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Ounces of Prevention and Pounds of Cure: Developing Sound Policies for Environemtnal Compliance Programs

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OUNCES OF PREVENTION AND POUNDS OF CURE: DEVELOPING SOUND POLICIES FOR ENVIRONMENTAL COMPLIANCE PROGRAMS

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Although we must maintain an imposing enforcement presence as a means of deterring noncompliance, traditional enforcement should be seen as a tool for achieving the broader goal of compliance and not as an end unto itself.[1]

In the 1990s, with criminal enforcement of American environmental statutes becoming more widespread,[2] and the consequences of violations potentially more severe, the creation of

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1. EPA, THE OFFICE OF COMPLIANCE: AN INTRODUCTORY GUIDE 13 (1995) (statement of EPA Administrator Carol M. Browner).

2. The criminal sanctions were enacted to serve the traditional goals of criminal prosecution. *See* Charles J. Walsh & Alissa Pyrich, *Corporate Compliance Programs as a Defense to Criminal Liability: Can a Corporation Save its Soul*, 47 RUTGERS L. REV. 605, 632-33 (1995) ("Four rationales support the imposition of criminal penalties: rehabilitation, incapacitation, deterrence, and retribution.") (citations omitted). The environmental crimes program was intended to advance all four of these goals.

effective environmental compliance programs has rapidly become a priority for the regulated community.[3] In previous years, creation of such programs could have been viewed merely as a responsible option to assist corporations in achieving or maintaining reputations as good corporate citizens.[4] Additionally, the

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3. *See* Laurence S. Kirsch & J. Walter Veirs, *Although the EPA Recently Issued Its Final Policy on the Confidentiality of a Company's Environmental Self-Audit, Numerous Questions Remain Unanswered*, NAT'L L.J., Mar. 11, 1996, at B5 ("Ten years ago, few companies conducted environmental reviews. Today, in light of increasingly stringent and complex environmental requirements and increasingly vigorous civil and criminal enforcement by the EPA and the states, environmental reviews are common."). *See also* Joe D. Whitley & Trent B. Spechals, *Increased Prosecution is Predicted*, NAT'L L.J., Dec. 5, 1994, at A1, C4 ("[I]t is clear that the single most important step [to limit liability] is the implementation of an environmental compliance and audit program"); Terrell E. Hunt & Timothy A. Wilkins, *Environmental Audits And Enforcement Policy*, 16 HARV. ENVTL. L. REV. 365, 365 (1992) ("The rise in the volume and complexity of environmental laws and regulations has led to dramatic increases in the number and size of environmental enforcement cases. . . . [I]ndustrial enterprises subject to these standards are searching for ways to ensure compliance and discover and correct environmental problems without creating additional enforcement liability.") (citations omitted).

4. At the most basic level, of course, the realization has developed that environmental irresponsibility is fundamentally wrong and poses a threat to human health. Such threats have far-reaching consequences for current and future generations and should be avoided, regardless of the legal consequences that attach to them. *See* Robert W. Adler & Charles Lord, *Environmental Crimes: Raising the Stakes*, 59 GEO. WASH. L. REV. 781, 787-88 (1991). These authors noted that:

> [F]rom a strictly ethical perspective, such activities warrant sanctions as, or more, severe than those imposed for many other crimes. Environmental laws are designed to prevent death and serious illness from exposure to toxic and other pollutants or the destruction or waste of valuable or irreplaceable natural resources. Other crimes that jeopardize the health or well-being of one or more individuals, or that threaten personal or public property, are considered serious enough to impose strict criminal penalties. Environmental crimes that endanger even more members of the public, due to contamination of air, water, land and food and actions that damage and destroy valuable public property . . . deserve similar treatment.

Id.

On a more practical level, the negative publicity and economic consequences of an environmental disaster have motivated others. The public has reportedly become less patient with those committing environmental wrongs.

existence of a compliance plan might have been perceived as a sound way to avert the common law tort liability that could arise from environmental misdeeds.[5] More recently, the possession of

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See Mary Ellen Kris & Gail L. Vannelli, *Today's Criminal Environmental Enforcement Program: Why You May be Vulnerable & Why You Should Guard Against Prosecution Through an Environmental Audit*, 16 COLUM. J. ENVTL. L. 227, 227 (1991) ("Love Canal, Times Beach, Bhopal, Chernobyl, Exxon Valdez, torched Kuwaiti oil refineries, medical waste on New Jersey beaches—mass disasters and local accidents such as these have spawned public opinion and paranoia regarding public health and the environment, resulting in political and industrial reaction.") (emphasis omitted); Lauren A. Lundin, *Sentencing Trends in Environmental Law: An "Informed" Public Response*, 5 FORDHAM ENVTL. L.J. 43, 60-61 (1993) ("A recent survey conducted by the Opinion Research Corporation found that 'eighty-four percent of Americans believe that damaging the environment is a serious crime.' A Department of Justice poll found that the public ranks environmental offenses as the seventh most severe type of crime, behind violent crimes such as murder."); Colleen C. Murnane, *Criminal Sanctions For Deterrence Are a Needed Weapon, but Self-Initiated Auditing Is Even Better: Keeping the Environment Clean And Responsible Corporate Officers Out of Jail*, 55 OHIO ST. L. J. 1181, 1184 (1994) ("Sixty thousand people were surveyed in 1984 to rank crimes in order of severity and the result ranked environmental crime in seventh place-even above heroin smuggling!") (citations omitted); Lisa Ann Harig, Note, *Ignorance is Not Bliss: Responsible Corporate Officers Convicted of Environmental Crimes and the Federal Sentencing Guidelines*, 42 DUKE L.J. 145, 145 (1992) ("During the latter part of the 1980s and now into this decade, environmental crimes have become the focus of much media coverage and public attention.").

5. Toxic tort suits and mass mishaps could result in significant liability beyond the already substantial penalties outlined in the statutory framework, and

> [i]n certain situations liability law can be a valuable weapon in the arsenal of policy responses to pollution problems. By creating legal precedents which assure that pollution damages inflicted on some other party will be borne by the polluter, liability law can create incentives for polluters to take efficient levels of precaution. By providing an alternative means of internalizing externalities, judicial remedies can complement legislative and administrative remedies. At the same time damage payments can compensate directly those victims of pollution who are parties to the suit, an attribute not shared by traditional regulatory approaches.

Tom H. Tietenberg, *Indivisible Toxic Torts: The Economics of Joint and Several Liability*, LAND ECONOMICS, Nov. 1, 1989, at 305. *See also* Allan Kanner, *Environmental & Toxic Tort Issues*, C127 ALI-ABA 775, 783 (June 26, 1995) (stating that "[e]nvironmental contamination may be addressed through nui-

a compliance plan became a desirable way of reducing expensive civil and administrative penalties for the violation of environmental statutes.[6] However, when the 1990's ushered in increased

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sance, trespass, dangerous condition of public property, negligence, liability for ultrahazardous activity, and public trust doctrines as well as fraud, waste, breach of implied warranty, and restitution. Additionally, contractual and property relationships may also provide a foundation for environmental suits.") (citations omitted).

However, it has also been noted that despite this enormous tort liability for environmental damage, the tort system is an inadequate way to deter environmental wrongdoing. *See* Steven L. Humphreys, Comment, *An Enemy of the People: Prosecuting the Corporate Polluter as a Common Law Criminal*, 39 AM. U. L. REV. 311, 323 (1990) (noting that "[t]ort system remedies do not sufficiently deter environmental crime[.]"). *See generally* William R. Ginsberg & Lois Weiss, *Common Law Liability for Toxic Torts: A Phantom Remedy*, 9 HOFSTRA L. REV. 859 (1981) (describing inadequacies in tort recovery for environmental harm).

6. As modern environmental statutes were enacted during the 1970s and 1980s, a range of sanctions was established as the consequence for non-compliance. Many of these sanctions were administrative or civil, giving the regulatory agencies the authority to pursue administrative remedies, injunctions, and substantial civil fines against those who violated the statutes in question. President Nixon created the EPA as an independent agency of the executive branch on Dec. 2, 1970, and thus consolidated much of the authority for the advancement of environmental initiatives. *See* 5 U.S.C. app. § 1-7 (1970) (establishing EPA pursuant to Reorganization Plan No. 3 of 1970). That most of the major environmental statues contained citizens' suit provisions magnified the impact of these civil remedies. *See* Toxic Substance Control Act, 15 U.S.C. § 2619 (1994); Endangered Species Act, 16 U.S.C. § 1540 (1994); Clean Water Act, 33 U.S.C. § 1311 (1994); Clean Air Act, 42 U.S.C. § 7604 (1994); Comprehensive Environmental Response, Compensation, & Liability Act, 42 U.S.C. § 9659 (1994). These provisions allow for more widespread enforcement than might otherwise be possible without a scheme of "private attorneys general." *See* ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE & POLICY 1078 (2d ed. 1996) ("EPA commissioned a comprehensive study of citizen suits in 1984. The study found that citizen suits generally had been operating in a manner consistent with the goals of the environmental statutes by both stimulating and supplementing government enforcement."); Jeffrey G. Miller, *Private Enforcement of Federal Pollution Control Laws: The Citizen Suit Provisions*, C127 ALI-ABA 997 (June 26, 1995) (generally describing use of citizen suits to enforce environmental laws). *But see Citizen Suits Against Companies Unlikely if They Correct Violations, Official Says*, 25 Env't Rep. (BNA) 2530 (Apr. 28, 1995) (describing differences of opinion regarding eagerness of citizens to pursue violators with audit

criminal prosecution of environmental violators,[7] the stakes were raised significantly[8] and the motives for creating environmental compliance plans changed.[9]

The 1990's have seen an unprecedented increase in the use of

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or compliance programs in place).

7. The Pollution Prosecution Act of 1990 provides concrete evidence of this new focus. The Act specifically granted the EPA increased resources with which to conduct a more aggressive environmental prosecution program as well as enhanced investigatory authority. *See* 42 U.S.C. § 4321 (1990).

8. Of course, environmental offenses first became criminalized nearly a century ago. *See* Rivers and Harbors Appropriation Act of 1899, 30 Stat. 1148; Refuse Act of 1899, 30 Stat. 1152 (both providing for criminal penalties). Throughout the 1970s and 1980s, the "modern" federal environmental statutes contained criminal provisions. However,

> the majority of the early laws came to be considered mild or ineffectual deterrents to pollution. Indeed, only 25 criminal environmental violations were prosecuted at the federal level during the 1970s. . . . Although many of the 1970s [sic] environmental laws contained sweeping and significant criminal penalties, the use of these enforcement tools was delayed by the lack of an effective enforcement mechanism . . . . In the late 1970s and early 1980s, the government slowly- or erratically-began to turn to criminal sanctions to deter and punish those who ignored or flouted the law. Consequently, the number of federal criminal environmental prosecutions substantially increased in the 1980s.

DONALD A. CARR ET AL., ENVIRONMENTAL CRIMINAL LIABILITY: AVOIDING AND DEFENDING ENFORCEMENT ACTIONS 5 (1995) (footnotes omitted). Thus, the 1990s have seen the increase in environmental prosecutions. *See generally* James M. Strock, *EPA's Environmental Enforcement in the 1990s*, 20 Envtl. L. Rep. (Envtl. L. Inst.) 10, 327 (1990).

9. *See* Frederick R. Anderson, *Environmental Corporate Compliance Programs: When Performed Properly, Compliance is Automatic*, CORPORATE BOARD, May 1993, at 6 ("The criminalization of environmental law has increased to the point that environmental infractions that earlier would have been treated as civil regulatory matters now have blossomed into potential criminal offenses."); Edward L. Quevado, *Effective Environmental Program Could Keep Executives Out of Jail, But Lack of One Could Be Costly, Humiliating*, 10 BUS. J. 24 (Nov. 30, 1992) ("Historically, the risks of environmental noncompliance have been small and could be quantified as a cost of doing business. Some companies' budgets have included line items to cover environmental violations in much the same way they have allowed for litigation costs."). Toxic torts and mass mishaps could result in significant liability beyond or in addition to the already substantial penalties outlined in the statutory framework.

criminal sanctions to enforce environmental laws.[10] Members of

10. Much has been written regarding the growth in criminal prosecution of environmental offenses. For an excellent overview of the role of criminal law in environmental enforcement, see Carr, *supra* note 8, at 12-13 ("[T]he number of prosecutions rose exponentially through the 1980s. The number of indictments obtained in 1990 was triple the 1983 level . . . . Environmental crime may now comprise almost 10 to 15 percent of all corporate criminal offenses prosecuted at the federal level."); *see also* EPA, *Enforcement & Compliance Assurance Accomplishments Report FY 1994* 2-2 (1994) ("[T]he [EPA] brought a record 2,246 enforcement actions with sanctions, including 220 criminal cases, 1,596 administrative penalty actions, 403 new civil referrals to the Department of Justice . . . 27 additional civil referrals . . . [and] assessed penalties for FY 94 totaling approximately $151 million combined for civil penalties and criminal fines . . . ."); James E. Calve, *Environmental Crimes: Upping the Ante for Noncompliance with Environmental Laws*, 133 MIL. L. REV. 279 (1991) (discussing increased use of environmental criminal sanctions); Richard J. Lazarus, *Assimilating Environmental Protection into Legal Rules and the Problem with Environmental Crime*, 27 LOY. L.A. L. REV. 867, 870 (1994) ("[B]etween fiscal years 1983 and 1993, the Department 'has recorded environmental criminal indictments against 911 corporations and individuals, and 686 guilty pleas and convictions have been entered. A total of $212,408,903 in criminal penalties has been assessed. More than 388 years of imprisonment have been imposed . . . .'") (quoting memorandum from Peggy Hutchins, Paralegal, U.S. Department of Justice, to Neil S. Cartusciello, Chief, Environmental Crimes Section, U.S. Department of Justice (May 27, 1992)); Janet S. Kole & Hope C. Lefeber, *The New Environmental Hazard: Prison*, 41 RISK MANAGEMENT, June 1994, at 37 ("Pursuant to the Pollution Prosecution Act of 1990, Congress has authorized the EPA to hire as many as 200 criminal investigators by 1995, and federal criminal prosecutions, while not overwhelming in number, have increased more than 300 percent in the last 10 years, with criminal penalties totalling over $260 million in fines and 446 years in prison for environmental criminals."). *But see* David Burnham, *Careerists at DOJ Put Politics First*, NAT'L L.J., Mar. 4, 1996 at A19 ("In fiscal year 1994 . . . the Justice Department brought criminal charges against 51,253 individuals for alleged violations of federal law. . . . One of the smallest categories concerned alleged violations of the dozens of criminal statutes concerning the environment, occupational health and consumer and product safety. Here the prosecutors brought only 250 indictments-a shade less than half of 1 percent."). *See generally* Mark A. Cohen, *Environmental Crime and Punishment: Legal/Economic Theory and Empirical Evidence on Enforcement of Federal Environmental Statutes*, 82 J. CRIM. L. & CRIMINOLOGY 1054 (1992) (providing statistical analysis of environmental criminal enforcement practices and theory); Lundin, *supra* note 4 (discussing types of sentences imposed in environmental crimes cases); James M. Strock, *Environmental Criminal Enforcement Priorities for the 1990s*, 59 GEO. WASH. L. REV. 916, 916-22 (1991) (describing new EPA focus on environmental criminal

the regulated community no longer seek to create compliance plans merely because they will assist them in becoming responsible corporate citizens,[11] reduce their tort liability for negligent

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investigation); Carol E. Dinkins, *Criminal Prosecution of Environmental Violations*, C640 ALI-ABA 23 (Apr. 18, 1991) (describing increase in criminal enforcement that began in early 1990s); Susan Gembrowski, *Environmental Laws Puzzling*, SAN DIEGO DAILY TRANSCRIPT, Nov. 30, 1993, at A17; Karen Heller, *Clamping Down on Environmental Crime*, CHEMICAL WEEK, Apr. 1, 1992, at 22 (describing DOJ's new focus on criminal prosecution); Samuel R. Miller & Michael Shaffer, *Sentencing for Environmental Crimes Under Federal Law*, C800 ALI-ABA 213, 215-16 (1992) (describing environmental criminal prosecution statistics for the early 1990s); Irma S. Russell, *The Role of Public Opinion, Public Interest Groups, and Political Parties in Creating and Implementing Environmental Policy*, 23 Envtl. L. Rep. (Envtl. L. Inst.) 10,665 (Nov. 1993) (describing increasing public concern with environmental protection and corresponding increase in environmental regulation); Kris & Vannelli, *supra* note 4, at 229-30 (describing history of environmental criminal enforcement); *Criminal Enforcement: 1990 Record Year for Criminal Enforcement of Environmental Violation, Justice Announces*, 21 Env't Rep. (BNA) 1397 (Nov. 23, 1990) ("U.S. Attorney General Janet Reno has placed the prosecution of environmental crimes at the top of her national agenda."). *See generally* Dick Thornburgh, *Criminal Enforcement of Environmental Laws a National Priority*, 59 GEO. WASH. L. REV. 775 (1991) (discussing new focus on environmental prosecutions). That the EPA has been developing relationships with other federal agencies, most notably the Federal Bureau of Investigation, the United States Customs Service, and the Occupational Safety & Health Administration, to assist in enforcement is further evidence of the seriousness with which the criminal enforcement of environmental wrongs is being pursued. *See* Strock, *supra*, at 933-34 (discussing inter agency cooperative efforts).

11. However, the desire to be a good corporate citizen, or to be perceived as such, still influences corporations planning their environmental compliance efforts. For example, corporations have considered the "CERES Principles," adopted in the wake of the Exxon-Valdez oil spill. The CERES Principles establish a higher standard than that required by the government, but adoption of the principles has occurred mostly because of shareholder activism. *See* James R. Arnold, *Disclosure of Environmental Liabilities to Government Agencies and Third Parties in 1995*, C945 ALI-ABA 411, 468-69 (Oct. 6, 1994) (discussing CERES Principles). Overall, "[t]hese special efforts [at corporate compliance] are motivated by company concerns about keeping and gaining customers, winning public trust and the confidence of lenders and investors, securing affordable insurance, and addressing other matters essential to corporate growth and competitive advantage." Michael Baram, *The New Environment for Protecting Corporate Information*, 25 Env't. Rep. (BNA) 545 (July 22, 1994). *See also* discussion in *infra* note

acts, or decrease their likelihood of incurring substantial administrative and civil fines.[12]

While these goals remain important, regulated actors now have another incentive for compliance efforts: the desire to avoid serious criminal liability.[13] As environmental statutes are growing more complex,[14] and as the mens rea required for conviction is

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121 (describing potential economic benefits of sound compliance); Walsh & Pyrich, *supra* note 2, at 680-81 ("Corporate compliance policies can also foster public goodwill and a positive public image of the corporation. A good corporate reputation builds consumer confidence and can counteract any negative publicity that may result from the unfortunate acts of isolated employees.").

12. Throughout this Article, the clear assumption is that criminal sanctions are significantly more serious than civil or administrative sanctions. This reflects the reality that criminal punishment is unique and that "although civil enforcement actions by the government can have serious consequences, including monetary penalties; the consequences of a criminal prosecution or investigation are even more significant, including substantial monetary penalties, the possibility of hard jail time, and a recognized 'stigma of criminality.'" Kevin A. Gaynor, et al., *Environmental Criminal Prosecutions: Simple Fixes for a Flawed System*, 3 VILL. ENVTL. L.J. 1, 2 (1992). However, this Article does not seek to downplay the importance and seriousness of civil punishment. Indeed, commentators have argued quite forcefully that the administrative and civil sanctions currently available have the potential to be quite powerful:

> [L]ess serious violations could be addressed civilly and administratively, despite the popular contention that absent a criminal sanction, companies will simply internalize or pass on to consumers the cost of civil penalties. Such non-criminal remedies may already have the greater deterrent effect given the often multimillion dollar penalties, injunctive relief, and internal compliance auditing that EPA regularly seeks . . . . With the market place [sic] now so competitive, with corporations carefully reviewing the performance of each business unit and plant, and with public perception being so important to a company's success, any significant penalty frequently can have devastating impacts . . . . Suffice it to say that EPA has myriad tools to make civil violations very expensive . . . .

Kevin A. Gaynor & Thomas R. Bartman, *Specific Intent Standard for Environmental Crimes: An Idea Whose Time Has Come*, 44 Env't Rep. (BNA) 2206 (Mar. 10, 1995).

13. Naturally, not all commentators acknowledge the efficacy of criminal law as a vehicle to regulate corporate activity. *See generally* V.S. Khanna, *Corporate Criminal Liability: What Purpose Does It Serve?*, 109 HARV. L. REV. 1477 (1996) (questioning rationale of corporate criminal liability scheme).

14. Indeed, many say that even "good" companies cannot possibly be in com-

pliance with *all* environmental statutes and regulations. *See* JOHN F. COONEY ET AL., ENVIRONMENTAL CRIMES DESKBOOK 9 (1995) ("Regulatory requirements range from the simple to the enormously complex. Few entities can be expected to attain 100 percent compliance, especially at large facilities."); Percival, et al., *supra* note 6, at 1039 ("A survey of corporate counsel found that two-thirds admitted that their companies recently had violated the environmental laws . . . . Most . . . surveyed asserted that it was not possible to achieve full compliance with the environmental laws because of their cost, complexity, or . . . uncertainty [of interpretation] . . . ."); Adler & Lord, *supra* note 4, at 809 (citing survey indicating that "of 500 leading industrial corporations . . . nearly two thirds were involved in significant illegalities."); Joseph G. Block & Gregory S. Braker, *Self Audits: The Key to a Clean Environment*, AM. LAW., Apr. 17, 1995, at 6 ("While rigorous enforcement of environmental laws has grown exponentially, the laws and regulations have become even more complicated — so complicated that total compliance is a virtual impossibility. . . . About 70 percent of counsel surveyed also said that they did not believe that total compliance with environmental laws was even achievable."); John C. Coffee, *Environmental Crime & Punishment*, N.Y. L.J., Feb. 3, 1994, at 5 ("Sooner or later corporations in some industries are likely to experience an environmental criminal prosecution."); Margaret J. Kim et al., *Can We Trust the Government with Environmental Audits?*, BARRISTER, Summer 1995, at 35, 37 ("[A] June 1994 survey of small and medium-sized companies conducted by Colorado State University [found that] . . . more than 90% of the respondents disagreed or strongly disagreed with the proposition that environmental regulations are easy to understand [and] . . . almost 80% of the respondents disagreed or strongly disagreed with the proposition that the government was a good place to go for help."); Michael S. McMahon, *The Growing Role of Accountants in Environmental Compliance*, 54 OHIO CPAJ 21 (Apr. 1995) ("No business can be in compliance with today's environmental laws 100% of the time."); Alan Charles Raul, *EPA Needs Reshaping But Not Wiping Out*, NAT'L L.J., Mar. 11, 1996 at A19, A20 ("There are simply too many standards in too many statutory regimes that have not been reconciled with one another."); Clinton J. Elliott, *Kentucky's Environmental Self-Audit Privilege: State Protection or Increased Federal Scrutiny*, 23 N. KY. L. REV. 1, 7 (1995) ("[T]he morass of the environmental regulatory world is virtually overwhelming. Every year since 1972, the federal government has promulgated environmental statutes or regulations at an average of 600 pages per year.") (footnotes omitted); Lazarus, *supra* note 10, at 882-83 ("Full compliance with all applicable environmental laws is consequently the exception rather than the norm . . . In a recent survey, two-thirds of all corporate counsel reported that their companies have recently been in violation of applicable environmental laws."); James W. Moorman & Laurence S. Kirsch, *Environmental Compliance Assessments: Why Do Them, How to Do Them, And How Not to Do Them*, 26 WAKE FOREST L. REV. 97, 97-98 (1991) ("Businesses, no matter how well-intentioned, have been overwhelmed by this expanding web of intricate and often enigmatic requirements. To exacerbate an already confusing

increasingly relaxed,[15] business must consider compliance plans

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situation, environmental requirements are administered by a mix of various federal, state, and local agencies."); Kirk F. Marty, Note, *Moving Beyond the Body Count And Toward Compliance: Legislative Options for Encouraging Environmental Self-Analysis*, 20 VT. L. REV. 495, 498-99 (1995) ("Environmental laws and regulations are numerous and complex. Most industry observers contend that, particularly at large facilities, a perfect record of compliance is practically unachievable.") (citations omitted). For a further discussion of the complexity of environmental laws, see Gaynor, et al., *supra* note 12, at 5 ("EPA's regulations alone without explanatory preambles and agency guidance, total over 10,000 pages in the Code of Federal Regulations and are constantly changing."); Lazarus, *supra* note 10, at 867 ("In relatively few years this country has adopted a vast array of environmental protection programs set forth in hundreds of pages of statutes and thousands of pages of regulations. . . . Environmental lawyers must cope not only with the regulatory morass presented by the environmental protection laws themselves, but must frequently become enmeshed in issues of bankruptcy, constitutional, corporate, insurance, international trade, and securities law."). Indeed,

> [t]he amount of environmental law and regulation in the United States alone is staggering. Not counting state statutes and common law, there are over one hundred separate environmental statutes at the federal level. The texts of seven major federal environmental statutes run to several thousand pages. . . .
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> Environmental juridification significantly increases the burden of compliance for businesses. By the year 2000, EPA estimates that expenditures made in the United States under environmental programs to control pollution will amount to approximately two percent of GNP. Moreover, a recent survey of corporate general counsels found that less than a third of them believed fully complying with applicable environmental laws was even possible.

Eric W. Orts, *Reflexive Environmental Law*, 89 NW. U. L. REV. 1227, 1240 (1995) (footnotes omitted).

15. Several have noted the decline of the mens rea requirement. *See, e.g.*, Anderson, *supra* note 9, at 6 ("The traditional requirement of the criminal law that the defendant possess the specific intent to act criminally has been weakened and, at least in some environmental cases, replaced by negligence and strict liability standards."); Gaynor et al., *supra* note 12, at 11-29 (describing problems with declining mens rea for environmental offenses); Lazarus, *supra* note 10, at 881 ("Congress, for the most part, has not been especially discriminating in defining the mens rea for environmental crimes. Instead, consistent with the rationale that criminal sanctions serve regulatory deterrent purposes, Congress sought to maximize their deterrent effect by de-emphasizing mens rea."). Although a discussion of the declining mens rea requirement is beyond the scope of this Article, the reader can find excellent discussions of this issue elsewhere. *See* R.

not only as a way to prevent the occurrence of environmental harm, but also as a method of decreasing the criminal consequences of future occurrences.[16] Regarding the latter goal, creating an environmental compliance plan serves two purposes:[17]

Christopher Locke, *Environmental Crimes: The Absence of "Intent" and the Complexities of Compliance*, 16 COLUM. J. ENVTL. L. 311 (1991); Ruth Ann Weidel et al., *The Erosion of Mens Rea in Environmental Criminal Prosecutions*, 21 SETON HALL L. REV. 1100 (1991).

16. Of course, it is not only in the environmental field that companies are discovering that there is a benefit in creating a sound compliance program. Such initiatives have been employed in other contexts as well. *See, e.g.*, Walsh & Pyrich, *supra* note 2, at 660 ("Corporate compliance programs and codes of conduct have become commonplace in the modern business world."); Anderson, *supra* note 9, at 6 ("Most major corporations have had compliance programs and corporate codes of conduct in effect for years. In addition to the environmental field, areas covered include antitrust, relations with foreign governments, insider trading, labor relations, conflicts of interest, misuse of confidential information, gifts to corporate officers and political contributions."); Dominic Bencivenga, *Corporate Compliance: '91 Guidelines Spur Growth in Ethics Programs*, N.Y. L.J., Mar. 23, 1995, at 5 ("A growing number of corporations, in a move considered to be both legally prudent and good for business, are establishing compliance or ethics programs, often under the supervision of their in-house legal departments.").

17. Two commentators have suggested a different perspective on the benefits of a corporate compliance program. *See* Dan K. Webb & Steven F. Molo, *Some Practical Considerations in Developing Effective Compliance Programs: A Framework for Meeting the Requirements of the Sentencing Guidelines*, 71 WASH. U. L.Q. 375 (1993) (discussing compliance generally). Webb and Molo suggest that, in addition to the benefits at the prosecutorial decision making and sentencing stages, there are two other benefits to a compliance program: "First, an effective compliance program disseminates a positive, law-abiding corporate ethos throughout an organization, and thereby creates an atmosphere that will discourage wrongdoing. Second, an effective compliance program detects misconduct as it occurs so the organization can address problem situations quickly and minimize their adverse consequences." *Id.* at 376. This optimistic view suggests that compliance plans *are* created to have a deterrent, remedial impact as well as a mitigating one. *See also* Hunt & Wilkins, *supra* note 3, at 371-72 (adopting expansive view of benefits from implementing audit plans).

A more far-reaching perspective concerning the benefits of environmental compliance plans argues that

> [e]nvironmental compliance programs can: improve internal management practices; [i]mprove production processes and efficiency; [t]rain employees in environmental compliance and more efficient production

> 1. It leads to decisions by the Environmental Protection Agency ("EPA") and the Department of Justice ("DOJ") to charge a defendant with a civil offense rather than a criminal offense.
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> 2. Under the Proposed Sentencing Guidelines for Organizations Convicted of an Environmental Offense, the existence of a compliance plan can lead to a reduced sentence in the event of a conviction.

Unfortunately, however, while much attention has been paid to the beneficial *legal* consequences of compliance plans for those who implement them, the more crucial question has received far less public and academic attention: What is the actual impact of compliance plans on the avoidance of harmful *environmental* consequences? While it would be naive at best, and foolhardy at worst, to discount the legitimate legal benefits for creating a compliance plan,[18] these rewards should not be the exclusive reason for doing so.[19] In addition, they should not be the primary focus

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> processes; [i]mprove risk management practices; [i]ncrease waste minimization; [p]rovide data regarding cost of regulatory compliance useful for promoting regulatory reform at the local, state, and federal level; [i]mprove company public relations and market perceptions; and [m]itigate civil or criminal penalties for non-compliance.

Kenneth D. Woodrow, *The Proposed Federal Environmental Sentencing Guidelines: A Model for Corporate Environmental Compliance Programs*, 7 Env't Rep. (BNA) 325 (June 17, 1994).

18. According to the EPA:

> more than 90% of the corporate respondents to a 1995 Price-Waterhouse survey who conduct audits said that one of the reasons they did so was to find and correct violations before they were found by government inspectors. . . . More than half of the respondents . . . said that they would expand environmental auditing in exchange for reduced penalties for violations discovered and corrected.

EPA, Incentives for Self-Policing, 60 Fed. Reg. 66,706, 66,707 (1995) (final policy statement).

19. Indeed, many discussions concerning the reasons for having a compliance plan focus *exclusively* on the legal benefits of doing so rather than on the environmental good to be achieved. *See, e.g.*, Carr, *supra* note 8, at 16 ("[C]ompanies should strive to implement these criteria . . . to shield themselves, as best they can, from prosecution for environmental violations."); Kirsch & Veirs, *supra* note 3, at B5 ("[A]ll such [environmental] reviews have one common purpose: the identification and correction of noncompliance without regulatory involvement.").

environmental compliance is necessary and desirable, the policies created to encourage such compliance should be carefully evaluated to ensure that they include adequate incentives not merely to comply with the *law*, but also to benefit the *environment.*

This Article examines the federal policies currently in place to benefit organizations[20] that adopt compliance plans.[21] Parts I and II will explore those benefits at two stages of an environmental criminal action: case selection[22] and sentencing.[23] In doing so, this Article will outline the requirements for an acceptable compliance plan at these two stages.[24] Parts III and IV will then

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20. This Article focuses on organizational offenders rather than individual offenders because the compliance policies are created for organizations and organizations are also most likely to benefit from them.

21. This Article deals specifically with the formal federal policies. However, tort law, common law duties of care for officers and directors, and state statutes provide other incentives for corporate compliance plans. *See* David T. Buente, Jr. et al., *Developing & Implementing an Environmental Corporate Compliance Program*, C868 ALI-ABA 85, 88-93 (Oct. 7, 1993) (fully discussing other sources of environmental compliance guidance).

22. This will be explored from the point of view of both the DOJ and the EPA. While this Article focuses on federal enforcement, one should not underestimate the role of local and state prosecutors in pursuing environmental violators with criminal sanctions. *See* Herbert G. Johnson, *State & Local Environmental Criminal Enforcement*, C496 ALI-ABA 29, 31 (1990) ("In recent years, state Attorneys General have become increasingly active in pursuing environmental criminal cases."). Although a discussion of state policies is beyond the scope of this Article,

> [s]tate prosecutors across the country have been much more aggressive; many more arrests and indictments have resulted from local district attorneys and attorneys general than from the federal government . . . . [S]o far, the federal government has been concentrating on cleanups rather than prosecution . . . . [L]ocal prosecutors have fewer hurdles to jump and can act more quickly. And penalties under state environmental laws are often just as tough as under the federal laws.

Kole & Lefeber, *supra* note 10. *See generally Federal Environmental Enforcement Debated*, HAZ. WASTE NEWS, Jan. 29, 1996 ("In 1994, states accounted for 83 percent of enforcement actions . . . "). *See also* Michael M. Stahl, *Enforcement in Transition*, ENVTL. F., Nov./Dec. 1995 at 18, 19 ("At the state level, environmental agencies issued 11,334 enforcement actions in [1994].").

23. This will be explored from the perspective of the Advisory Working Group of the United States Sentencing Commission.

24. For additional benefits of environmental compliance plans, see EPA Poli-

postulate that while these policies are the beginning of a good effort to promote compliance plans, they must be refocussed. To gain the most environmental benefit, the policies creating incentives for environmental compliance must center on the goal of *preventing* environmental harm from occurring rather than focussing solely on encouraging legal compliance. American environmental policy has been moving from a command-and-control enforcement philosophy toward one that focusses more heavily on encouraging legal compliance.[25] This is a wise move, but it must

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cy Regarding the Role of Corporate Attitude, Policies, Practices, & Procedures, in Determining Whether to Remove a Facility from the EPA List of Violating Facilities Following a Criminal Conviction, 56 Fed. Reg. 64,785 (1991). This policy describes the compliance plan that a company must implement to get one of its facilities off the EPA's List of Violating Facilities. The Organizational Sentencing Guidelines of 1991 state:

> 1. The organization must have written policies defining the standards and procedures to be followed by its agents or employees.
> 2. The organization must have specific high-level persons, not reporting to production managers, who have authority to ensure compliance with those standards and procedures.
> 3. The organization must have effectively communicated its standards and procedures to agents and employees.
> 4. The organization must establish or have established an effective program for enforcing its standards.
> 5. The standards referred to in paragraph 1, above, must have been consistently enforced through appropriate disciplinary mechanisms.
> 6. After an offense or a violation has been detected, the organization must immediately take appropriate steps to correct the condition giving rise to the listing.

Id. at 64,787. This list bears many similarities to EPA's other compliance policies, and to the proposed U.S. Sentencing Guidelines for organizational defendants.

This EPA policy on delisting, and the compliance plan it requires are discussed more fully in JED S. RAKOFF, CORPORATE SENTENCING GUIDELINES: COMPLIANCE & MITIGATION § 8.02[4] (1993).

25. The recent reorganization of the EPA's Enforcement Division (re-named the Office of Enforcement & Compliance Assurance) reflects this trend. This change is not one of mere semantics. Rather, it reflects the view that enforcement and compliance must both be part of an effective environmental program, and

> [w]hen the Agency reorganized its enforcement and compliance program and created the Office of Enforcement and Compliance Assurance, it realized that the changes would affect all levels of its national

continue to shift the emphasis from mere legal compliance to real pollution prevention and outcome-oriented environmental improvement.[26] The Article will conclude by suggesting that this goal can be achieved only if the concept of a "compliance plan" is broadened to emphasize and reward initiatives with a direct positive impact on the environment.

I. EFFECTS OF A COMPLIANCE PLAN ON CASE SELECTION

The existence of an effective compliance plan may result in significant legal benefits in any environmental criminal case.[27] Primarily, a good compliance plan will be a factor in a decision to pursue a violation as a civil or administrative matter rather than as a criminal one.[28] This case selection takes place in two

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> enforcement program, including headquarters, the Regions, and the States. EPA knew that the national program itself would need to undergo "reinvention." An integral part of reinventing the national program was recognizing that EPA's traditional enforcement tools — monitoring, administrative actions, criminal sanctions, and monetary penalties — could not, in isolation, lead to sustained compliance in the regulated community. After detailed analysis, Agency officials determined that EPA needed to combine compliance assistance and promotion programs with the traditional aspects of compliance monitoring and enforcement.

EPA, ENFORCEMENT AND COMPLIANCE ASSURANCE ACCOMPLISHMENTS REPORT FY 1994 2-1 (May 1995).

26. In a broader context, this debate over what the goal of compliance plans should be may reflect a more general ambivalence about the proper goal of environmental law in the United States. The primary goal of the regulatory framework may be to punish wrongdoing; alternatively, it may be to prevent wrongdoing. Obviously the true goal, of necessity, involves both of these motives. However, the interplay between them is, at times, an uneasy one. As one commentator has noted, "[t]his emphasis on the difference between enforcement and compliance plans seems to be the major point of contention between industry and EPA. EPA wants to be able to enforce federal environmental laws with discretion. . . . Industry wants the focus to be on compliance with environmental laws rather than enforcement of them through the assessment of penalties." Virginia M. Creighton, Comment, *Colorado's Environmental Audit Privilege Statute: Striking the Appropriate Balance?*, 67 U. COLO. L. REV. 443, 448 (1996).

27. Because this Symposium Issue concerns environmental criminal issues, this Article will focus on the benefits of a compliance plan in the event of a criminal prosecution of an environmental case. However, this is not meant to suggest that there are no civil benefits as well.

28. For a comprehensive early analysis of the complexities of the case selec-

settings — EPA decisions to *recommend* a case for prosecution[29] and DOJ decisions to *pursue* criminal prosecution rather than civil or administrative action. Because significant discretion exists in case selection,[30] the regulated community clearly has a strong interest in attempting to ensure that this discretion is channeled away from criminal prosecution.[31] Compliance plans have become a popular vehicle for achieving this goal since both the EPA and the DOJ view the presence of a compliance plan favorably when deciding whether to prosecute an environmental violation.[32]

A. *The Perspective of the Environmental Protection Agency*

The EPA set out its most recent policy regarding corporate compliance efforts in December 1995.[33] In its final policy state-

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tion process, see F. Henry Habicht II, *The Federal Perspective on Environmental Criminal Enforcement: How to Remain on the Civil Side*, 17 Envtl. L. Rep. (Envtl. L. Inst.) 10,478 (1987).

29. Closely related to this is, of course, the EPA's earlier decision to investigate a case with an eye toward later recommending prosecution.

30. In many respects, this expansive discretion is a serious problem with the current environmental criminal enforcement mechanism. *See* Cooney et al., *supra* note 14, at 9 ("[T]he absence of more sharply defined principles has contributed significantly to the political problems the environmental crimes program has experienced in recent years. . . . In many instances, there has been little difference between the cases that Justice has prosecuted criminally and those that have proceeded civilly — other than the decisionmaker's intuition."); Lazarus, *supra* note 10, at 884 ("[B]y criminalizing far more conduct than it would expect to be the subject of criminal enforcement, Congress has, in effect, delegated all of the line-drawing issues to the executive branch without providing any guidance on how that discretion should be exercised."). In addition, at the risk of stating the obvious, the way in which the EPA and DOJ apply these guidelines is a discretionary matter. Hence, decisions whether to prosecute are not easily subject to court review.

31. See discussion in *supra* note 10 (chronicling increased criminal enforcement activities).

32. Throughout this Article, the focus will be on the *federal* compliance policies. However, the actions of the states in case selection often mirror the actions of the federal government. *See* GREGOR I. MCGREGOR, ENVIRONMENTAL LAW AND ENFORCEMENT 120 (1994) ("Nearly 30 states have formal criminal environmental-crime units at the state level.").

33. Incentives for Self-Policing, *supra* note 18 (final policy statement). The

ment on "Incentives for Self-Policing," the EPA stated that it will "generally not recommend criminal prosecution"[34] against those who find violations of environmental laws "through an environmental audit"[35] or through "an objective, documented, systematic procedure or practice reflecting the regulated entity's due diligence in preventing, detecting, and correcting violations."[36] Although the policy provides no absolute guarantees,[37] it indicates

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policy became effective on January 22, 1996. The EPA had announced an interim policy on June 30, 1995, and the final policy is the product of comments to that interim policy. *See* Marty, *supra* note 14, at 515-21. *See also* Block & Braker, *supra* note 14, at 6 (commenting on interim policy); Paul J. Curran & Gregory J. Wallance, *The New EPA Interim Policy, Which is Meant to Encourage Companies to Report Violations, May Have the Opposite Effect*, NAT'L L.J., July 31, 1995, at B4. Prior to the 1995 policy, the EPA had an audit policy in effect that it issued in 1986. *See* Environmental Auditing Policy Statement, 51 Fed. Reg. 25,004 (July 9, 1986). However, the 1986 policy was implemented prior to the recent surge in criminal prosecutions and therefore is not a particularly useful framework for analysis. The 1986 policy is discussed more fully in Baram, *supra* note 11, at 545.

In addition to the audit policy, The Director of the EPA's Office of Criminal Enforcement outlined the policy to be used in the EPA's exercise of its investigative discretion, stating in a memorandum that:

> EPA policy strongly encourages self-monitoring, self-disclosure, and self-correction. When self-auditing has been conducted (followed by prompt remediation of the noncompliance and any resulting harm) and full, complete disclosure has occurred, the company's constructive activities should be considered as mitigating factors in EPA's exercise of investigative discretion.

Memorandum from Earl E. Devaney to All EPA Employees Working in or in Support of the Criminal Enforcement Program at 6 (Jan. 12, 1994) (footnotes omitted). However, the memorandum also indicated that "[c]orporate culpability may also be indicated when a company performs an environmental compliance or management audit, and then knowingly fails to promptly remedy the noncompliance and correct any harm done." *Id.* (footnote omitted). Mr. Devaney's memorandum is discussed more fully in Woodrow, *supra* note 17, at 325.

34. Incentives for Self-Policing, *supra* note 18, at 66,706. The EPA policy also provides two other powerful incentives for aggressive compliance efforts that are beyond the scope of this Article: a 100% or 75% reduction in the gravity-based fines assessed for a *civil* violation, and a policy of refraining from routine requests for copies of audit reports. *Id.* at 66,711.

35. *Id.*

36. *Id.*

37. *See id.* at 66,710. The EPA specifically rejected granting a statutory privi-

that regulated entities will generally not have to fear criminal prosecution[38] if their audit and compliance plans meet nine specified criteria. As stated in the policy, these criteria are:

1. Finding the violation through: (a) an environmental audit; or (b) an objective, documented, systematic procedure or practice reflecting the regulated entity's due diligence in preventing, detecting, and correcting violations;[39]
2. Voluntary Discovery;[40]
3. Prompt Disclosure;[41]
4. Discovery and Disclosure Independent of Government or Third Party Plaintiff;[42]
5. Correction and Remediation;[43]
6. Prevention of Recurrence;[44]
7. No Repeat Violations;[45]
8. Other Violations Excluded;[46]

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lege against the use of an audit/compliance report for evidence. It feared the secrecy that would accompany it, the lack of evidence that a privilege was needed, the possibility that the term "audit" would be interpreted in an inappropriately broad way, and the likelihood the privilege would foster litigation. *Id.*

38. *Id.*

39. *Id.* at 66,711.

40. *Id.* However, "voluntary" disclosures do not include those that are "identified . . . through a legally mandated monitoring or sampling requirement prescribed by statute, regulation, permit, judicial or administrative order, or consent agreement." *Id.*

41. *Id.* This requires written notice to the EPA within ten days from the discovery of the violation. *Id.*

42. *Id.* "[R]egulated entities must have taken the initiative to find violations and promptly report them, rather than reacting to knowledge of a pending enforcement action or third-party complaint." *Id.* at 66,709.

43. *Id.* at 66,711.

44. *Id.* This mandates that the "regulated entity agrees in writing to take steps to prevent a recurrence of the violation, which may include improvements to its environmental auditing or due diligence efforts[.]" *Id.*

45. *Id.* at 66,712. This portion of the rule requires that to receive the benefits provided by the statutes, "the same or closely-related violation must not have occurred previously within the past three years at the same facility, or be part of a pattern of violations . . . over the past five years." *Id.* at 66,709. This rule was an attempt to avoid granting "unlimited amnesty for repeated violations of the same requirement." *Id.*

46. *Id.* Penalty reductions were not available for "violations that resulted in serious actual harm or which may have presented an imminent and substantial

9. Cooperation.[47]

Ironically, the requirement does not mandate that one discover the violation through a process routinely called an "audit."[48] Recognizing that entities may find different types of compliance programs to be beneficial in different ways, "due diligence" is deemed an acceptable alternative to a formal audit.[49] Most likely, many companies will discover their violations through "due diligence" rather than via an audit. Thus, the guidance on "due diligence" is valuable because it clarifies the elements the EPA will require when it evaluates which compliance plans are ade-

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endangerment to public health or the environment . . . [or] violations of the specific terms of any order, consent agreement, or plea agreement." *Id.*

47. *Id.*

48. The distinction between an "audit" and a compliance plan is not unequivocally clear. Generally, however, "a compliance plan" will include a review of all aspects of an entity's compliance efforts, while an audit will focus on the fact-finding, investigatory aspect of that effort. *See* John Calvin Conway, Note, *Self-Evaluative Privilege & Corporate Compliance Audits*, 68 S. CAL. L. REV. 621, 627 (1995) ("A compliance audit is any internal investigation aimed at discovering existing or potential legal problems . . . . Generally, an audit is only a portion of a more comprehensive compliance program . . . "); Kris & Vannelli, *supra* note 4, at 240-41 ("An environmental audit will usually include an examination of all records and permits relating to air emissions, hazardous waste storage, handling and transportation, water discharges, and workplace safety conditions. Air, water and soil testing may also be conducted . . . . The completed audit provides . . . a 'snapshot' of existing environmental problems."). In addition,

> [a]lthough audits can take many forms, the two most common types are compliance audits and management audits. *Compliance* audits entail an investigation by internal or outside environmental specialists of a facility's compliance with applicable environmental laws and regulations and the identification of nonregulatory environmental liability risks. *Management* audits include a review of the managerial risk-control systems and procedures used by the corporation or facility to detect and remedy possible violations and potentially problematic environmental conditions.

Hunt & Wilkins, *supra* note 3, at 366 (emphasis added) (footnotes omitted).

Additional discussion of compliance audits may be found in ELIZABETH G. GELTMAN, ENVIRONMENTAL LAW AND BUSINESS, 109-28 (1994).

49. This focus on "due diligence" as an acceptable way to comply differs from the EPA's "interim policy" of April 1995, since "[t]he interim policy applie[d] only to violations discovered through . . . efforts that reflect a regulated entity's due diligence." Kirsch & Veirs, *supra* note 3, at B5.

quate to support a decision not to recommend a case for criminal prosecution.[50] To qualify as "due diligence," the compliance plan must include:

> (a) Compliance policies, standards and procedures that identify how employees and agents are to meet the requirements of laws . . .;[51]
>
> (b) Assignment of overall responsibility for overseeing compliance . . . and assignment of specific responsibility for assuring compliance at each facility or operation;[52]
>
> (c) Mechanisms for systematically assuring that compliance policies . . . are being carried out, including . . . a means for employees or agents to report violations of environmental requirements without fear of retaliation;[53]
>
> (d) Efforts to communicate effectively the regulated entity's standards and procedures . . . ;[54]
>
> (e) Appropriate incentives to managers and employees . . . including consistent enforcement through appropriate disciplinary mechanisms;[55] and

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50. A quick overview of these elements of "due diligence" will indicate that they focus primarily on the management structure of a company rather than on environmental performance.

51. Incentives for Self-Policing, *supra* note 18, at 66,710.

52. *Id.*

53. *Id.* at 66,711. Another practical advantage for providing employees with a safe way to report violations is that "[s]eventy percent of environmental criminal prosecutions begin with the whistle-blower. In most cases, the employee would have reported the problem internally, but was rebuffed or did not know how to make the report." Quevado, *supra* note 9, at 24. This problem with whistle-blowers is exacerbated by the fact that Congress has been "adding citizen-award provisions to federal environmental statutes. The concept of offering citizen awards, both as an incentive for individuals to come forward with information concerning violations . . . and as a deterrent to committing violations, is well established by statute and federal law enforcement practice." Strock, *supra* note 10, at 925 (citing citizen award provisions in, e.g., 42 U.S.C. §§ 7413(f), 9609(d) (1994)). *See also* Thomas C. Green & James Connaughton, *Defending Charges of Environmental Crime-The Growth Industry of the '90's*, 474 PRACTICING L. INST. LITIG. & ADMIN. PRAC.: LITIG. 319, 462 (Apr. 1993) ("To further enhance enforcement efforts, so-called 'bounty hunter' provisions are being added to environmental statutes, granting awards of up to $10,000 for information leading to a conviction.").

54. Incentives for Self-Policing, *supra* note 18, at 66,711.

55. *Id.*

> (f) Procedures for the prompt and appropriate correction of any violations, and any necessary modifications to the regulated entity's program to prevent future violations.[56]

At least in theory, those who follow this guidance in developing and implementing their compliance plans help create a presumption against an EPA recommendation for criminal prosecution.[57] When the EPA released this policy, it generated a great deal of attention for its failure — wise or unwise — to adopt a formal privilege for environmental audit information.[58] However,

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56. *Id.*

57. The policy is limited, however, and will not apply "where corporate officials are consciously involved in or willfully blind to violations, or conceal or condone noncompliance[,]" or cause "serious harm or . . . pose imminent and substantial endangerment to human health or the environment . . . ," or where the issue is the culpability of individuals. *Id.* at 66,707.

58. A discussion of the audit privilege is beyond the scope of this paper. However, the reader may find excellent discussions of the audit privilege in this Symposium Issue. *See also* Block & Braker, *supra* note 14, at 6; Heather L. Cook & Robert R. Hearn, *Putting Together the Pieces: A Comprehensive Examination of the Legal & Policy Issues of Environmental Auditing*, 7 TUL. ENVTL. L.J. 545 (1994); Creighton, *supra* note 26, at 443; John Davidson, *Privileges for Environmental Audits: Is Mum Really the Word*, 4 S.C. ENVTL. L. J. 111 (1995); Clinton J. Elliott, *supra* note 14, at 1; David R. Erickson & Sarah D. Mathews, *Environmental Compliance Audits: Analysis of Current Law, Policy and Practical Considerations to Best Protect Their Confidentiality*, 63 UMKC L. REV. 491 (1995); Paula C. Murray, *The Environmental Self-Audit Privilege: Growing Movement in the States Nixed by EPA*, 24 REAL EST. L. J. 169 (1995); Linda Richenderfer & Neil R. Bigioni, *Going Naked Into the Thorns: Consequences of Conducting an Environmental Audit Program*, 3 VILL. ENVTL. L.J. 71 (1992); Conway, *supra* note 48, *passim*; Robert W. Darnell, Note, *Environmental Criminal Enforcement and Corporate Environmental Auditing: Time for a Compromise?*, 31 AM. CRIM. L. REV. 125 (1993); Marty, *supra* note 14, *passim*; Peter A. Gish, *The Self-Critical Analysis Privilege & Environmental Audit Reports*, 25 ENVTL. L. 73 (1995); Craig N. Johnston, *An Essay on Environmental Audit Privileges: The Right Problem, The Wrong Solution*, 25 ENVTL. L. 335 (1995); Kim, *supra* note 14, at 35-38; Jim Moore & Nancy Newkirk, *Not Quite a Giant Step*, ENVTL. F., May/June 1995 at 16. *See generally* Cynthia L. Goldman, *Colorado's New Voluntary Environmental Compliance Law*, 23 COLO. LAW 2549 (1994); Hunt & Wilkins, *supra* note 3; James T. O'Reilly, *Environmental Audit Privileges: The Need for Legislative Recognition*, 19 SETON HALL LEGIS. J. 119 (1994); Michael T. Scanlon, Note, *A State Statutory Privilege for Environmental Audits: Is it A Suit of Armor or Just the Emperor's New Clothes?*, 29 IND. L.

it will no doubt play a major role in the development of corporate compliance plans because it is, to date, the most significant EPA policy on environmental compliance initiatives.[59]

B. *The Perspective of the Department of Justice*

While the EPA makes case referrals and recommends cases for prosecution, the DOJ exercises the discretion concerning whether a particular case should be criminally prosecuted.[60] In 1991, the DOJ issued guidelines as to how it would decide whether to pursue a criminal prosecution where the defendant had a compli-

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REV. 647 (1996). Naturally, the failure to create a full privilege has been the subject of much critical commentary, particularly among the defense bar. *See, e.g.*, Carr, *supra* note 8, at 16 ("[T]he guidelines do not have the force of law and thus offer no binding authority on which a regulated entity can undoubtedly rely."); Orts, *supra* note 14, at 1276-77 ("Although many businesses went forward with extensive environmental auditing programs, others followed the more cautious advice of many commentators . . . who warned that environmental auditing may hand evidence of environmental violations to regulators (including prosecutors) on a silver platter."); Anderson, *supra* note 9, at 6 ("[M]any companies . . . are discovering that even the remote possibility of a prosecution could trigger a host of important and contentious decisions for which the company, despite its compliance program, is totally unprepared."); Block & Braker, *supra* note 14, at 6 ("the regulated communities fear of stiff penalties is legitimate . . . "); Kirsch & Veirs, *supra* note 3, at B5 ("The EPA's and DOJ's policy statements on investigative and prosecutorial discretion offer little concrete protection from the disclosure and use of environmental audits."); Thomas L. Weisenbeck & Ritaelena M. Casavechia, *Guidelines for Prosecution of Environmental Violations: The Tension Between Self-Reporting and Self-Auditing*, 22 Env't Rep. (BNA) 2481, 2482 (Mar. 6, 1992); *Companies Would Perform More Audits if Penalties Were Eliminated Survey Says*, 25 Env't Rep. (BNA) 1606 (Apr. 14, 1995); *New Audit Policy Creates Uncertainty, Obstacles to Audits, Industry Counsel Says*, Daily Rep. for Executives (BNA), Apr. 4, 1995, at A-64. Obviously, there is tension between "encouraging compliance generally and enforcement against specific violations." Conway, *supra* note 48, at 647.

59. *See supra* notes 24 and 33 for a discussion of earlier policies articulated by the EPA.

60. For further discussion of the relationship between the EPA and the DOJ, see GREGOR L. MCGREGOR, ENVIRONMENTAL LAW & ENFORCEMENT 99-106 (1994); Richard J. Lazarus, *Meeting the Demands of Integration in the Evolution of Environmental Law: Reforming Environmental Criminal Law*, 83 GEO. L.J. 2407, 2462-65 (1995) (further discussing relationship between EPA and DOJ).

ance plan.[61] As the DOJ acknowledged, setting a policy in this area requires creating a delicate balance between pursuing effective enforcement and encouraging voluntary compliance.

The DOJ was less clear than the EPA regarding what specific criteria will satisfy the standards for a successful compliance program.[62] Similar to the EPA's policy, however, the presence of a compliance plan is not a binding protection against criminal prosecution.[63] Acknowledging that "[c]ompliance programs may vary," the DOJ policy provides a list of questions that a regulated entity must answer affirmatively before a compliance program becomes a mitigating factor in the DOJ's decision not to pursue a criminal prosecution:

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

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61. *See* DOJ, FACTORS IN DECISIONS ON CRIMINAL PROSECUTIONS FOR ENVIRONMENTAL VIOLATIONS IN THE CONTEXT OF SIGNIFICANT VOLUNTARY COMPLIANCE OR DISCLOSURE EFFORTS BY THE VIOLATOR (July 1, 1991) [hereinafter DOJ].

62. The DOJ's plan is also considerably more vague than the policy in the Proposed Sentencing Guidelines. *See* Whitley & Spechals, *supra* note 3, at C4 ("The [DOJ's] policy does not describe the requirements of a compliance program with the detail of the proposed sentencing guidelines.").

63. *See* Moore & Newkirk, *supra* note 58, at 16 ("[I]n a manner similar to the EPA audit policy, the Justice policy did not provide enough insurance to well-intentioned companies as to how prosecutors would really make decisions. The policy was simply not definitive enough and left too much to discretion."); Whitley & Spechals, *supra* note 3, at C4 ("Significantly, however, the Department of Justice notes that its policy statement is not binding, but is provided only to give corporations a sense of how it exercises its criminal prosecutorial discretion.").

> employee and corporate departmental performance was judged?[64]

A compliance plan that includes many of these features will be a significant factor in a DOJ decision not to prosecute a case criminally.[65]

II. EFFECTS OF A COMPLIANCE PLAN ON SENTENCING

Obviously, because the EPA and DOJ positions are not binding, incidents can arise in which a company does, in fact, have a compliance plan in place[66] but is subject to criminal prosecution.[67] As the EPA and the DOJ imply in their policies, these incidents should be rare.[68] In theory, the impact of a compliance plan on the sentencing question should be relatively insignificant because such sentencing should rarely occur.[69] However, in the

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64. DOJ, *supra* note 61, at 4-5.

65. The DOJ audit/compliance policy is discussed more fully in Hunt & Wilkins, *supra* note 3, at 396-400; *see also* Marty, *supra* note 14, at 521-24.

66. "[P]rosecutors are understandably reluctant to trust the effectiveness of a compliance program once a violation has occurred . . . " Walsh & Pyrich, *supra* note 2, at 666.

67. As two commentators reported,

> [a]t an EPA public meeting in July 1994, representatives of industrial concerns identified numerous instances where severe penalties had been imposed on a company that had audited, corrected the problem, and self-reported the violation. More recently, a Price Waterhouse survey of industry disclosed 25 incidents where confidential audit information had been sought by government agencies or others seeking to use the information against the companies that were audited.

Moore & Newkirk, *supra* note 58, at 16. From the point of view of industry, the prospect of being prosecuted, even with a compliance plan in place, is a frightening one. *See* Block & Braker, *supra* note 14, at 6 (indicating that mitigating provisions in sentencing "serve[] as small consolation to companies whose good faith efforts ought to protect them from any criminal prosecution to begin with.").

68. Ironically, the Proposed Sentencing Guidelines' compliance plan requirements are the most stringent of all three policies. This appears to be inconsistent. It makes little sense for the EPA and the DOJ to promise laxity in case selection for those with a compliance plan in place that is *less* strict than that which is needed to result in a sentencing mitigation. It would seem to be the rare case when a compliance plan is solid enough to meet the standards for mitigation under the Proposed Sentencing Guidelines but is not good enough to prevent the case from being prosecuted ab initio.

69. However, because prosecutorial discretion is relatively unfettered, the

event that the DOJ prosecutes and convicts a defendant with a compliance plan, the Proposed Sentencing Guidelines for Organizations Convicted of Environmental Offenses[70] provide that

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Proposed Sentencing Guidelines become more important. *See* Lazarus, *supra* note 10 at 891 n.58 ("The issues that should have been considered at the front end of the criminal process-that is, whether specific conduct should be subject to criminal sanction in the first instance-have instead been relegated to the sentencing phase.").

70. The United States Sentencing Commission's Advisory Working Group on Environmental Offenses released these Proposed Guidelines on November 16, 1993. Thus far, the Commission has declined to submit this proposal to Congress for its consideration, due in part to some conflict among the members of the drafting group. *See New Draft on Sentencing Corporations for Environmental Crimes Released for Review*, 24 Env't Rep. (BNA) 1331-32 (Nov. 19, 1993) (stating that "[t]he proposal has strong industry support, and approximately 12 of the members voting for it have industry ties, one source said."). *But see* Paul E. Fiorelli & Cynthia Rooney, *The Environmental Sentencing Guidelines for Business Organizations: Are There Murky Waters in Their Future?*, 22 B.C. ENVTL. AFF. L. REV. 481, 483 (1995) (describing dissent among committee members). Regardless of the final fate of this set of Proposed Guidelines, it will undoubtedly play a significant role in shaping any future sentencing scheme. Prior to the Proposed Sentencing Guidelines for Organizations Convicted of Environmental Offenses, the federal sentencing guidelines included guidelines for offenses against the environment. *See, e.g.*, Joan Tagliareni, *Actual Contamination in the Federal Sentencing Guidelines: To Prove or Not to Prove?*, 22 B.C. ENVTL. AFF. L. REV. 413 (1995); Jane Barrett, *Sentencing Environmental Crimes Under the United States Sentencing Guidelines-A Sentencing Lottery*, 22 ENVTL. L. 1421 (1992); Judson W. Starr & Thomas J. Kelly, Jr., *Environmental Crime & the Sentencing Guidelines: The Time Has Come . . . and it is Hard Time*, 20 Env't L. Rep. (Envt. L. Inst.) 10,096 (Mar. 1990). The federal sentencing guidelines also contained a general section on sentencing organizational offenders. However, at the time the organizational chapter was written, it was believed that environmental crimes were significantly different from other organizational crimes and thus should be governed by a different chapter. *See Commission Excludes Environmental Crimes from Sentencing Guidelines Sent to Congress*, 22 Env't Rep. (BNA) 11 (May 3, 1992); Richard S. Gruner, *Just Punishment & Adequate Deterrence for Organizational Misconduct: Scaling Economic Penalties Under the New Corporate Sentencing Guidelines*, 66 S.CAL. L. REV. 225, 285-87 (1992); Ilene H. Nagel & Winthrop M. Swenson, *The Federal Sentencing Guidelines for Corporations: Their Development, Theoretical Underpinnings, & Some Thoughts About Their Future*, 71 WASH. U.L.Q. 205, 254-58 (1993); Jed S. Rakoff, *The Ideology of Environmental Sentencing Guidelines*, N.Y. L.J., Sept. 9, 1993, at 30. *See generally* Rakoff, *supra* note 24; James T. Banks, *Substantial Penalty Mitiga-*

the sentence should be affected by whether the defendant had a compliance plan in place.[71] Although the Guidelines remain only a proposal, if they are ever implemented, "[w]ith criminal prosecutions for environmental infractions becoming more common, . . . incentives provided under the guidelines will very like-

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tion for Environmental Crimes: A "Gold Standard" Proposal Worth Considering, 8 FED. SENT. REP. 216 (Feb. 1996); Lynn L. Bergeson, *Necessity for Sentencing Guidelines Questioned*, CORPORATE LEGAL TIMES, July 1993, at 8; Peter Blackman, *Environmental Crimes: Proposed Guidelines Emphasize Compliance*, N.Y. L.J., Dec. 23, 1993, at 5; John C. Coffee, *Environmental Crime & Punishment*, N.Y. L.J., Feb. 3, 1994, at 5; Mark A. Cohen, *Environmental Sentencing Guidelines or Environmental Management Guidelines: You Can't Have Your Cake and Eat It Too!*, 8 FED. SENT. REP. 225 (Feb. 1996); Nicholas M. De Feis, *Significant Differences Between Environmental & Other Guidelines*, N.Y. L.J., Apr. 8, 1993, at 1; Mark S. Dreux & Craig H. Zimmerman, *The Proposed Federal Sentencing Guidelines for Environmental Crimes*, OCCUPATIONAL HAZARDS, July 1993, at 46; Richard S. Gruner, *Challenges in Drafting Corporate Sentencing Guidelines for Environmental Offenses*, 8 FED. SENT. REP. 212 (Feb. 1996); Richard S. Gruner, *Reconciling Nature & Industry: Developments in Environmental Law*, LEGAL TIMES, Apr. 17, 1995, at 13; *Industry Unleashes Assault on Environmental Guidelines Draft*, Nat'l Env't Daily (BNA), May 13, 1993; Raymond W. Mushal, *Fines For Organizational Environmental Criminals: Two Approaches, But Still No Satisfactory Solution*, 8 FED. SENT. REP. 206 (Feb. 1996); Lucia Ann Silecchia & Michael J. Malinowski, *Square Pegs & Round Holes: Does the Sentencing of Corporate Citizens for Environmental Crimes Fit Within the Guidelines*, 8 FED. SENT. REP. 230 (Feb. 1996); Whitley & Spechals, *supra* note 3, at A1; Woodrow, *supra* note 17, at 325; *Dissent Filed By Advisory Group Members Urges Sentencing Commission to Reject Draft*, Env't Rep. (BNA), Jan. 7, 1994, at 1594; Patrick J. Devine, Note, *The Draft Organization Sentencing Guidelines for Environmental Crimes*, 20 COL. J. ENVTL. L. 249 (1995); Jason M. Lemkin, Comment, *Deterring Environmental Crime Through Flexible Sentencing: A Proposal for the New Organizational Environmental Sentencing Guidelines*, 84 CAL. L. REV. 307 (1996).

71. *See* Thomas M. McMahon, *Criminal Enforcement of Environmental Laws*, 474 PRACTISING L. INST./LITIG. 319, Sept./Oct. 1991 ("[T]he proposed environmental management system requirements are much more detailed, and each aspect must be met as described before a company can gain the benefit of this mitigation."); *Sentencing Guidelines to Increase Business Concern About Enforcement*, HAZ. WASTE NEWS, Aug. 29, 1994 ("'The clear and unmistakable message to the corporate world . . . is that instituting and operating high-quality environmental compliance programs is necessary to mitigate punishment for environmental offenses . . . .'") (quoting George Terwilliger, Esq.).

ly prove important."[72]

First, according to the Proposed Sentencing Guidelines, if "prior to the offense, the organization either had no program or other organized effort to achieve and maintain compliance with environmental requirements, or it had such a program in form only and had substantially failed to implement such a program . . .,"[73] the offense level increases by four levels. The description of what one must do to avoid imposition of this aggravating factor is vague, and does not provide much guidance.[74]

Similarly, while the lack of a compliance plan may be an aggravating factor, the presence of a compliance plan may be a mitigating circumstance. Indeed, it reduces the offense level by three to eight levels and serves as a "partial escape valve"[75] from the otherwise harsh sentences mandated by the Proposed Sentencing Guidelines. Because a compliance plan may be an aggravating circumstance, if absent, or a mitigating circumstance, if present, it has a "double impact"[76] and provides "a 'sweeter' carrot and a 'larger' stick."[77] The absence or presence of a compliance plan will thus have a significant impact on the harshness of the sentence imposed. However, in order to gain this credit warranting mitigation, the defendant must demonstrate "a [c]ommitment to [e]nvironmental [c]ompliance."[78] This commitment requires that the defendant prove seven so-called "minimum factors."[79] They are:

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72. Orts, *supra* note 14, at 1281.

73. Proposed Sentencing Guidelines § 9C1.1 (f) (LEXIS, Envirn. Library, Guidoc File).

74. The drafters suggest only that the compliance program's "design and implementation must evidence, at a minimum, a genuine organized effort to monitor, verify, and bring about compliance with environmental requirements." *Id.* § 9C1.1(f) (Comment 1). This hardly provides much guidance in how to formulate an effective plan. However, because the prosecution has the burden of proof for aggravating factors, this lack of guidance may not be as troubling as it would otherwise appear.

75. Blackman, *supra* note 70, at 5.

76. Rakoff et al., *supra* note 24, § 8.01[A], at 8-6.1.

77. Fiorelli & Rooney, *supra* note 70, at 495.

78. Proposed Sentencing Guidelines, *supra* note 73, § 9D1.1(a).

79. Since these standards were articulated, however, they have been criticized for requiring too much to be reasonable. *See, e.g.*, Rakoff, *supra* note 24, at 8-6.1

1. Line Management Attention to Compliance;[80]

2. Integration of Environmental Policies, Standards and Procedures;[81]

("The elements of an effective compliance program remain highly burdensome."); *id.* at 8-6.3 ("[E]xtraordinarily complex compliance programs continue to be required in order to earn penalty reductions."); Fiorelli & Rooney, *supra* note 70, at 496 ("The dissent disagreed with the [Proposed Sentencing Guidelines,] stating that: The proposed compliance program is excessive. Within the workgroup, this program was described as a 'Cadillac' program or one with a 'gold' standard. . . . There are seven factors; within the seven factors, there are numerous subfactors. Some have high thresholds for any credit . . . ."); Devine, *supra* note 70, at 271 ("The compliance program mitigating factor alone requires courts to make at least fourteen separate determinations under eight different sub-provisions."); Dreux & Zimmerman, *supra* note 70, at 62 ("If these components are adopted without revision they will, as a practical matter, require organizations to consider investing enormous amounts of time and money into environmental compliance without any commensurate assurance of a reasonable reduction in potential criminal fines."); Elisabeth Kirschner, *Environmental Crime: Prevention Pays*, CHEM. WEEK, Nov. 24, 1993, at 12 ("Anderson says the recommended program goes further than responsible care and has been called a gold-plated standard.") (quoting Frederick Anderson, Esq.); Kole & Lefeber, *supra* note 10, at 40 ("Given these extraordinary [criminal] penalties and expectations, one can only question which is more expensive, the fine or compliance."); Stephen D. Ramsey, et al., *Statement of General Electric Co., IMCERA Group Inc. & Johnson Controls Inc. on the Advisory Working Group on Environmental Sanctions Draft Environmental Guidelines for Organizational Offenders*, Apr. 16, 1993 (*reprinted in* 474 PRACTISING L. INST./LITIG. 319, 327) (describing dissatisfaction with burdens imposed by compliance policy); *Industry Unleashes Assault on Environmental Guidelines Draft*, Daily Envtl. Rep. (BNA), May 14, 1993, at 98 ("[Former DOJ Environmental Crimes Section Chief Joseph G.] Block noted that the detailed section on environmental compliance programs . . . would 'straightjacket' companies that may feel they can achieve compliance better through means other than those specified in the very detailed provisions of the draft.").

80. Proposed Sentencing Guidelines § 9D1.1(a)(1). This factor means that all line managers at all levels "direct their attention, through the management mechanisms utilized throughout the organization . . . to measuring, maintaining and improving the organization's compliance with environmental laws and regulation." *Id.* These managers must also "routinely review environmental monitoring . . . direct the resolution of identified compliance issues, and ensure application of the resources and mechanisms necessary . . . . " *Id.*

81. *Id.* § 9D1.1(a)(2). This requirement attempts to ensure that environmental compliance is made a part of the life and work of all employees, "including a

3. Auditing, Monitoring, Reporting, and Tracking Systems;[82]
4. Regulatory Expertise, Training and Evaluation;[83]
5. Incentives for Compliance;[84]
6. Disciplinary Procedures;[85] and
7. Continuing Evaluation and Improvement.[86]

In addition to these required factors, the Proposed Sentencing Guidelines will consider "[a]dditional [i]nnovative [a]pproaches" as an eighth element.[87]

The Proposed Sentencing Guidelines commentary also explains that while all organizations must have these seven minimum factors in some form, the exact nature of their compliance effort will vary depending upon two key variables: the size of the operation[88] and the nature of the organization's business.[89] Paradox-

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requirement that employees report any suspected violation to appropriate officials within the organization, and that a record will be kept by the organization of any such reports." *Id.*

82. *Id.* § 9D1.1(a)(3). This factor contains five discrete subparts requiring (i) frequent auditing; (ii) continuous on-site monitoring; (iii) internal reporting; (iv) tracking the status of responses to identified compliance issues; and (v) redundant, independent checks on the status of compliance. *Id.*

83. *Id.* § 9D1.1(a)(4). Essentially, this is the "education" requirement of the compliance plan, requiring that the company implement adequate training programs for those whose responsibilities include environmental compliance and create a system that avoids delegating too much discretionary authority to the unsupervised. *Id.*

84. *Id.* § 9D1.1(a)(5). This factor obligates companies to implement "a system of incentives . . . to provide rewards (including, as appropriate, financial rewards) and recognition to employees and agents for their contributions to environmental excellence." *Id.*

85. *Id.* § 9D1.1(a)(6). This is obviously the converse of compliance incentives. It requires companies to have negative consequences — including "termination, demotion, suspension, reassignment, retraining, probation, and reporting individuals' conduct to law enforcement authorities" — for those employees who do not enhance the organization's environmental policies. *Id.*

86. *Id.* § 9D1.1(a)(7). This requires that the compliance program in place not be static, but that it be subject to constant and consistent reevaluation and improvement where appropriate. *Id.*

87. *Id.* § 9D1.1(a)(8).

88. Obviously, larger organizations would be required to have more formal programs in place, while smaller businesses would have to show that the plan they had in place was appropriate given the size of their operation. Some argue that smaller companies will find more burdensome implementing extensive com-

ically, then, while the compliance requirements for mitigation under the Proposed Sentencing Guidelines are the most extensive, they also most fully recognize that the size and nature[90] of the defendant business will affect the feasibility of the compliance plans and should govern whether the plans are deemed acceptable.[91] The DOJ and the EPA are less explicit about this flexibility in their guidance.[92] Thus, the Proposed Sentencing Guidelines mitigate penalties if the offender can demonstrate a "commitment" to environmental compliance manifested through a compliance plan meeting the seven stated criteria.[93]

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pliance programs. *See* Mark Haveman, *Small Business Caveats & Cautions*, ENVTL. F., Nov./Dec. 1995, at 42 (discussing impact of ISO compliance plans on small businesses); Lemkin, *supra* note 70, at 334 ("The Proposed Guidelines do address size in the seven mitigation factors, but they do so in a way that improperly discriminates against smaller organizations and discourages their efforts at compliance."). *See also* Marty, *supra* note 14, at 499-500 (describing different impact of audit requirements on small business compared to large business).

89. Those businesses which, by their nature, may pose a greater threat to health or the environment should necessarily have more sophisticated programs in place than those whose operations are less intrinsically risky.

90. Similarly, in organizations other than the traditional industrial corporation, a different management protocol might be warranted. For an interesting discussion of environmental audits in a military context, see J. Michael Abbott, *Environmental Audits: Pandora's Box or Aladdin's Lamp?*, 1989 A.F. L. REV. 225 (1989) (describing Air Force implementation of EPA audit policies).

91. This flexibility recognizes the difficulty in mandating one policy for all types of entities. *See* Buente et al., *supra* note 21, at 99 ("Translating these general elements into an effective compliance program is a difficult task. Obviously, each company's compliance program should be specifically tailored to its unique needs . . . . [I]t is important to remember that there is no 'cookbook' for compliance programs.").

92. This lack of consistency is not beneficial and particularly hurts small businesses. Small companies have more difficulty determining whether they should feel free to have a more informal plan, or whether the DOJ and the EPA would require something different.

93. Throughout the discussion of the Proposed Guidelines it should be recalled that, as stated *supra*, note 70, these Guidelines have not been passed. Indeed, in their final form, the provisions on compliance, as well as other features, may be changed, and

> [a]lthough the Commission has not rejected the Proposed Guidelines, it is extremely unlikely to adopt the Proposed Guidelines in their current form, since neither prosecutors nor corporate counsels support

III. CRITIQUE OF THE CURRENT COMPLIANCE POLICIES

As a result of these three policies,[94] those seeking to create an environmental compliance plan have a number of sources to which they may turn for guidance. Indeed, they have a number of sources to which they *must* look to gain the maximum legal benefit for creating their compliance plans.[95] All three policies, when taken together, are a significant positive step for environmental improvement. They highlight the importance of pursuing aggressive compliance,[96] encouraging employee training,[97] and foster-

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them. Prosecutors see them as too cumbersome and complicated, and industry sees them as too favorable to prosecutors. However, the Commission is likely to adopt Environmental Guidelines containing key provisions very similar to some of those set out in the Proposed Guidelines.

Lemkin, *supra* note 70, at 318 (footnotes omitted).

94. Again, beyond these three federal policies there also are additional incentives or guidelines available on the state level which can be effective incentives as well. *See* Marty, *supra* note 14, at 524-37 (describing state audit protections); John H. Cushman, Jr., *Many States Give Polluting Firms New Protections*, N.Y. TIMES, Apr. 7, 1996, at A1 (describing statutes in eighteen states which "protect companies from disclosure or punishment when they discover environmental offenses at their own plants.").

95. In addition to these legal guidelines, voluntary, private codes of environmental conduct also exist which provide guidance for compliance and a "public relations" benefit for doing so. Perhaps the most well known of these guidelines is the set of CERES or "Valdez" Principles. These guidelines, "developed by the Coalition for Environmentally Responsible Economies, . . . call[] on corporations to, *inter alia*, reduce waste matter and provide for its safe treatment, market safe products and services, and provide redress for environmental damage." United Paperworkers Intl. Union v. International Paper Co., 985 F.2d 1190, 1193 (2d Cir. 1993). *See generally* J. Andy Smith III, *The CERES Principles: A Voluntary Code for Corporate Environmental Responsibility*, 18 YALE J. INT'L L. 307 (1993) (discussing more fully these voluntary guidelines).

96. *See* Webb & Molo, *supra* note 17, at 376 ("A well-structured, widely disseminated, and strongly enforced compliance program encourages employees to think twice before engaging in questionable conduct.").

97. *See* John W. Hoberg, *Education: Bedrock of Compliance*, 138 CERAMIC INDUSTRY, June 1992, at 18 ("The best protection against civil and criminal environmental enforcement [is] employees who know precisely what they must do to achieve environmental compliance . . . . Regulators and juries can interpret the absence of trained workers as evidence of negligent or reckless senior managers."); Lundin, *supra* note 4, at 70 ("The legal community should educate busi-

ing a responsible corporate attitude toward environmental responsibilities. In addition, the policies also stress the importance of environmental responsibility in industry generally and provide parameters for companies who want to develop compliance plans.[98] In some respects, this new interest in compliance plans may be one of the most beneficial "side effects" of this increasingly aggressive criminal agenda.[99] This positive benefit will endure even if political or economic trends require a downscaling of actual criminal prosecutions.[100] Much has been written offering guidance to those who, in good faith, wish to create compliance plans.[101] This dialogue can only help increase environmen-

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nesses as well as the major waste producers, consumers, and farmers. Once people understand the significance of protecting the environment, there may be in turn an incentive to develop less polluting production processes and products."); Polly T. Strife, *How Important Is Employee Training?*, ENVTL. F., Mar./Apr. 1996, at 10 ("Employee awareness and training is a very important part of any environmental management system. . . . [T]he awareness and training element must be well planned, implemented in as effective and cost-effective way as possible, and periodically assessed and changed as needed.").

98. The Proposed Sentencing Guidelines, in particular, provide a useful outline for compliance planning. "[T]he proposal will aid corporate executives and counsel in constructing law compliance programs. The detailed standards specified should be valuable not only in shaping environmental compliance programs, but also in constructing and operating compliance programs in other non-environmental areas." Gruner, *Reconciling Nature & Industry: Developments in Environmental Law*, *supra* note 70, at 13. The guidance provided in the Proposed Sentencing Guidelines is also praised in Woodrow, *supra* note 17, at 325 ("The guidelines present a comprehensive model of an ideal compliance program, delineating seven specific components and describing how to implement each component.").

99. *See* Woodrow, *supra* note 17, at 325 ("The threat of criminal prosecution, as well as the pressure of significant fines, has encouraged many corporations to develop and implement environmental compliance programs. Moreover, the federal government has actively encouraged the implementation of corporate compliance programs.") (footnotes omitted).

100. To foster such an attitude, one must avoid lax compliance that "is unfair to responsible environmental actors, who may suffer severe competitive disadvantage at the hands of those who evade their legal duties." Adler & Lord, *supra* note 4, at 788.

101. A full discussion as to how to develop an environmental compliance plan is beyond the scope of this paper. *See* FRANK B. FRIEDMAN, A PRACTICAL GUIDE TO ENVIRONMENTAL MANAGEMENT (6th ed. 1995); Moorman & Kirsch, *supra*

tal compliance and reduce the excessive reliance on a strict "command-and-control" policy for achieving compliance.[102]

Yet, despite these benefits, two fundamental policy flaws exist in the current philosophy underlying compliance plans. First, the compliance plans do not focus primarily on measuring beneficial environmental results. Instead, they focus on the *means* of managing compliance. In addition, the suggested environmental compliance plans encourage the attainment of full legal compliance rather than aggressively prodding companies to reach beyond that standard.[103] These two problems must be remedied before the laudable goals of the compliance programs can be achieved and before compliance plans will ensure beneficial environmental effects.

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note 14, at 121-26 (reviewing guidelines for effective assessments); Webb & Molo, *supra* note 17, at 383-96; Anderson, *supra* note 9; Baram, *supra* note 11, at 545 (outlining ideal elements of regulatory audits); Buente et al., *supra* note 21, at 93-114; Michele Galen, *Keeping the Long Arm of the Law at Arm's Length*, BUS. WK., Apr. 22, 1991, at 104 (discussing corporate compliance generally); David S. Machlowitz, *Making A Compliance Program Work: A Practical Guide*, AM. LAW., Mar. 1992, at 16 (discussing corporate compliance in the environmental context and beyond); Donald W. Stever, *How Not to Become an EPA Criminal*, AM. METAL MARKET, Feb. 26, 1993, at 14 (containing excerpts of presentation on creating realistic compliance plans); Woodrow, *supra* note 17, *passim*. *See generally* Courtney M. Price & Allen J. Danzig, *Environmental Auditing: Developing a "Preventive Medicine" Approach to Environmental Compliance*, 19 LOY. L.A. L. REV. 1189 (1986) (providing an earlier view of the benefits of and approaches to environmental compliance plans).

102. *See generally* Eric Bregman & Arthur Jacobson, *Environmental Performance Review: Self-Regulation in Environmental Law*, 16 CARDOZO L. REV. 465, 484-98 (1994) (discussing benefits of environmental self-regulation).

103. *See* Fritof Capra, *Ecologically Conscious Management*, 22 ENVTL. L. 529, 532 (1992) ("In the United States and Britain, most environmental auditing done today is limited by so-called 'compliance auditing,' designed to ensure that a company is complying with all the relevant environmental regulations and standards."); John A. Pendergrass & John A. Pendergrass III, *Beyond Compliance: A Call for EPA Recognition of Voluntary Efforts to Reduce Pollution*, 21 Envtl. L. Rep. (Envtl. L. Inst.) 10,305, 10,305 (June 1991) ("[E]nforcement generates only disincentives to violating the law, creating a negative influence on behavior. Enforcement is designed to achieve minimal standards, not to encourage exceeding those standards. In addition to deterring violations, agencies would be wise to create incentives to *exceed* the bare minimum required by the law.").

A. *Flawed Means: Compliance Policies Focus on Managerial Process Rather than Ecological Result*

The most troubling aspect of the mandates found in all three policies is that they do not focus directly on the scientific prevention of environmental harm.[104] Instead, they concentrate too much on means rather than ends, paying too little attention to whether the compliance efforts actually result in improved environmental protection.[105] The policies all focus on the regulated entity's management programs rather than on the attainment of any environmental goal. Indeed, as the Sentencing Guidelines commentary explicitly states, the legal rewards are given for having in place a scheme that theoretically *should* have prevented harm,[106] rather than requiring one that actually *did*. Thus,

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104. Yet, pollution *prevention* would seem to be the more desirable goal. *See* McMahon, *supra* note 14, at 121 ("Many companies have found significant cost savings from reducing emissions or disposal of wastes even without considering potential liability."). The goals of reducing environmental harm and running a profitable enterprise need not always be mutually exclusive. *See, e.g.*, John R. Beaumont, *Managing the Environment: Business Opportunity and Responsibility*, FUTURES, Apr. 1992, at 190; Michael E. Porter & Claas van der Linde, *Green and Competitive: Ending the Stalemate*, HARV. BUS. REV., Sept.-Oct. 1995, at 120.

105. This same criticism has been made of the proposal for international compliance plans under ISO 14001. For example, one critique states that

> [t]he trouble with the ISO 14001 standard is that it is not likely to have a major impact on the environmental performance of business firms around the world. Unfortunately, ISO 14001 has been focused exclusively on the internal environmental management system of a company. It is not clear whether or not it will actually influence either the company's compliance with its local environmental regulations or its willingness or capacity to prevent pollution.

Gareth Porter, *Little Effect on Environmental Performance*, ENVTL. F. Nov./Dec. 1995, at 43. Although full discussion of the ISO standards are beyond the scope of this paper, they are in many ways analogous to the compliance plans advocated by the EPA, the DOJ, and the Advisory Working Group of the Sentencing Commission. Thus, criticism of the ISO standards is applicable here. However, criticism of the ISO regime is by no means unanimous. *See, e.g.*, Kenneth A. Freeling, *Implementing an Environmental Management System in Accordance With the ISO's Draft Standards is Not Necessarily Costly and Could Yield Benefits as Well*, NAT'L L.J., July 24, 1995, at B5.

106. Obviously, the fact that a company is being sentenced for an environmen-

> [i]f, prior to the conviction, the organization had a reasonable basis to believe that its commitment of resources and processes would be sufficient, given its size and the nature of its business, then an appropriate mitigation value should be applied even though that commitment proved insufficient to prevent the offense of conviction.[107]

None of the three policies requires any serious study as to what types of management result in fewer environmental incidents.[108] Certainly, all three policies mandate that the environmental compliance plan contain steps to prevent repeat violations.[109] This may prevent environmental harm if there is recidivism in environmental violations.[110] In addition, because all three policies require sanctions for noncompliant employees,[111] they may induce

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tal crime means that — unless the conviction was wrongful — the compliance plan did not prevent the harm. Of course, a good compliance and response plan may well have contained the harm and mitigated the danger, but that is not the same as prevention.

107. Proposed Sentencing Guidelines, *supra* note 73, § 9D1.1(a) (Comment 3).

108. A cynical view of compliance plans' efficacy argues that

> [a]lthough there is today a virtual cottage industry of law firms cranking out compliance plans for their corporate clients (often with the mechanical uniformity of a cookie cutter), most of the Advisory Panel that drafted the new [proposed sentencing] guidelines was skeptical of both the organizational premises upon which the existing guidelines rest and the likelihood that adoption of such compliance plans would have significant beneficial effect upon corporate behavior.

Coffee, *supra* note 70, at 5. *See also* Fiorelli & Rooney, *supra* note 70, at 494-95 ("The prosecutors on the [Advisory Working Group] believed that they would not be able to distinguish 'good' programs from 'bad' programs and would effectively be giving organizations free credits for paper compliance programs.").

109. The EPA's policy requires that there be "necessary modifications to the regulated entity's program to prevent future violations," EPA, *supra* note 18, at 66,711; the DOJ inquires into steps taken to "remedy circumstances like those that led to the noncompliance," DOJ, *supra* note 61; and the Proposed Sentencing Guidelines require "continuing evaluation and improvement." Proposed Sentencing Guidelines, *supra* note 73, § 9D1(a)(7).

110. This would seem to be a logical assumption since repeat violations often indicate that a company has an overall lax policy toward environmental compliance.

111. *See* EPA, *supra* note 18, at 66,711 (expressing EPA's requirement that

employees to avoid causing environmental harm. In addition, compliance programs quite often enable companies to identify environmental problems while they are still manageable and before significant environmental harm occurs. In these ways, a reform in corporate management may have a beneficial environmental impact.

Yet, all three policies rest on the assumption that avoiding legal violations of environmental statutes is equivalent to avoiding environmental harm, a link that may not be as strong or direct as it appears.[112] If this assumption is not correct, then no principled basis exists for giving such substantial benefit to those who develop compliance plans. However, the policies do not require rigorous inquiry regarding whether a compliance plan will actually prevent harm, or whether parties receiving legal credit for their plans are reducing their environmentally harmful activity.[113]

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compliance plans include "appropriate incentives to managers and employees . . . including consistent enforcement through appropriate disciplinary mechanisms"); DOJ, *supra* note 61 (asking whether "environmental compliance was a standard by which employee and corporate departmental performance was judged"); Proposed Sentencing Guidelines, *supra* note 73, § 9D1.1(a)(6) (asking whether company had "disciplinary procedures" in place).

112. *See* Block & Braker, *supra* note 14, at 6. After all, "a failure to adopt compliance programs or to disclose information is often perceived as symptomatic of a larger problem, one more serious than any single act of wrongdoing." Walsh & Pyrich, *supra* note 2, at 661. *See also* Elliott, *supra* note 14, at 8 ("[E]nvironmental auditing can be preventive in nature and may assist a company to either avoid environmental problems altogether, or at least avoid the exacerbation of existing problems.").

113. In fact, the Proposed Sentencing Guidelines have been criticized for providing disparate benefits to large companies rather than small ones, regardless of the degree of harm the companies actually cause. Thus,

> [i]ronically, the environmental harm done by the large corporation may vastly exceed that done by the smaller entity, but it is the large organization that will more often be able to implement and benefit from a compliance program. Indeed, the reduced fine incurred as a result of having a compliance plan may be regarded by the large organization as simply a "cost of doing business," whereas the larger fines imposed upon a small entity that cannot implement or benefit from a compliance program may prove fatal to its ability to continue doing business.

Rakoff, et al., *supra* note 24, § 8.01[6], at 8-13.

All three sets of guidelines indicate greater concern with quantifiable legal compliance and business management practice than with aggressive environmental protection:[114]

> Deterrence will always have an important role in environmental protection. But . . . the definition of success tends to devolve to counting activities . . . . This measure reveals little, if anything, about the actual state of compliance or even the actual impact of enforcement actions, *much less the state of the environment*. . . . Racking up increasing numbers of enforcement actions tends to become the mission of deterrence instead of a means to achieving the larger ends of compliance *and environmental protection*.[115]

That this dichotomy exists is not reason to abandon aggressive compliance efforts, nor is it a reason for laxity in the application of environmental laws. However, it should cause some concern and reevaluation of the compliance regime to see if the resources expended[116] may be redirected to focus on "environmental im-

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114. Evidence of this may be found, among other places, in advice that emphasizes the role of the lawyer rather than the environmental scientist in carrying out the compliance programs. For example, one article states that

> [t]he purposes of many reviews are to determine the existing state of a facility's compliance with the law . . . . The development or analysis of technical information is not the purpose of such reviews. . . . [A]ttorneys have the training necessary to interpret the complex web of federal and state environmental statutes . . . [T]echnical consultants' strong suit, the generation and interpretation of . . . data, may result in unnecessary delays and expense.

Moorman & Kirsch, *supra* note 14, at 111.

115. Stahl, *supra* note 22, at 19 (emphasis added). Although Mr. Stahl, the EPA Deputy Assistant Administrator for Enforcement & Compliance Assistance, was referring to the dichotomy between *enforcement* and environmental benefit rather than between *compliance plans* and such benefit, the analogy is important: both arguments recognize the way in which real environmental improvement is easily ignored when legal compliance is over-emphasized.

116. The financial and personnel costs of a compliance plan should not be underestimated. *See* Murnane, *supra* note 4, at 1202 ("A company may feel cheated or at significant disadvantage if its competitor has not initiated these programs and is subsequently saving on the outlay cost for them."); Orts, *supra* note 14, at 1328-30 (reviewing costs of compliance plans); Walsh & Pyrich, *supra* note 2, at 679 ("Implementing a compliance program is an expensive and time-consuming process. Particularly for smaller companies, it requires an investment of resources that might otherwise be applied in other areas. Corporations

provement,"[117] and center more on "accountability toward envi-

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must weigh the significant implementation costs against the inability of a compliance program to guarantee equivalent benefits."); *id.* at 681 (although "[t]he implementation of corporate compliance programs ultimately will prove cost effective . . . [i]n the short term, corporate compliance programs are expensive to implement and maintain. . . . [A] corporation must have personnel specifically responsible for supervising, implementing, and reviewing the compliance policy. . . . [D]rawing up an appropriate program requires legal advice and accompanying legal fees."); Woodrow, *supra* note 17, at 325 ("[S]atisfying the minimum requirements might require more staff or financial resources than even sophisticated corporations currently employ."). Furthermore,

> [i]n addition to the basic expense of paying a consultant, the audit process necessarily disrupts a facility's operations, thus reducing revenues and profits. First, audits have the potential to interfere with or delay projects. . . . Second, environmental audits can provoke internal "turf wars" between environmental monitors and facility employees . . . . Finally, audits may suggest the need for specific corrective actions that might themselves be disruptive of normal operations.

Hunt & Wilkins, *supra* note 3, at 372-73.

117. Leaving aside the unique costs of creating a new compliance plan, it is obvious that even complying with the record keeping requirements imposed by federal environmental statutes is a costly endeavor. *See* Cindy Skrzycki, *Chemistry Quiz: Do Clean Streams Require Filing Reams?*, WASH. POST, Apr. 12, 1996, at F1 (quoting Chemical Manufacturers Association report claiming that "businesses spent 55 million hours in 1994 doing the paperwork associated with eight laws at a cost of $3 billion."). *But see id.* at F2 (discussing EPA's challenge to the report.). Clearly, with such substantial costs associated with meeting the reporting requirements, the increased cost that comes with a voluntary compliance program can create a substantial burden. This may be about to change. According to Michael Stahl, Deputy Assistant Administrator for the EPA's Office of Enforcement & Compliance Assurance,

> EPA hopes to broaden the way it measures success of its enforcement program. . . . The agency is developing data on the environmental impact of enforcement actions — such as the quantity of emissions reduced — that would appear for the first time in EPA's enforcement report for fiscal 1995 . . . [Stahl said], "What we ought to be doing as we tell the American people about environmental compliance is not just what has EPA done. It ought to be a little bit, at least, about what that industry has done — how have they performed?"

Enforcement Also Targets Reinvention, 38 Env't Rep. (BNA) 1907 (Feb. 2, 1996). This prosecution-oriented measure of "success" has also been criticized by commentators. *See* Hunt & Wilkins, *supra* note 3, at 401 ("For prosecutors and those who would prefer severe punishment, foregoing retribution for environmental violations may be unsatisfying. In the long run, however, an empha-

ronmental obligations rather than just toward regulatory obligations."[118]

Finally, the compliance policies do not focus at all on pollution prevention or any other proof of environmental improvement.[119] Clearly, pollution prevention serves a purpose different from that of compliance.[120] However, conferring such significant legal benefits for compliance plans while not explicitly rewarding pollution prevention plans sends the wrong message to the regulated community concerning what it should prioritize.[121] This is particularly unsettling if, in fact, pollution prevention brings significant environmental benefits that gain no legal reward.[122]

As a practical matter, perhaps those companies that make a

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sis on remediation and deterrence will provide greater social benefit and help achieve the country's environmental protection goals.").

118. Stahl, *supra* note 22, at 20.

119. *But see* Stephen M. Axinn, *The Benefits of "Gold Star" Compliance: The Need for a Self-Audit Privilege*, 8 FED. SENT. RPTR. 221 (Feb. 1996) ("The proposed [sentencing] guidelines are preventative in nature — they encourage extraordinary efforts to avoid noncompliance in the first place."); Banks, *supra* note 70, at 219 (arguing that the draft Proposed Sentencing Guidelines *do* accomplish this goal because "[u]nder the Draft, it is not good enough to learn from past mistakes unless there also has been a genuine effort to avoid those mistakes in the first place.").

120. *See* Orts, *supra* note 14, at 1329-30 (suggesting that companies are unlikely to invest in pollution prevention in a systematic uniform way unless they have an independent commitment to environmental protection).

121. Of course, companies may have other non-legal incentives to create pollution prevention programs. *See* McMahon, *supra* note 14 ("Many companies have found significant cost savings from reducing emissions for disposal of wastes even without considering potential liability."). However, it is troubling that the legal scheme does not recognize these benefits. *See* Orts, *supra* note 14, at 1286 (suggesting that voluntary pollution prevention programs developed by the EPA "are probably more beneficial than the defensive compliance programs encouraged by sentencing standards and federal enforcement policies because they have the virtue of encouraging businesses to 'do good' proactively.").

122. This argument assumes that a reward is needed to get industry to create compliance plans or engage in pollution prevention. Perhaps this is a cynical view. However, it is the view that has led to the current system of incentives for compliance plans. In an ideal world, of course, incentives for responsible behavior would not be needed. However, if such incentives *are* being employed, they should be used to encourage behavior that will achieve the most environmentally beneficial results.

good faith effort to remain in compliance should be rewarded because they are the entities least likely to cause environmental harm.[123] In a climate of scarce enforcement resources[124] and

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123. *See* Moore & Newkirk, *supra* note 58, at 20 ("[C]ompanies that make no effort to look for problems are quite likely to be causing more significant harm to the environment than those who look, correct, and report.").

124. The fact that EPA enforcement budget resources are strained is widely acknowledged. *See* John H. Cushman, Jr., *EPA Cancels Pollution Inspections*, PORTLAND OREGONIAN, Nov. 25 1995, at A1 ("Congress has proposed cutting enforcement spending to $314 million from $395 million."); *Environment Transcends Partisan Politics*, 24 Eco-Log Week (1996) ("In the interim spending bill . . . the EPA budget has been cut by 22% compared to last year. According to EPA Administrator Carol Browner, this will mean a 24% reduction in enforcement."); *EPA Says Proposed Funding Package Ravages Enforcement, Infrastructure*, AIR/WATER POLLUTION REPORT'S ENVIRONMENT WEEK, Dec. 1, 1995 (describing impact of budget cuts on various aspects of EPA activities); *EPA Curtails Inspections Ahead of Spending Bill Vote*, DOW JONES NEWS SERVICE, Nov. 28, 1995 ("[I]n [the] mid-Atlantic region more than 200 inspections and audits have had to be cancelled because of money shortages. Browner said the number could exceed 1,000 nationwide . . . "); *Federal Environmental Enforcement Debated*, HAZARDOUS WASTE NEWS, Jan. 29, 1996 ("A 25-percent budget cut in enforcement EPA faces in fiscal 1996 creates 'a definite threat of taking the environmental cop off the beat.'" (quoting Lois Schiffer, head of the DOJ's Natural Resources Division)); H. Josef Herbert, *Stop Gap Spending Bill Slashes Funding for Several Agencies*, SAN DIEGO UNION-TRIBUNE, Jan. 27, 1996, at A21 ("EPA Administrator Carol Browner told a Senate hearing she is concerned that enforcement and other EPA programs were being targeted for steeper cuts than the overall agency."); Marianne Lavelle, *Businesses Cheer and Citizens Moan As Stalemate Forces U.S. To Relax Safety Enforcement*, NAT'L L.J., Mar. 11, 1996, at A1, A17 (discussing budget cuts and impact on environmental enforcement); Marianne Lavelle, *Enforcement Shutdown: The Score*, NAT'L L.J., Mar. 11, 1996, at A17 ("[T]he EPA likely will prosecute at least 120 fewer enforcement cases this year due to the shutdowns. . . . if reduced funding continues, inspections would be cut from 9,000 to 6,000 for the full fiscal year, resulting in about 420 fewer cases against environmental lawbreakers."); Gary Lee, *Temporary Reductions Halt "Environmental Cap"*, WASH. POST, Dec. 14, 1995, at A21 ("Browner and other officials point to GOP initiated cuts amounting to about a third of the agency's budget since last September, including a 50 percent cut in funds for enforcement of federal anti-pollution statutes. A revised budget passed by the House last week would reduce the EPA's enforcement budget by 25 percent."); Bud Ward, *Time to Do More With Less-Again*, ENVTL. F., Nov./Dec 1995, at 6 ("In the current climate, EPA and other regulatory agencies will have to make do with reduced budgets-and EPA with much less.").

support,[125] effort should not be expended on punishing those already attempting to comply.[126] However, if the compliance policies[127] are really proxies for resource allocations, this should be explicitly acknowledged as the goal. Instead, under the current system, implementation of a compliance plan merits rewards yet does not require a demonstration that the environment was or will be improved.[128]

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125. One commentator observed,

> [e]nvironmental enforcement's gorilla is facing extinction or, perhaps more accurately, execution or starvation. After more than two decades of expanding power and influence, federal government agencies find themselves subject to increasing calls to reduce dramatically, or even eliminate, their enforcement roles . . . . [M]any politicians and commentators now view federal enforcement as an unwarranted intrusion.

Robert R. Kuehn, *The Limits of Devolving Enforcement of Federal Environmental Laws*, 70 TUL. L. REV. 2373, 2373 (1996).

126. *See* Cheryl Hogue, *Environmental Leadership May Lead to Cuts in EPA Inspections, Reporting, Monitoring*, Daily Envt. Rep. (BNA), No. 227, at AA-1 (Nov. 27, 1995) (praising Environmental Leadership Program); Stahl, *supra* note 22, at 20 ("[The] widening gap between government's compliance assurance mandate and the resources it can apply to it means there will simply never be enough inspectors and government attorneys to achieve significant levels of compliance through enforcement actions alone."); Walsh & Pyrich, *supra* note 2, at 684 ("A corporate compliance program will also deter prosecutions that are not socially useful. When a corporation can interpose the corporate compliance defense, the government is less likely to expend its scarce resources on prosecuting the corporation."); Whitley & Spechals, *supra* note 3, at C4 ("Given that the [EPA's] resources for criminal prosecution are scarce, a violation that is voluntarily revealed and fully and promptly remediated as part of a corporation's systematic and comprehensive self-evaluation program generally will not be a candidate for prosecution.").

127. This is most true in the context of case selection rather than on sentencing.

128. Some have suggested that the focus of legal compliance may adversely impact the motives for compliance, and that

> if companies adopt compliance programs only because they want to get the benefit of "credits" if they get caught, the motivation behind the adoption of a compliance program may mute its effect. Companies may prove more likely to adopt defensive programs oriented toward proving a satisfactory compliance program to the legal system, rather than developing more honest and open systems to review environmental performance in all its complexity.

Orts, *supra* note 14, at 1283. While the legal benefits may well create a self-

B. *Under-ambitious Ends: The Compliance Guidelines Do Little to Encourage Companies to Do Anything Beyond Ensuring That They Are in Full Compliance with the Law*

The second major flaw in current compliance policies is that an organized method of compliance is viewed as the *end*.[129] While all three policies emphasize the need to effectively ensure compliance *with* the laws, they impose no substantial requirements *beyond* that.[130] The DOJ's policy does ask whether the regulated entity had "safeguards *beyond* those required by existing

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interested motive for compliance plans, it does not *necessarily* follow that this will result in weakened efficacy. However, the inclination of the compliance policies to downplay benefits for truly innovative environmental improvements may encourage a more minimalist, management approach rather than an environmentally-centered one.

129. The much-touted ISO 14000 standards also contain this flaw. Currently being drafted by the International Organization for Standardization, the ISO 14001 standard "establishes overall standards for organizational environmental management systems. In stressing systems rather than performance — that is, instead of dictating specific emissions levels and the like — the ISO 14000 series will lay out the essential elements and practices that organizations need . . . ." *Forum: ISO 14001: Performance Through Systems?*, ENVTL. F., Nov./Dec. 1995, at 36. However, this lack of focus on actual outcome appears to replicate the means-driven standards already in place rather than create ends-oriented policies. *See* Cheryl Hogue, *Firms Accredited Under ISO 14000 Might Garner Credit Under Sentencing Guidelines*, DAILY REP. FOR EXECUTIVES, Nov. 25, 1994, at A225 ("ISO 14000 will not guarantee compliance or environmental performance for a company. Rather than focusing on these 'ends,' these new standards will target the 'means' by which businesses operate."). Supporters of the ISO standards argue that this will lead to an environmentally sound outcome. *See* Joe Cascio, *They Will Be Used—For Good Reason*, ENVTL. F., Nov./Dec. 1995, at 98 ("Skeptics have pointed out that the focus of the standard is the implementation and continuous improvement of an organization's environmental management system, and not environmental performance per se. However . . . focused management of the environmental aspects as described in the specification document will result in better environmental performance."). *See generally* Naomi Roht-Arriaza, *Shifting the Point of Regulation: The International Organization for Standardization and Global Lawmaking on Trade and the Environment*, 22 ECOLOGY L.Q. 479 (1995) (providing an in-depth discussion of the ISO system).

130. *But see* Woodrow, *supra* note 17, at 325 ("The model compliance program outlined in the proposed sentencing guidelines would exceed the mandatory requirements of the various environmental and health and safety regulations.").

law . . . ."[131] By and large, the policies require only that the companies have an effective internal mechanism to ensure that they are following the laws, yet the laws already impose substantial recording and monitoring obligations.[132]

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131. DOJ, *supra* note 61 (emphasis added). *See* discussion accompanying note 65, *supra*. A more comprehensive discussion of the impact of designing a scheme geared only toward legal compliance observes:

> if a business adopts an internal compliance program geared primarily toward how the legal system — especially prosecutors — will perceive the business's practices, a guarded and cautious review process will likely result. . . . [A] more fully reflexive management and auditing system would [be] a proactive, self critical approach to environmental issues, rather than a defensive focus on what the command-and-control legal system views as important.

Orts, *supra* note 14, at 1283-84.

132. It has been said that "[c]urrently, there is very little in the environmental field that is not subject to mandatory disclosure under one law, regulation, or permit or another." Anderson, *supra* note 9, at 6. Furthermore,

> under EPA's policy full civil and criminal penalty mitigation is only available where there is "voluntary" self-disclosure. "Voluntary" is defined as not including any type of violation that must be reported as a matter of law . . . . [T]he nexus between reporting requirements and environmental protection is, in many cases, unclear . . . . Because so many violations have to be reported (for example, any violation of a National Pollutant Discharge Elimination System permit or a Resource Conservation and Recovery Act ["RCRA"] permit or a Clean Air Act Title V operating permit), this exception to full self-disclosure penalty mitigation substantially undercuts the policy as a means of eliminating self-regulation program disincentives.

Moore & Newkirk, *supra* note 58, at 20. *See also* Kirsch & Veirs, *supra* note 3, at B5 ("Many environmental laws and regulations require the reporting of a range of information and violations. Some government officials may assert that the information was not submitted voluntarily, and thus deny the benefits of the final policy."). *But see* Buente et al., *supra* note 21, at 105 ("[M]any matters detected in audits or internal investigations may either be 'grey' or, while constituting evidence of a legal violation, are not required to be reported to the government."). This problem is exacerbated to the extent that disclosure requirements in the environmental statutes become more pervasive. As a result,

> [p]rosecutors will not consider a disclosure 'voluntary' if it is specifically required by law, regulation, or permit. Thus, the tougher the reporting requirement, the less effectively the DOJ Guidelines will provide an incentive towards voluntary disclosure . . . . Because the DOJ Guidelines foreclose a finding of voluntary compliance where

Development of business plans and management practices is required to create effective compliance mechanisms which are not explicitly required by law. Hence, in this sense, compliance will often involve significant expenditures on management practices not otherwise dictated by law. However, the *end* to which all three of these plans strive is full legal compliance, but little else.[133]

The current policies thus create one of two equally paradoxical results. In one way, through case selection and sentencing policies, the government provides a substantial reward to those who do little more than comply with the legal obligations that statutes already impose on them.[134] Of course, the companies are creat-

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> reporting is required by law, regulation, or otherwise, or where reporting has occurred after the violation has come to the attention of the authorities, they provide no incentive to report violations of strict reporting requirements.

Mark L. Manewitz & William M.A. Porter, *Voluntary Disclosure in Environmental Matters and the Effect of Sentencing & Prosecutorial-Discretion Guidelines*, 457 PRACTICING L. INST. LITIG. & ADMIN. PRAC.: LITIG. 111, 117 (Mar. 29, 1993). These disclosure requirements and their broad reach are discussed in Arnold, *supra* note 11, at 411.

133. Of course, these benefits are not unimportant. Their only flaw is that they do not go far enough, and

> [h]opefully, [ISO-based compliance requirements] will make companies more conscientious about maintaining adequate files and communications systems, thus establishing some of the prerequisites for both regulatory compliance and effective industrial pollution prevention programs. But an environmental compliance system standard, as currently defined, cannot substitute for mechanisms that actually spur better environmental performance.

Porter, *supra* note 105, at 44.

134. These statutes are those, of course, that contain discharge limitations, recording requirements, monitoring obligations, and mandatory disclosure/reporting regulations. Such statutes include, but are surely not limited to disclosure requirements under the Comprehensive Environmental Response, Compensation & Liability Act, 42 U.S.C. § 9603 (1994) (notification requirements respecting released substances); Federal Water Pollution Control Act, 33 U.S.C. § 1318 (1994) (requirements for records, reports, and inspections); Safe Drinking Water Act, 42 U.S.C. §§ 300g-3 (required notices), 300j-4 (1994) (records and inspections); Solid Waste Disposal Act, 42 U.S.C. §§ 6906 (financial disclosure), 6921 (identification of wastes), 6924(s) (recordkeeping), 6927 (inspections), 6934 (monitoring, testing, and analysis), 6939b (1994) (mixed waste inventory reports

ing an extensive, often expensive,[135] and admirably efficient way to do so. But, if this is all they accomplish, the compliance policies appear to be overly generous. Although the "bedrock criterion . . . should be compliance with all regulations,"[136] rewarding "efforts and improvements that go *beyond* compliance to make further gains in environmental performance" is critical.[137]

The second equally paradoxical and more likely outcome flows from the first. Perhaps rewarding entities for mere compliance with the law is not overly generous if compliance with the law is, as a practical matter, impossible. Modern environmental statutes have often been criticized for their complexity. Critics argue that even the best actors cannot fully comply with all environmental legal requirements.[138] If this criticism is accurate, then rewarding those who come closest to achieving an impossible goal makes sense.[139] Yet, a more straightforward and honest alter-

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and plan); Clean Air Act, 42 U.S.C. §§ 7414 (1994) (recordkeeping, inspections, monitoring, and entry), 7422 (listing of unregulated pollutants), 7427 (public notification); Emergency Planning & Community Right to Know Act, 42 U.S.C. §§ 11,001-50 (1994) (focusing, throughout the statute, on extensive disclosure requirements). In addition to these federal environmental statutes, federal agricultural and occupational safety laws require extensive disclosure. *See* Baram, *supra* note 11, at 545 (describing Occupational Safety & Health Administration audit requirements). State environmental statutes as well contain disclosure obligations mirroring or exceeding those of the federal laws. Thus, even without conducting any audits, most companies will be required to gather and report a significant amount of information.

135. *See* Orts, *supra* note 14, at 1240 ("By the year 2000, EPA estimates that expenditures made in the United States under environmental programs to control pollution will amount to approximately two percent of GNP."); Steven M. Wheeler & Edward Z. Fox, *Avoiding Environmental Liabilities: A Primer for Business*, 23 ARIZ. ST. L.J. 483, 483 (1991) ("Environmental regulation is exacting an increasingly heavy toll on American business.").

136. Pendergrass & Pendergrass, *supra* note 103, at 10,307.

137. *Id.* (emphasis added).

138. *See* discussion *supra* note 14. *See also* Banks, *supra* note 70, at 216 ("Environmental regulations have become so complex and technically difficult that compliance failures are routine, some would say inevitable, in most industrial enterprises.").

139. This would also appear to be most consistent with Congress' intent regarding the enforcement of environmental laws. "Congressional intent underlying the environmental criminal provisions is unequivocal: criminal enforcement au-

native would be to revisit the statutes themselves and create a more realistic regulatory scheme rewarding those who create compliance plans that go beyond the legal minimum. Instead, the current system does no more than reward those companies[140] that try to comply in part because full compliance is virtually impossible.

IV. CREATING A SOUND POLICY FOR COMPLIANCE PLANS

Industry has created and continues to create environmental compliance plans because it can receive substantial legal benefits for doing so.[141] Given this situation, the compliance plans' policies and rewards should be reworked to ensure that the effort expended on creating plans advances the overall goal of environmental protection.[142] Such initiatives already exist and lay the groundwork for further development.[143]

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thority should target the most significant and egregious violators." Memorandum from Earl E. Devaney, *supra* note 33, at 2.

140. This Article focuses on the corporation or other artificial entity as the environmental criminal. Most compliance policies focus on this actor as well. However, another flaw with the compliance standards is that they do not acknowledge the reality that *corporate* offenses — covered by the standards — often involve potential criminal liability of *individuals* as well.

141. Despite the flaws that exist in the current policies, companies should nevertheless be advised to create compliance plans that not only reduce the legal consequences of an environmental incident, but serve the more beneficial goal of ensuring that such incidents occur only very rarely. After all, "[i]n the final analysis, prevention comes far cheaper than mounting a criminal defense. Companies that make environmental compliance a genuine priority can avoid the consequences of the sentencing guidelines, and their officers can spend more time in the boardroom than in the courtroom." Starr & Kelly, *supra* note 70, at 10,104.

142. Indeed, in reality, the efforts of industry — regardless of motive — will have the most direct impact on whether environmental protection will succeed. *See* Orts, *supra* note 14, at 1229 ("Important as pressure from environmentalists and governmental direction are to stimulating change, in the end only the corporate community can efficiently provide the necessary organization, technology, and financial resources needed to design and implement change on the scale required."). *See also* Elliott, *supra* note 14, at 2 ("[T]he 'greening' of corporate America itself, if to be successful, must rely in large part on self-imposed corporate awareness and internal compliance auditing to complement environmental protection performed by government regulators and public watch dogs.").

143. *See infra* notes 147-62, and accompanying text.

While legal compliance is important, policies rewarding corporate initiatives must move away from rewarding those that focus solely on mere *compliance* with the law. Thus, only those with plans that reduce pollution should receive legal rewards.[144] Such a new approach would encourage voluntary efforts to prevent pollution[145] and require a showing of a direct positive impact on the environment before any legal reward would be offered.

The EPA's Environmental Leadership Program ("E.L.P.") is an initiative that recognizes this philosophy. This plan was proposed in 1993[146] and launched in April, 1995, with twelve facilities selected to participate in the pilot program.[147] This program

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144. *See* Pendergrass & Pendergrass, *supra* note 103, at 10,307 ("The primary purpose of the voluntary program should be to achieve actual improvements in our environment. Therefore the program should emphasize improved and demonstrable results."); Gary Lee, *Regulators Urged to Alter Approach to Pollution: Panel Says Government Should Prescribe Targets, Not Means, for Clean Environment*, WASH. POST, Feb. 14, 1996, at A3 (describing report of the President's Council on Sustainable Development recommending that "the government encourage industry to introduce more products that help prevent pollution and preserve natural resources.").

145. These legal rewards would be bolstered by the practical effect that many pollution prevention initiatives have business benefits for the companies employing them. For example,

> [t]wenty years ago, the typical American paper mill spewed 40 million gallons of contaminated water a day . . . . Today, the Weyerhauser Company's mill . . . releases just 1.1 million gallons of much cleaner effluent a day into the Flint River. . . . And many other paper producers, responding to tougher environmental laws and the threat of litigation, are following the same pristine path . . . . Regulations were the goad at first, but more recently some companies have made environmental performance a competitive tool. "The best companies have found a way to integrate the environment in their investment decision-making. . . . They have found ways to use less water, less energy and still increase production, which is a competitive advantage."

John Holusha, *Pulp Mills Turn Over a New Leaf; Some Companies See Green as Just Good Business*, N.Y. TIMES, Mar. 9, 1996, at D1 (quoting John Ruston, Environmental Defense Fund paper industry specialist).

146. The EPA proposed the E.L.P. in January, 1993. *See* 58 Fed. Reg. 4802 (Jan. 15, 1993).

147. EPA, *supra* note 25, at 2-1 (describing creation of E.L.P.). The initial twelve facilities included ten private industrial facilities and two federal facilities. Current planning calls for a full-scale implementation of the E.L.P. in January,

would require participating companies to meet stringent pollution prevention goals in exchange for public recognition as "model facilities."[148] Although much of the E.L.P. still focusses on rewarding companies that employ a superior compliance or auditing program, its inclusion of pollution prevention makes it superior to the current compliance plans. E.L.P. recognizes that "the basic components of what *should* be state-of-the-art compliance management programs . . . include *pollution prevention activities*, as well as technology exchange and conducting self-audits."[149] Again, because pollution prevention and compliance are distinctly different, it is possible and desirable to mandate that compliance plans include some form of pollution prevention to merit a legal reward.

Second, the standards for a compliance plan should focus heavily on avoiding environmental harm. The roots of these elements are already present in all three policies, in provisions that call for prevention of recurrence,[150] correction and

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1997, after the EPA selects the final policy implementation procedures. *See* EPA, *Timeline Environmental Leadership Program* (Sept. 1995).

148. The E.L.P. is described in more detail in Buente et al., *supra* note 21, at 92 ("The concept behind the program would be to demand a high level of environmental performance by companies participating in the program (i.e., companies would have to go beyond compliance), with participating facilities possibly being afforded some recognition for participating in the program."). In addition, other incentives for participation in the E.L.P. include "[p]ublic recognition for their E.L.P. participation; [a] limited period in which to correct violations disclosed to EPA and the States during the E.L.P. pilot program[; and] [p]articipation in a joint initiative with EPA and the States to identify methods for reducing inspections and streamlining reporting requirements." Information Sheet, *in EPA Launches Environmental Leadership Program* (Apr. 1995).

149. Press Release, *in EPA Launches Environmental Leadership Program*, *supra* note 148, at 2 (emphasis added). *See also* Statement of Carol M. Browner, *id.* ("[W]e're going to help businesses put their time, their money, and their creativity into finding the very best ways to clean up pollution and prevent pollution."); Statement of Steven Herman, *id.* ("[E]ach facility will conduct specific projects which emphasize such elements of environmental leadership as the use of pollution prevention or other innovative technologies to reduce risk, as well as the employment of environmental auditing and information management systems to track and measure improvements in environmental and compliance performance.").

150. EPA, *supra* note 18, at 66,709.

remediation,[151] evaluation of cross-media transfers of pollution,[152] and rewards for "[i]nnovative [a]pproaches [to compliance]."[153] However, these features should be considered more heavily in evaluating compliance plans, rather than emphasizing the technical management organization requirements. The direct link to environmental compliance should determine which aspects of the compliance plans should be priorities and how great the legal rewards for a specific compliance plan should be.[154]

In addition, the compliance efforts must focus more on outcome-oriented solutions.[155] The current policies focus on the *process* of ensuring that violations do not occur.[156] While parties should receive some reward for effort, the actual outcome that a plan achieves deserves greater attention. This shift in priorities would help redirect the focus to protecting the environment rather than obtaining legal advantages.

Such a philosophy — focussing on pollution reduction goals rather than regulatory fastidiousness — lies behind the EPA's new "Project XL."[157] Project XL does *not* focus on compliance

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151. *Id.*

152. DOJ, *supra* note 61.

153. Proposed Sentencing Guidelines, *supra* note 73, § 9D1.1(a)(8).

154. This is not intended to undermine the importance of those other elements of the plan that concern management. Sound management should lead, indirectly, to prevention of environmental harm. However, requirements *directly* linked to the environmental outcome should receive priority over those related to internal management.

155. *See* Lee, *supra* note 141, at A3 ("[E]nvironmental regulations should emphasize the performance targets that industries should aim for rather than prescribing the means they should use to achieve the goals. . . . The performance targets should be based on national standards designed to protect ecosystems and public health . . . "); Stahl, *supra* note 22, at 21 (advocating "problem-oriented compliance priorities *based on environmental or human health risks*, noncompliance patterns associated with industry sectors, communities, and other geographic areas, and medium-specific issues.") (emphasis added).

156. *See* Fiorelli & Rooney, *supra* note 70, at 496-97 ("The [Proposed Sentencing Guidelines] also contain[] too many command and control requirements. This runs contrary to recognized management approaches that establish objectives and leave it to the entity to fashion a program that efficiently achieves those objectives.").

157. For a more comprehensive discussion of "Project XL," see Lee, *supra* note 144, at A3; *see also* Beth S. Ginsberg & Cynthia Cummis, *EPA's Project*

plans, and so it offers, at best, a helpful analogy. Project XL seeks to provide "regulated parties the flexibility to replace the requirements of the current system with their own alternative strategies to achieve better bottom-line environmental results."[158] Although the EPA envisioned Project XL as a creative alternative to the regulatory scheme,[159] the analogy is appropriate. This initiative attempts to replace means-oriented requirements with outcome-oriented rewards.[160] Although measuring environmental benefit may be difficult at times, it is not an impossible task.[161] Because compliance plans should focus ulti-

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XL: A Paradigm for Promising Regulatory Reform, 26 Envtl. L. Rep. (Envtl. L. Inst.) 10,059 (Feb. 1996).

158. Letter from David Gardiner, EPA Assistant Administrator, to Colleagues (May 25, 1995) (on file with author).

159. *See* John Atcheson, *Can We Trust Verification*, ENVTL. F., July/Aug. 1996, at 15, 21 ("The administration's Project XL and Common Sense Initiative were developed to test alternative ways of accomplishing environmental objectives that emphasize performance, allow flexibility, encourage prevention and efficiency at a facility level, while assuring accountability.").

160. The projects accepted for XL must "achieve better environmental results than would have been attained through full compliance with regulations." EPA, XL-Regulatory Reinvention Pilot Projects Fact Sheet (1995). These better environmental results can "be achieved directly through the environmental performance of the project or through the reinvestment of the cost savings from the project in activities that produce greater environmental results." EPA, Solicitation of Proposals & Request for Comment, 60 Fed. Reg. 27,282, 27,287 (1995). *See also* John H. Cushman & Timothy Egan, *Battles on Conservation Are Reaping Dividends*, N.Y. TIMES, July 31, 1996, at A1, A12 ("Project XL . . . encourages companies to achieve greater pollution control than the law requires, but gives them almost complete flexibility in doing so.").

161. In evaluating ways to measure environmental success, Project XL's creators suggested that

> [p]rojects that are chosen should be able to achieve environmental performance that is superior to what would be achieved through compliance with current and reasonably anticipated future regulation. 'Cleaner results' can be achieved directly through the environmental performance of the project or through the reinvestment of the cost savings from the project in activities that produce greater environmental results.

EPA, *Selection Criteria for XL Projects* (1995). Other commentators contend that determining what is better environmental performance is a subjective and difficult endeavor. *See generally* Ginsberg & Cummis, *supra* note 157.

mately on the "bottom line," this model is worth exploring more fully.

Such outcome-oriented approaches are most feasible when one considers industry-specific compliance initiatives. These initiatives should provide incentives for particular industries[162] to create environmental compliance plans geared specifically for them, rather than encourage companies to follow the more general guidelines the current policies reward.[163] A movement toward setting individual industry standards might mean that companies will invest "compliance" dollars to obtain ascertainable environmental benefits.

This "sector approach" lies behind the EPA's "Common Sense Initiative," an effort to focus environmental expertise on particular industrial sectors such as iron/steel, electronics/computers, metal plating/finishing, auto assembly, petroleum refining, and printing.[164] As the EPA develops expertise in each of these sectors, it should become better able to provide guidelines not only on processes and procedures, but also for the "promoti[on of] pollution prevention opportunities"[165] and "innovative environmental technologies."[166] Similar sector-by-sector study should continue in the compliance area as well. By focussing on outcome and developing the scientific ability to improve outcome, the EPA can assist in ensuring that desirable *ends* as well as *means* are achieved through environmental compliance efforts.[167]

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162. *See, e.g.*, Holusha, *supra* note 145, at D1 (describing pollution reduction initiatives benefitting paper industry).

163. *See* Stahl, *supra* note 22, at 20 (advocating new regulatory approach that "targets industry sectors, communities, or geographic areas . . . ").

164. EPA, *supra* note 25, at 2-11.

165. *Id.*

166. *Id.*

167. In the current format, however,

> the new environmental sentencing guidelines for organizations and federal policies concerning environmental auditing have reflexive aspects to the extent they provide incentives for companies to adopt internal review processes that take the environment into account. A substantial shortcoming, however, is a tendency to encourage an attitude of defensive relexion . . . [t]his prospect is in contrast to . . . a proactive, self-critical approach to environmental issues, rather than a defensive focus on what the command-and-control legal system views

V. CONCLUSION

Today, many members of the regulated community spend a great deal of time and resources developing environmental compliance plans. If a legal violation occurs that results in potential criminal liability, these members receive substantial legal benefits from having such a plan in place. Compliance programs are themselves a positive development in environmental enforcement. However, to date, environmental compliance plans have been defined too narrowly. The compliance plans that the EPA and DOJ policies encourage focus too heavily on creating *means* for good *legal* conduct. However, policy initiatives must reward the *results* of good *environmental* conduct. These goals are not mutually exclusive, nor should they be at cross-purposes with each other. The latter goal has been overlooked due to the process-oriented compliance model currently in vogue. As environmental criminal law matures and continues to create ways to ameliorate the fate of well-intentioned violators, it must abandon the narrow definition of "compliance." A new view should emerge that is an outcome-oriented active vehicle for improving the environment.

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as important.

Orts, *supra* note 14, at 1283-84.