information which could be problematic because it may serve as admissions or as evidence against the company in future litigation. Without an appropriate privilege for an environmental audit, concerns over the future use of information gathered during the audit create a disincentive for business to conduct audits. Additionally, the facility's location, its state as well as its county, impacts how an environmental audit is constructed and whether a privilege to protect information gathered during the audit exists. These risks, and the fact that audits are an essential and desired tool for business, have motivated legislative interest in an effective and meaningful privilege for environmental audits.6

5. EPA Environmental Auditing Policy Statement, 51 Fed. Reg. 25,004, 25,006 (1986). The policy statement further provides that "[e]nvironmental auditing includes a variety of compliance assessment techniques which go beyond those legally required and are used to identify actual and potential environmental problems." Id. at 25,004.

6. Thirty-four states introduced legislation in 1995 to protect the results of corporate environmental audits from disclosure. Cheryl Hogue, Audit Legislation Gains in States, But Some Predict Slowdown in Future, 26 ENV'T REP. (BNA) 882, 882 (Sept. 1, 1995). Nine of the bills passed, bringing the number of states who currently have environmental audit privilege statutes to fourteen. For a complete list of the states having passed such statutes, see discussion infra part IV.H. Additionally, EPA launched a pilot program in 1994 to encourage audits through a limited environmental audit privilege. E.P.A. Note to Correspondents, 94-R-147 (June 20, 1994). Anyone contemplating conducting an audit should consider the potential detrimental use of the audit or information developed and design a program that can protect the information, to the extent possible, during the audit program and thereafter.
A. Compliance Profiles

One central purpose of almost every environmental audit is to identify the areas where the business's operations may trigger compliance problems. Most emissions or discharges into the air, water or ground, especially in ways that would leak into groundwater, will trigger some form of regulatory compliance requirement. Reporting and recordkeeping obligations are substantial for those companies that handle any material defined as a hazardous waste, a hazardous material or a hazardous substance. A compliance audit identifies violations and potential violations of these rules and recommends programs which will either prevent future compliance problems or will correct existing ones. The benefit of conducting this type of audit is that it puts a company in a position to insure regulatory compliance. However, the concern is that by conducting an audit a company will have created a database that regulators, private citizen groups, and competitors can use against the business.

Several states have now created enforcement agencies and adopted a variety of environmental audit privileges. The availability of


9. See James T. O'Reilly, Environmental Audit Privileges: The Need for Legislative Recognition, 19 SETON HALL LEGIS. J. 119, 126-27 (1994) (footnote omitted) (noting the recognition by courts of “a ‘chilling effect’ on the frankness of environmental audits when they are compelled to be disclosed in litigation”).

10. See Environment-Audit Privilege Puts Corporate Interests First, 140 N.J.L.J., June 5, 1995, at 29 (noting that at least nine states, including Arkansas, Colorado, Illinois, Indiana, Kentucky, Mississippi, Oregon, Virginia and Wyoming have passed environmental audit privileges that “encourage companies to make more aggressive efforts to analyze and improve their environmental performance”); State Audit Legislation Could Cause Programs to Revert to EPA, Browner Says, DAILY ENV'T REP. (BNA) (Mar. 28, 1995) (reporting that beginning with Oregon in 1993, twelve states have adopted some type of environmental audit statute and “nearly every other state in the union is considering bills on environmental audits”); States Taking Legislative Initiative in Encouraging Corporate Audits, DAILY ENV'T REP. (BNA) (Mar. 15, 1995) (asserting that in 1994 Colorado, Kentucky and Indiana were the first states to adopt aggressive audit
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a privilege, and a business's ability to rely upon this privilege, must be analyzed on a case-by-case basis. In anticipation of litigation, counsel may ask that a business complete a specific type of audit, at least in part which, under appropriate circumstances, can be protected by the attorney-client privilege under federal and state laws of evidence. Anyone contemplating an audit under these circumstances must, with the assistance of counsel, check the state and federal law regarding the privilege to ensure that the audit is undertaken in a way that protects it.

A compliance audit should identify the regulatory requirements for the business, determine whether the business is in compliance with these requirements at a particular point in time, and assess the cost to the business to comply with these requirements. This enables the business to develop a strategy which will either bring the business into compliance or ensure the business's continued compliance with applicable laws, rules and regulations.

B. Plant Process Improvement Audits

The second type of audit, the plant process improvement audit, allows a company and its management or reengineering team to identify areas where cost savings and risk reduction can occur. Preventing pollution, reducing risk of non-compliance, promoting cost-effective growth, identifying risks, and reductions of those risks constitute the goals of a plant process improvement audit. This audit impacts the availability of insurance, identifies the permits that must be modified or are necessary for continued operation, and allows a manager to have the tools to control costs, decide whether changes in processes are needed, readjust staffing in the current era.
of downsizing, and improve the business's ability to budget. Again, before going forward with this type of audit, the ability to protect this data should be explored.

C. Acquisition Or Divestiture Audits

The acquisition or divestiture audit is typically conducted in anticipation of a sale or a change in ownership. A business conducts an acquisition audit to establish a baseline for potential problems at the facility, thus preventing future liability. The audit may also be used to help businesses working toward an acquisition address potential liabilities and indemnities. Because an acquisition is usually done for strategic purposes, an acquisition audit may also help both parties identify whether the facility will be a good “fit” and will meet the identified purpose of the acquiring company.

An acquisition audit should focus on the existing plant -- whether a history of environmental violations exists as well as the potential for prospective environmental liability. Issues ranging from on-site and off-site disposal practices to the target company's failure to obtain necessary permits or permit modifications can trigger liability. Thus, an audit must explore each of these areas of concern. The question of privilege for potentially damaging information remains an issue to be negotiated.

An acquisition audit identifies and reduces the risk of liability to individuals while promoting compliance. Such an audit should explore whether liability could potentially extend beyond a company's normal corporate structure. Failure to comply with environmental laws, especially for small companies that do not honor the corporate form, may expose the principals who make the environmental compliance decisions to personal liability. Furthermore, the "enterprise" that continues to reap the benefits of non-compliance may also be subject to liability. An acquisition audit identifies and reduces the risk of liability to individuals while promoting compliance.

In addition to statutory liability, an acquisition audit identifies common law claims in the acquisition context such as negligence, nuisance, material misrepresentation, fraud, trespass, strict liability, toxic tort, citizens', or attorney general actions which might be brought against the plant and its owner. An acquisition audit catalogs and quantifies the risk of these types of liability and allows parties to allocate liability in the acquisition process.

III. PARTICIPATION IN THE REGULATORY PROCESS

An audit identifies the issues that a new business should evaluate. A recent survey of Business and Industry Associations across the country indicated that companies that have conducted environmental audits have identified the key legislative and regulatory issues that will affect their business and, as a result, participate in the future legislative and regulatory decision-making processes. Audits afford companies data and insight thus allowing them to meaningfully bring their concerns into the political and regulatory process.

No matter what type of audit one contemplates, the benefits of conducting a thoughtful audit must be weighed against the risk of inertia. The availability of an audit privilege and the federal

14. *The Voluntary Environmental Audit Survey of U.S. Businesses*, March 1995, Price Waterhouse LLP. According to the survey "U.S. companies say they would conduct more environmental audits if they were assured that the results would not be used to penalize them." *Id.* The survey also revealed that among auditing companies, nine percent (9%) had audit findings involuntarily discovered and twelve percent (12%) had voluntarily disclosed findings used against them. See also *Elimination of Penalties Could Boost Environmental Self-Auditing, Survey Says*, **INT’L ENV’T DAILY** (Apr. 24, 1995); *Most Government Agencies Do Not Conduct Environmental Audits, GAO Finds*, **DAILY ENV’T REP.** (BNA) (May 8, 1995) (citing the General Accounting Office's Finding that with the exception of the military and Energy Department, most federal agencies do not undertake environmental audits of agency operations). But see *Companies Conducting Audits Despite Lack of Privilege Laws, Lawyer Says*, **DAILY ENV’T REP.** (BNA) (Apr. 28, 1995) (citing an official from the National Association of Attorney Generals who claims that "[c]ompanies increasingly are conducting environmental audits, despite the lack of legal protections treating audit results as privileged information.").

15. *See David Sive & Daniel Riesel, The EPA and Some State Legislatures Weigh Strengthening the Self-Critical Analysis Privilege so as to Promote Candor*
government's position on audit privilege viability are essential to this analysis. The corporate actor must base its decision on a balance of risks.

IV. RISKS OF AUDITING

A. Prosecutorial Use of Self-Assessments

The often close question of who has knowledge of compliance violations separates criminal violations of the law from civil violations. A prosecutor's discretion in choosing between civil or criminal prosecution often turns on the strength of proof of knowledge. In this situation, an audit or self-assessment could demonstrate such knowledge. Thus, the stakes are high for industrial clients in the ongoing debate in New Jersey, Washington D.C., and throughout the country, as Congress, the EPA, and state legislatures consider privilege statutes to protect environmental audits.

B. The Threat to Efficient Prosecutions

Similarly, the stakes are high for EPA, the Justice Department, the New Jersey Department of Environmental Protection ("NJDEP"), and many environmental agencies around the nation as their ability to enforce environmental laws is impaired by "privilege" statutes. Any diminution of law enforcement's ability to obtain evidence of intent of criminal conduct undercuts the protec-

in Audits, NAT'L J., Feb. 13, 1995, at B4 (discussing employment of outside counsel by companies to ensure that evidentiary privileges can be asserted to protect the information from discovery if the company comes under investigation).


17. New Jersey has, after much debate, passed a limited audit privilege (Bill S. 384). The bill allows the Attorney General to obtain the audit under certain circumstances. See discussion infra part IV.G.

The privilege for self-assessment and audits is viewed suspiciously by law enforcement agencies (especially the EPA) as a potential shield to prevent enforcement of the environmental laws.

C. Background Court Decisions

To encourage environmental audits, some federal courts have held that environmental audit reports are privileged, and are not subject to discovery in litigation. This reasoning emerged from *Bredice v. Doctors Hospital, Inc.* The *Bredice* line of cases en-

19. See Craig N. Johnston, *An Essay on Environmental Audit Privileges: The Right Problem, The Wrong Solution*, 25 ENVTL. L. 335, 337 (Spring 1995) (concluding that the “EPA should take immediate steps to preempt the audit-privilege movement by providing an alternative scheme that better balances the competing goals of vigorous enforcement and encouraging compliance-assurance activities.”).

20. See *EPA Policy Offers No Audit Privilege; Lack of Prosecution, Punitive Fines Possible*, DAILY ENV’T REP. (BNA) (Apr. 3, 1995) (reporting that the EPA “would not grant immunity from penalties to those who audit, remedy violations, and report the wrongdoings voluntarily” because the agency wants “to preserve a level playing field’ in which violators do not gain a competitive advantage.”).

21. See infra notes 22-28 and accompanying text.

22. 50 F.R.D. 249 (D.D.C. 1970), aff’d, 479 F.2d 920 (D.C. Cir. 1973). *Bredice* involved a medical malpractice suit in which plaintiff sought to discover documents pertaining to medical staff reviews. *Id.* at 249-50. Defendant hospital argued that such documents were privileged on public policy grounds and the court agreed stating that “[t]here is an overwhelming public interest in having those staff meetings held on a confidential basis so that the flow of ideas and advice can continue unimpeded.” *Id.* at 250-51.

The reasoning in *Bredice* is similar to that of an earlier decision by the Fifth Circuit, *Southern Railway Company v. Lanham*, 403 F.2d 119, 131 (5th Cir. 1968), which held that public policy mandated a railroad’s accident reports be immune from discovery because “absent complete and honest reports, effective accident evaluation may be impaired and the prevention of future accidents hampered.”

Since the *Bredice* decision, the self-critical analysis privilege has been widely recognized by courts in the context of medical peer reviews and most states have enacted statutes protecting medical peer reviews from discovery. *Reichhold Chems., Inc. v. Textron, Inc.*, 157 F.R.D. 522, 525 (N.D. Fla. 1994). Additionally, the privilege has been broadened to apply in numerous non-medical contexts. See *Bradley v. Melroe Co.*, 141 F.R.D. 1, 2-3 (D.D.C. 1992) (extending

23. 50 F.R.D. at 251. The Bredice court articulated:

Candid and conscientious evaluation of clinical practices is a sine qua non of adequate hospital care. To subject these discussions and deliberations to the discovery process, without a showing of exceptional necessity, would result in terminating such deliberations. Constructive professional criticism cannot occur in an atmosphere that one doctor's suggestion will be used as a denunciation of a colleague's conduct in a malpractice suit.

Id. at 250.

The privilege applied "only to reports which were prepared after the fact for the purpose of candid self-evaluation and analysis of the cause and effect of past pollution, and of Reichhold's possible role . . . in contributing to the pollution at the site." 25

Judicial acceptance of the critical self-evaluation privilege in the environmental context has been mixed. 26 A district court in the Third Circuit held that "the self-evaluation privilege does not apply a fortiori to environmental reports, records, and memoranda." 27 In 1994. The Reichhold court explained that the self-critical analysis privilege "allows individuals or businesses to candidly assess their compliance with regulatory and legal requirements without creating evidence that may be used against them by their opponents in future litigation. The rationale for the doctrine is that such critical self-evaluation fosters the compelling state interest in observance of the law." Id. at 524.

25. Id. at 527. The Florida district court further qualified the self-critical analysis privilege by asserting that the privilege could be overcome by a defendant's demonstration of "extraordinary circumstances or special need[s]." Id. Other courts have similarly recognized limitations in applying the privilege. See Bradley, 141 F.R.D. at 3 (applying the self-critical analysis privilege to "discovery of impressions, opinions, and evaluations" but requiring disclosure if moving party demonstrates substantial need); Federal Trade Comm'n v. TRW, Inc., 628 F.2d 207, 210 (D.C. Cir. 1980) (finding the privilege inapplicable where a government agency subpoenas documents); Wylie v. Mills, 478 A.2d at 1273, 1278 (N.J. Supr. 1984) (refusing to apply the privilege to factual information); Robert v. National Detroit Corp., 87 F.R.D. 30, 32 (E.D. Mich. 1971) (excepting data and statistical information from the scope of the privilege); Gillman v. United States, 53 F.R.D. 316, 319 (S.D.N.Y. 1971) (asserting that the privilege did not extend to factual information).

26. In an article by Peter Gish, The Self-Critical Analysis Privilege & Environmental Audit Reports, 25 ENVTL. L. 73, 85-6 (Winter 1995) (footnote omitted), the author surmises that

[t]he reluctance among federal judges to recognize a privilege of self-critical analysis stems in part from a realization that the privilege, although appealing in theory, is very difficult to apply in practice . . . . Moreover, federal judges have had difficulty balancing the policy of ensuring open and complete disclosure of all relevant facts against the public interest in shielding self-evaluations in order to further socially recognized goals.


New Jersey, it is doubtful that a federal court would recognize a critical self-evaluative privilege in the environmental context because New Jersey District Courts have not embraced *Bredice*, even in the medical peer review context.28

D. EPA's Interim Audit Policy

Both Congress and EPA recognize the need to provide some protection to conscientious corporate actors who conduct environmental audits. On April 3, 1995, EPA announced an interim policy regarding environmental audits.29 Accordingly, EPA has announced that it will not make criminal referrals and will reduce

(W.D. Pa. 1994). The *Koppers* court further asserted that, following this decision, corporations would not “face a Hobson’s choice between the due diligence and self-incrimination in the tightly-regulated environmental context, for that context requires strict attention to environmental affairs.” *Id.* The district court expressed doubt that the decision would result in potential polluters avoiding environmental diligence obligations for fear that such documentation will be used against them in the future. *Id. But cf.* James T. O'Reilly, *Environmental Audit Privileges: The Need for Legislative Recognition*, 19 SETON HALL LEGIS. J. 119, 119 (1994). O'Reilly argues that “critical self-examination of the weaknesses of facilities . . . leads to positive changes . . . but it results in an audit document that can help outsiders to prosecute . . . corporation[s]” and when faced with the choice “between effective candor and circumspect risk avoidance, some companies are foregoing the benefits of environmental self-audits in an effort to avoid future confrontations over the content of these reports.” *Id.*

28. *See* Wei v. Bodner, 127 F.R.D. 91, 98 (D.N.J. 1989). The *Wei* court reasoned that although New Jersey statutory law protects information obtained through hospital utilization review committees, the privilege is limited. *Id.* (citing N.J.S.A. 2A:84A-22.8 (Supp. 1988)). After balancing the policies supporting the privilege and the policies underlying the antitrust laws in issue, the district court held that disclosure was appropriate. *Id.* at 98-99.

On February 5, 1996, the New Jersey State Senate voted unanimously to provide incentives for businesses to perform voluntary evidentiary audits. *Bill Promoting Environmental Audits Advances*, STATE ENV’T DAILY (BNA) (Feb. 15, 1996). Such incentives included limiting the access of enforcement agencies to audit information. *Id.* The Senate, however, provided several exceptions to the confidentiality, including situations in which confidentiality is shown to be outweighed by the public interest and instances in which the entity did not take steps to correct environmental violations discovered through an audit. *Id.*

civil penalties for corporate actors who discover violations through a voluntary environmental audit, provided that the actor voluntarily discloses and corrects the violation, remedies the harm, prevents further occurrences, and cooperates with EPA. Additionally, the violation must not have resulted from "fail[ure] to take appropriate steps to avoid repeat or recurring violations . . . ." Whether this additional requirement is merely a backstop to allow EPA to continue past enforcement policies remains to be seen. However, EPA postulates that the new policy will provide an incentive for companies to conduct environmental audits. Under the new policy, EPA will stop making routine requests for voluntary environmental audit reports to trigger civil or criminal investigations.

EPA's interim policy is a step in the direction sought by industry. Yet, for industry, it does not go far enough. The key

30. Id. at 16,877.
31. Id.
32. Id.
33. On December 18, 1995, EPA issued its final policy relating to an entity's privilege against disclosure of self-audit reports. See Incentives for Self-Policing: Discovery Disclosure, Correction & Prevention of Violations, 60 Fed. Reg. 66,706 (1995). Commentators have found, however, that the policy did not pronounce concrete protection to companies from disclosure of self-audits. Id. The National Law Journal reported that the revisions to the audit policy attempted to promote "a higher standard of self-policing by providing incentives to companies that perform voluntary self-evaluations and disclose and correct the violations." Id. (footnote omitted). The article further explained that

[u]nder the final policy, when an entity discovers a violation through a voluntary environmental audit or compliance management system that demonstrates a certain level of due diligence; discloses the violation within ten days . . . corrects the violations and remedies any . . . harm . . . within sixty days . . . and agrees . . . to take steps to prevent the recurrence of the violation; and fully cooperates with the EPA, the EPA will eliminate the punitive component of the penalty known as the "gravity-based penalty."

Id. (footnote omitted).
34. See also Lynn Bergeson, EPA's Voluntary Auditing Policy is Final, But Not Definitive, CORP. LEGAL TIMES, p.32 (Mar. 1996) (stating that EPA's new policy does little to clarify the scope of a company's privilege from disclosure of self-auditing materials); Marianne Lavelle, Companies Seek More EPA Leeway, NAT'L L. J., p.A12 (Feb. 26, 1996) (espousing that "[e]ven though the Clinton Administration has put into place a moderate new policy to ease the punishment
failing of EPA’s interim policy is that it only protects the would-be auditor from prosecutorial actions by EPA. Even this protection may be fleeting; EPA has stated that it reserves the right to rescind the interim policy.\(^\text{35}\) The policy is insufficient, as it stands, to assure those corporate actors who might conduct environmental audits that they are safe from future prosecution.

Further, the policy does not protect environmental audit reports from discovery by third parties, such as toxic tort plaintiffs or non-cooperative potentially responsible parties.\(^\text{36}\) EPA’s position is that the alternative, a legislatively-created privilege, will be used by lawbreakers to gain economic advantage and to create costly litigation.\(^\text{37}\) Its rationale for the policy is that it will “level the economic playing field” by collecting penalties for economic benefits reaped by parties that do not report violations.\(^\text{38}\) Of course, EPA’s internal calculation of economic benefits will also eventually become the subject of litigation.

E. Federal Legislation

EPA’s ostensibly conciliatory stance on the audit issue is undoubtedly prompted by proposed federal legislation which is expected to create a strong audit privilege. The House version, introduced by Representative Hefley, is known as the “Voluntary Environmental Self-Evaluation Act” and provides a qualified privilege for audit materials and substantial immunity for voluntary disclosures of violations.\(^\text{39}\) The Senate version, introduced by Senator Hatfield, is known as the Voluntary Environmental Audit Protection Act (“VEAPA”).\(^\text{40}\) VEAPA exempts voluntary environmental audits from both discovery and admissibility in any administrative, civil or criminal action before a federal court or agency, or under a

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35. EPA Interim Policy, supra note 29, at 16,878.
36. Id.
37. Id.
38. Id.
federal law. To protect against the abuses predicted by EPA, VEAPA exempts reports made and/or required by regulatory agencies and information gained from independent sources. The holder of the privilege may expressly waive the privilege. If the privilege is asserted for fraudulent reasons, or if the privilege is used to shield ongoing and continuing non-compliance with federal environmental laws, it may be waived implicitly. Disclosures under VEAPA are considered voluntary (even if the resultant information must be disclosed to EPA) so long as compliance measures are undertaken and further relevant information is provided to appropriate regulatory agencies. Finally, VEAPA provides for in camera reviews if the party seeking disclosure can show that the privilege is being abused.

F. EPA's Reaction to VEAPA

EPA is opposed to VEAPA and has stated that it will more closely scrutinize enforcement in states with audit privileges. Suggesting that a privilege would undermine the trust between industry and government, EPA Assistant Administrator Steven Herman has noted that "when it comes to audits, 'we trust you' to do the right thing," and "[i]n turn, companies have to 'trust us to use good judgment.'" Not only does EPA rely on the "trust me, I'm from the government" rationale, but it also relies on a report by Price Waterhouse, LLP in which 75% of responding businesses indicated that they had some type of environmental auditing policy, despite the absence of privilege protections.

41. Id.
42. Id.
43. Id.
44. Id.
46. Id.
47. EPA Interim Policy, supra note 29, at 16,878.
49. Id.
EPA's concern about VEAPA is not completely tenable. After a 1994 Colorado bill was enacted, several Colorado companies voluntarily came forward to discuss their environmental problems with state regulators. Moreover, the fall back privilege used by many companies is the attorney-client privilege. This privilege is unnecessarily expensive and occasionally ineffective, because it requires (i) the costly use of attorneys; and (ii) that privileged information is only shared with high level management, i.e., the "control group." The Price Waterhouse report disclosed that more audits would be performed, if the contents of the reports were guaranteed to be confidential.

G. The Self-Critical Analysis Privilege in New Jersey

In a recent suit in New Jersey Superior Court to recover environmental cleanup costs from its general liability insurers, CPC International, Inc. ("CPC") claimed the self-critical analysis privilege in response to discovery requests. The court evaluated whether

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53. For a discussion of the attorney-client privilege in environmental audits, see Michael H. Levin et al., Discovery and Disclosure: How to Protect Your Environmental Audit Report, 24 Env't Rep. (BNA) 1606 (Jan. 7, 1994).
54. But see Upjohn v. United States, 449 U.S. 383, 391 (1981) (stating that the narrow "control group" test was too narrow and would frustrate the privilege by discouraging communication of information by employees, but failing to provide any rules to govern the privilege outside of the control group test).
56. CPC Int'l, Inc. v. Hartford Accident and Indem. Co., 620 A.2d 462 (N.J. Super. 1992). This was a case of first impression for the court, in that the court had never reviewed the application of the self-critical analysis privilege in the environmental context. Id. CPC argued that the privilege of self-critical analysis protected the documents because (1) the documents were "products of internal evaluations;" (2) confidentiality of the documents promoted "internal availability of such information;" and (3) "such evaluations would terminate in the future if such results were disclosed." Id. at 464. The insurers, in response, contended that the privilege did not apply to the documents because: (1) "the inspections and
the public need for disclosure was outweighed by the public need for confidentiality. While acknowledging that in certain instances the privilege might exist, the Court rejected CPC's claim of privilege, stating, "this court cannot ignore the clear direction of the New Jersey Legislature and condone the use of a privilege which would be contrary to both the legislative intent in enacting environmental regulations and the liberal discovery policy which exists in this state."

Like EPA, the New Jersey Department of Environmental Protection recognized that complete judicial rejection of any self-critical analysis privilege in the environmental context tends to: (i) discourage voluntary audits; and (ii) raise the possibility of a legislatively created privilege with stronger provisions than would be contained in any NJDEP policy. Seeking to mitigate the harsh dilemma audits contained therein were conducted in the ordinary course of business;" (2) there was "no public need for confidentiality regarding the documents;" and (3) the documents were "absolutely necessary in order to determine coverage since the information contained therein . . . [could not] be obtained from other sources." Id.

57. Id. at 464-65. The court proceeded to analyze the facts of the case under a three part inquiry crafted in Wylie v. Mills, 478 A.2d 1273 (N.J. Super. 1984), in which the New Jersey Superior Court submitted three criteria for application of the self-critical analysis privilege:

(1) the information which is the subject of a production request must be the criticisms or evaluations or the product of an evaluation or critique conducted by the party opposing the production request; (2) the "public need for confidentiality" of such analysis must be such that the unfettered internal availability of such information should be encourage as a matter of public policy; and (3) the analysis or evaluation must be of the character which would result in the termination of such self-evaluative inquiries or critical input in future situations if this information is subject to disclosure." Id. at 465.

58. Id. at 467. The court further maintained that:

the emphasis must be on the existence of strong environmental legislation as evidence of the compelling interest the public has in its regulation. . . . The public interest in preventing and remediating environmental pollution weighs heavily in favor of disclosure, even when the government is not a party . . . the public need for disclosure of documents relating to environmental pollution and the circumstances of such pollution outweighs the public's need for confidentiality in such documents.

Id.

59. Marlen Dooley, Assistant Commissioner for Enforcement for the DEP,
faced by corporate actors, the NJDEP has announced its intent to publish a policy which "would ordinarily waive or substantially reduce civil and administrative penalties for violations discovered as a result of an environmental audit."\textsuperscript{60} NJDEP will follow this policy only if corporate actors voluntarily disclose and correct violations.\textsuperscript{61} Such violations may not be the result of intentional or criminal conduct.\textsuperscript{62} The level of scienter needed for the conduct to be considered "intentional" will be addressed during rule-making sessions, but it is likely to include negligent, reckless, or intentional conduct resulting in a statutory violation.

Like the EPA, the NJDEP is concerned that a legislative privilege would be abused as a shield by corporate actors.\textsuperscript{63} One bill in the New Jersey Assembly and both bills in the New Jersey Senate\textsuperscript{64} expressly provide for an audit privilege. As in their federal counter-

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\textit{Address to Assembly Rules and Policy Committee} (Mar. 27, 1995) [hereinafter \textit{M. Dooley Address}] (on file with the New Jersey Department of Environmental Protection). Mr. Dooley proffered that:

\begin{quote}
[m]any entities may elect not to perform environmental audits and [choose] to remain ignorant of environmental problems if they believe that the enforcement response will be the same whether they identify and correct the problem themselves or the violations are identified during a routine compliance inspection performed by the department. If the threat of sanctions causes regulated entities to conclude that they have little to gain and much to lose by identifying their own compliance problems, then our enforcement program is not working well.
\end{quote}

\textit{Id.}

60. \textit{Id.}

61. \textit{Id.}

62. \textit{Id.}

63. In his address to the Assembly Rules and Policy Committee, Mr. Dooley cautioned the committee that although the privilege's intent is to "encourage companies to act responsibly" some companies may abuse it by using the privilege to "shield themselves from liability for past and continuing violations." \textit{M. Dooley Address}, supra note 59.

64. New Jersey Senate Bill 1797 was introduced February 9, 1995 by Senator MaclInnes and is identical to Assembly Bill 2521 introduced on the same date by Assemblymen Bateman, Doria, Digaetano, Impreveduto and Pascrell. Senate Bill 1891 was introduced on March 13, 1995 by Senator McNamara and contains similar provisions. The bill was substantially revised, reducing the level of privilege if certain conditions exist.
part. VEAPA, the environmental audit privilege proposed by these New Jersey bills would protect audit data from discovery by third parties and contain provisions such as in camera hearings while allowing for the government to obtain the audit information should certain conditions be met. Recognition of the usefulness of audits is not only found in the privilege bill itself, but also in its incorporation in other proposed environmental legislation.

H. Other States

New Jersey is not the first state to consider the audit privilege issue. In 1993, Oregon enacted the first environmental audit privilege law. During 1994, Colorado, Illinois, Indiana, and Kentucky all passed similar laws. So far in 1995, Arkansas, Idaho, Kansas, Minnesota, Mississippi, Texas, Utah, Virginia, and Wyoming have passed similar bills, and twenty-

66. See supra note 64.
67. 1993 Or. Laws 422 (codified at OR. REV. STAT. § 468.963 (Supp. 1996)).
68. 1994 Colo. Legis. Serv. 304 (West) (codified at COLO. REV. STAT. ANN. § 13-25-126.5 (Supp. 1996)).
70. 1996 Ind. Legis. Serv. P.L. 1-1996, § 18 (West) (codified at IND. CODE §§ 13-28-4-1 to 13-28-4-10 (Burns 1996)).
75. 1995 Minn. Sess. Law Serv. 168 (West).
one other states have introduced environmental audit or immunity bills.\textsuperscript{81} Early this year, the New Jersey State Senate also passed a privilege bill.\textsuperscript{82}

V. CONCLUSION

Until a policy is promulgated on the state and federal levels, environmental audits will not be completely safe. The concern that environmental audits will be used against the company doing self-assessment has caused fewer audits than necessary to be undertaken voluntarily. Alternatively, the findings and conclusions in some audits are sanitized, reducing their usefulness. It appears clear that legislation is needed and stands a good chance of passage. With many states establishing audit privileges, EPA is under pressure to keep pace. When such legislation passes, states like New Jersey will dramatically change their treatment of audit privileges.

\textsuperscript{81} Paula C. Murray, \textit{The Environmental Self-Audit Privilege: Growing Movement in the States Nixed by EPA}, 24 \textit{REAL ESTATE L.J.} 169, 171 (Fall 1995). For a thorough compilation of all state environmental audit privilege bills passed or at least sponsored nationwide, see \textit{States Taking Legislative Initiative in Encouraging Corporate Audits}, \textit{DAILY ENV'T REP. (BNA)} (Mar. 15, 1995).