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ENVIRONMENTAL AUDITING: DEVELOPING A “PREVENTIVE MEDICINE” APPROACH TO ENVIRONMENTAL COMPLIANCE

Courtney M. Price and Allen J. Danzig***

I. INTRODUCTION

Achieving and maintaining compliance with the nation's environmental laws and regulations is a primary goal of federal and state regulatory agencies. As environmental regulation has matured, the emphasis has expanded from initial compliance to continuous compliance. Recent major environmental incidents have demonstrated the critical need for companies to reassess their environmental programs¹ and for regulatory agencies to develop new compliance approaches. In developing compliance strategies under the environmental statutes, the United States Environmental Protection Agency (EPA) has found that traditional administrative and judicial enforcement efforts are not always sufficient to achieve a high level of compliance from all regulated entities, including industry, municipalities and federally-owned facilities. This has become particularly apparent under the environmental programs which regulate hazardous wastes and toxic substances. To address this issue, EPA has explored the concept of environmental auditing² as an innova-

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The views expressed in this article are the personal views of the authors. No official support or endorsement by the United States Environmental Protection Agency is intended or implied.

1. See Mays, *Environmental Audits: A New Enforcement Tool*, EPA JOURNAL, June 1985, at 27.

2. Several books have been written to assist corporations in developing environmental audit programs. See e.g., H. BLAKESLEE & T. GRABOWSKI, *A PRACTICAL GUIDE TO PLANT ENVIRONMENTAL AUDITS* (1985); J. GREENO, G. HEDSTROM & M. DiBERTO, *ENVIRONMENTAL AUDITING—FUNDAMENTALS AND TECHNIQUES* (1985); L. HARRISON, *THE MCGRAW HILL ENVIRONMENTAL AUDITING HANDBOOK* (1984); T. TRUITT, D. BERZ, D. WEINBERG, J.B. MOLLOY, G. GOLDMAN, G. PRICE & B. FLORENCE, *ENVIRONMENTAL AUDIT HANDBOOK—BASIC PRINCIPLES OF ENVIRONMENTAL COMPLIANCE AUDITING* (2d ed. 1983).

tive approach to promote increased compliance by the regulated community.

"Environmental auditing is a systematic, documented, periodic and objective review by regulated entities of facility operations and practices related to meeting environmental requirements."³ Auditing has been more broadly defined as "an independent appraisal of a corporation's environmental control systems and its environmental assets and liabilities to enable management to make rational decisions relating to environmental matters."⁴ Audits can be used to "verify compliance with environmental requirements; evaluate the effectiveness of environmental management systems already in place; or assess risks from regulated and unregulated material and practices."⁵ Auditing may also be viewed as a quality assurance check by "verifying that management practices are in place, functioning and adequate."⁶

Many corporate auditing programs, which began as a check on compliance status, have evolved into a more comprehensive audit of environmental management control systems to assess environmental risks.⁷ For example, in reviewing a corporate management system for polychlorinated biphenyls (PCBs),⁸ an audit may analyze the system and procedures for handling, storing, marking, cleaning up spills, inspecting, record keeping and annual inventorying. The audit could also look for risks not yet identified.

Audits should not be confused with the compliance monitoring activities required by environmental laws, regulations or permits. Audit programs do not replace the inspection programs of regulatory agencies;⁹ they evaluate direct compliance activities, such as obtaining permits, installing controls, monitoring compliance, reporting violations and keeping records.¹⁰

This Article will describe EPA's efforts to encourage environmental auditing by regulated entities. First, it discusses the evolution of govern-

3. U.S. Env'tl. Protection Agency, Interim Environmental Auditing Policy Statement, 50 Fed. Reg. 46,504 (1985).

4. Reed, *Environmental Audits and Confidentiality: Can What You Know Hurt You as Much as What You Don't Know?*, 13 ENVTL. L. REP. (ENVTL. L. INST.) 10,303 (Oct. 1983).

5. Interim Environmental Auditing Policy Statement, *supra* note 3, at 46,504.

6. *Id.*

7. ARTHUR D. LITTLE, INC., CURRENT PRACTICES IN ENVIRONMENTAL AUDITING, REPORT TO U.S. ENVIRONMENTAL PROTECTION AGENCY 1-2 (1984).

8. Polychlorinated biphenyls are defined as "any chemical substance that is limited to the biphenyl molecule that has been chlorinated to varying degrees or any combination of substances which contains such substance." 40 C.F.R. § 761.3 (1985).

9. See Interim Environmental Auditing Policy Statement, *supra* note 3, at 46,504.

10. *Id.*

ment and corporate interest in environmental auditing, including the benefits gained by firms which have instituted auditing programs. The Article then discusses EPA efforts to promote environmental auditing through publication of the Agency's Interim Environmental Auditing Policy Statement¹¹ and the Agency's negotiation of environmental auditing provisions in enforcement case settlement agreements. Finally, the Article discusses the major settlement agreements which contain environmental auditing provisions, and concludes with some recommendations on the appropriate use of environmental auditing in achieving EPA's goal of continuous compliance.

II. EVOLUTION OF CORPORATE ENVIRONMENTAL AUDITING PROGRAMS

Environmental auditing programs were developed for sound business reasons, primarily to assist regulated entities¹² in evaluating compliance and in managing existing and potential pollution control problems, rather than merely reacting to environmental crises.¹³ Much of the impetus for auditing programs has come from a number of recent cases in which the release of chemicals in the environment has caused and continue to cause businesses to incur major costs.¹⁴ A highly toxic cloud of methyl isocyanate released from the Union Carbide plant in Bhopal, India, which claimed about 2000 lives and 200,000 injuries and led to damage claims of billions of dollars, is the most dramatic example of a situation which has caused some companies to reassess their environmental and safety problems.¹⁵ Auditing programs also evolved, in part, from Securities and Exchange Commission (SEC) enforcement case settlements, which required environmental auditing.¹⁶ As a result of these developments, several hundred major corporations in the country have voluntarily developed environmental audit programs.¹⁷ Realizing that they need to encourage a higher level of corporate attention to environ-

11. Interim Environmental Auditing Policy Statement, *supra* note 3, at 46,504.

12. Regulated entities include private firms and public agencies with facilities subject to environmental regulation. Public agencies include federal, state or local agencies, and special purpose organizations such as regional sewage commissions. *Id.* at 46,504 n.1.

13. *Id.* at 46,504.

14. Mays, *supra* note 1, at 27.

15. *Id.* See also Hall, *Environmental Audits—A Corporate Response To Bhopal*, ENVTL. FORUM, Aug. 1985, at 36.

16. See *In re Occidental Petroleum Corp.*, [1980 Transfer Binder] FED. SEC. L. REP. (CCH) ¶¶ 82,622, 83,356 n.34 (1980); *In re United States Steel Corp.*, [1979-1980 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 82,319 (1979); SEC v. Allied Chem. Corp., No. 77-0373 (D.D.C. 1977). See also Reed, *supra* note 4, at 10,303-04.

17. Address by Francis Phillips, Deputy Regional Administrator, U.S. Env'tl. Protection

mental compliance, the federal government and state regulatory agencies have also taken a strong interest in auditing.

The benefits of environmental auditing are tangible and significant.¹⁸ First, firms face potential civil and criminal liability under state environmental laws and the environmental statutes administered by EPA, such as: the Clean Air Act,¹⁹ the Clean Water Act,²⁰ the Resource Conservation and Recovery Act (RCRA),²¹ the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA)²² and the Toxic Substances Control Act (TSCA).²³ The new EPA *Policy on Civil Penalties*, issued February 16, 1984, directs that penalties must, at a minimum, reflect the economic benefit or savings of delayed compliance,

Agency, Region VI, at the Government Institutes, Inc. Environmental Auditing Course (Apr. 18, 1985).

18. See generally ARTHUR D. LITTLE, INC., BENEFITS OF ENVIRONMENTAL AUDITING, REPORT TO U.S. ENVIRONMENTAL PROTECTION AGENCY (Dec. 1984) [hereinafter BENEFITS OF ENVIRONMENTAL AUDITING]; J. GREENO, G. HEDSTROM & M. DiBERTO, *supra* note 2, at 11-21; L. HARRISON, *supra* note 2, at 1-9 to 1-21.

19. 42 U.S.C. §§ 7401-7642 (1982). Clean Air Act § 113(b) provides up to \$25,000 civil penalties per day of violation. CAA § 113(b), 42 U.S.C. § 7413(b). Section 113(c) provides criminal penalties of \$25,000 and jail terms of up to one year for certain knowing violations. *Id.* § 113(c), 42 U.S.C. § 7413(c).

20. 33 U.S.C. §§ 1251-1376 (1982) (minor subsequent amendments have been enacted). Section 309(b) of the Clean Water Act provides up to \$10,000 civil penalties per day of violation, including a permit limitation or condition. CWA § 309(b), 33 U.S.C. § 1319(b) (1982). Section 309(c) provides criminal penalties of \$25,000 and jail terms of up to one year for certain knowing violations. *Id.* § 309(c), 33 U.S.C. § 1319(c) (1982).

21. 42 U.S.C. §§ 6901-6987 (1982). RCRA provides a comprehensive program for the cradle-to-grave management of hazardous wastes. This program covers generators, RCRA § 3002, 42 U.S.C. § 6922 (1982), and transporters, *id.* § 3003, 42 U.S.C. § 6923 (1982), as well as facilities which treat, store or dispose of hazardous waste. *Id.* § 3004, 42 U.S.C. § 6924 (1982). RCRA provides for civil penalties of up to \$25,000 per day. *Id.* § 3008(g), 42 U.S.C. § 6928(g). RCRA criminal penalties include

knowingly transporting any hazardous waste to a facility that does not have a permit; knowingly treating, storing, or disposing of any hazardous waste without a permit or in violation of any material condition of a permit; knowingly making any false material statement in any document filed, maintained, or used to comply with RCRA; and, for any person who has handled or is handling any hazardous waste, knowingly destroying, altering, or concealing any record required by regulations to be maintained.

Id. § 3008(d), 42 U.S.C. § 6928(d) (1982).

22. 42 U.S.C. §§ 9601-9657 (1982). CERCLA creates a fund for cleaning up abandoned hazardous waste sites and imposes strict joint and several liability on persons who arrange for treatment or disposal, or who arranged with a transporter for transportation for treatment or disposal of hazardous substances at such facilities. CERCLA §§ 106-107, 42 U.S.C. §§ 9606-9607 (1982).

23. Section 16(a)(1) of TSCA provides for civil penalties of up to \$25,000 per day of violation of the Act. TSCA § 16(a)(1), 15 U.S.C. § 2615(a)(1) (1982). Section 16(b) provides for criminal penalties of \$25,000 per day of violation, or imprisonment for up to one year, for knowing or willful violations. *Id.* § 16(b), 15 U.S.C. § 2615(b).

as well as the seriousness or gravity of the violation.²⁴ Violators also face potential environmental liability for violations of certain SEC disclosure requirements,²⁵ and tort liability arising from personal injury, property damage or toxic tort claims.²⁶ Indeed, environmental audits may be required in order for a firm to obtain pollution liability insurance.²⁷

Audits may be needed especially where a company wants to purchase, sell, lease or modify facilities. The company must be aware of any real or potential liabilities associated with the transaction to ensure that undisclosed liabilities will not come back to affect future operations.²⁸ The audit will also assist facility managers in understanding and interpreting regulatory requirements and potential liabilities.²⁹ Thus, an environmental audit provides corporate management with assurance that potential problems have been addressed before serious accidents, government enforcement or private lawsuits may result.³⁰

Second, firms can save money by assessing potential environmental violations and risks as well as by making capital spending decisions to correct violations, to reduce risks and to maintain proper operation of treatment systems.³¹ For example, a firm may realize cost savings through process changes which reduce the amount of raw materials needed and which result in less pollution at the end of the manufacturing process.³² Thus, when a corporation must obtain a new National Pollutant Discharge Elimination System (NPDES) permit, it may choose to review not just the basis for the permit, but the entire manufacturing process to determine if cost-effective changes may be needed.³³ A com-

24. See *infra* notes 98-106 and accompanying text for a discussion of the *Policy on Civil Penalties*.

25. See Securities and Exchange Act of 1934, 15 U.S.C. §§ 78a-78kk (1982). SEC regulations require all publicly held companies to disclose the effects of compliance with, and legal proceedings under, federal and state law through public filings to the SEC. Regulation S-K, Item 101(c)(1)(xii), 17 C.F.R. § 229.101(c)(1)(xii) (1985); Instruction 5 to Item 103, 17 C.F.R. § 299.103 (1985). Significant misstatements or omissions could result in criminal or civil liability under the federal securities laws. See L. HARRISON, *supra* note 2, at 2-109 to 2-119.

26. See Garrett, *Compensating Victims of Toxic Substances: Issues Concerning Proposed Legislation*, 13 ENVTL. L. REP. (ENVTL. L. INST.) 10,172 (June 1983).

27. H. BLAKESLEE & T. GRABOWSKI, *supra* note 2, at 5-6.

28. J. GREENO, G. HEDSTROM & M. DiBERTO, *supra* note 2, at 13.

29. *Id.* at 14. See also L. HARRISON, *supra* note 2, at 29.

30. See J. GREENO, G. HEDSTROM & M. DiBERTO, *supra* note 2, at 13-14.

31. BENEFITS OF ENVIRONMENTAL AUDITING, *supra* note 18, at 6-8, 11-14; Friedman, *Managing and Resolving Corporate Environmental Issues*, ENVTL. FORUM, Feb. 1985, at 28-31.

32. Friedman, *supra* note 31, at 31.

33. *Id.*

pany may also effect such savings by implementing similar changes at other company plants.

Third, an environmental auditing program can result in an improved relationship between a firm, regulatory agencies and the public, particularly where audit-discovered violations are identified and corrected within a relatively short period.³⁴ Further, EPA generally bases its enforcement priorities on industries with significant compliance problems.³⁵ Also, in developing an appropriate enforcement response to particular violations, EPA may give some consideration to expeditious, good faith efforts to achieve compliance.³⁶

Finally, regulatory agencies such as EPA obtain significant benefits from environmental auditing programs. These benefits include better assurances of compliance from regulated entities, more efficient use of government inspection and enforcement resources, improved cooperation with companies, better compliance information and useful information about audit systems.³⁷ Thus, environmental auditing can significantly complement the government's efforts to achieve continuous compliance.

While the benefits of auditing programs are significant, regulated entities have perceived some risks in developing such programs. Audit reports may generate information on violations of a pollution control statute which may not be otherwise discovered by a regulatory agency during its normal compliance monitoring activities. Such information could form the basis for an EPA or state enforcement action.³⁸ An audit report can also create potential criminal liability where the government can establish that corporate officials knew of violations.³⁹ Finally, the environmental statutes authorize private citizens to sue violators through "citizen suit" provisions.⁴⁰ Of course, a well-run audit program should expeditiously correct identified violations and other potential liabilities.

34. See H. BLAKESLEE & T. GRABOWSKI, *supra* note 2, at 5; M. WEISS, ISSUES OF CONFIDENTIALITY AND DISCLOSURE IN ENVIRONMENTAL AUDITING, REPORT TO U.S. ENVIRONMENTAL PROTECTION AGENCY 2 (1984).

35. See generally OFFICE OF THE ADM'R, U.S. ENVTL. PROTECTION AGENCY, AGENCY OPERATING GUIDANCE, FY 1986-1987, at 1-2 (discussing the EPA Priority List for Fiscal Year 1986-1987).

36. See U.S. ENVIRONMENTAL PROTECTION AGENCY, A FRAMEWORK FOR STATUTE-SPECIFIC APPROACHES TO PENALTY ASSESSMENTS—IMPLEMENTING EPA'S POLICY ON CIVIL PENALTIES 19-20 (1984) [hereinafter cited as IMPLEMENTING EPA'S POLICY ON CIVIL PENALTIES].

37. BENEFITS OF ENVIRONMENTAL AUDITING, *supra* note 18, at 1.

38. See Reed, *supra* note 4, at 10,304.

39. *Id.*

40. See, e.g., RCRA § 7002, 42 U.S.C. § 6972 (1982). See also Miller, *Private Enforcement of Federal Pollution Control Laws*, pt. I, 13 ENVTL. L. REP. (ENVTL. L. INST.) 10,309 (Oct. 1983).

There are also risks from the private sector. The audit report may contain trade secrets about the company's production process.⁴¹ Thus, firms may attempt to limit governmental access to such reports, particularly if they contain information not required to be reported under one of the environmental statutes.

To address these concerns, well-informed counsel can assist in structuring an audit system to protect particularly sensitive information through application of the attorney-client privilege and other exceptions to the discovery rules.⁴² Further, in developing an approach to encourage the growth of environmental auditing, EPA has sought to recognize the legitimate concerns of regulated entities while preserving its enforcement prerogatives.

III. DEVELOPMENT OF EPA ENVIRONMENTAL AUDITING POLICY

EPA's interest in environmental auditing evolved from recognition of mutual gains to be derived by the regulated community and the federal government. In view of recent environmental calamities and the increased complexity of environmental regulation, EPA has sought to encourage a higher level of corporate consciousness regarding compliance with environmental laws.⁴³ However, the Agency does not have sufficient resources to enforce these laws against all regulated entities who are in violation, and must consider innovative approaches to make compliance and enforcement programs more efficient. EPA has attempted to preserve its enforcement options while providing sufficient flexibility to give regulated entities an incentive to conduct audits.⁴⁴ Thus, the Agency has addressed concerns about Agency access to and use of audit reports in enforcement actions, as well as the concern for flexibility in corporate design and management of auditing programs.

In developing a policy on environmental auditing, EPA originally considered mandatory auditing programs requiring firms to hire external auditors to certify compliance with permits and other requirements. However, the Agency rejected this concept.⁴⁵ Regulated entities have strongly objected to using audits as an additional regulatory program or requirement.⁴⁶ EPA subsequently considered less structured methods to

41. Reed, *supra* note 4, at 10,304.

42. *See id.* at 10,308.

43. *See Mays, supra* note 1, at 27.

44. *Id.*

45. For a discussion of the evolution of EPA policymaking in environmental auditing, see L. HARRISON, *supra* note 2, at 5-3 to 5-21.

46. *See* OFFICE OF POLICY, PLANNING & EVALUATION, U.S. ENVTL. PROTECTION

encourage achievement of auditing goals, and encouraged auditing through participation in numerous auditing conferences, workshops and seminars sponsored by EPA, states, localities, trade associations and professional organizations.⁴⁷ EPA's policy work in this area culminated in November, 1985, with the publication of the Interim Environmental Auditing Policy Statement.⁴⁸

A. *The Environmental Auditing Policy Statement*

1. Encouraging environmental auditing

The *Environmental Auditing Policy Statement* initially provides that: "It is EPA policy to encourage the use of environmental auditing by regulated entities [including federal facilities] to help achieve and maintain compliance with environmental laws and regulations, as well as to help identify and correct unregulated environmental hazards."⁴⁹ While state and local regulatory agencies have independent jurisdiction over regulated entities, EPA encourages states to adopt the *Environmental Auditing Policy Statement* and approach auditing in a consistent manner.⁵⁰ EPA also encourages regulated entities to adopt sound environmental management practices that improve environmental performance, including programs that ensure the adequacy of internal systems to achieve, maintain and monitor compliance.⁵¹

The policy further states that EPA will not dictate or interfere with the environmental practices of private or public organizations,⁵² and will not prescribe minimum requirements for audit programs. Nonetheless, to provide some guidance to regulated entities which want to develop environmental audits, the policy outlines the common elements of effective audits:

- (1) explicit management support for environmental auditing and commitment to follow-up on audit findings;
- (2) an environmental audit function independent of audited activities;
- (3) adequate team staffing and auditor training;

AGENCY, PUBLIC COMMENTS RECEIVED ON THE EPA INTERIM ENVIRONMENTAL AUDITING POLICY STATEMENT (1986) [hereinafter cited as PUBLIC COMMENTS].

47. Speech by James Edward, U.S. Env'tl. Protection Agency, EPA's Environmental Auditing Outlook: Compliance and Enforcement's View, at the Edison Electric Institute (Sept. 27, 1984).

48. Interim Environmental Auditing Policy Statement, *supra* note 3, at 46,505-08.

49. *Id.* at 46,504.

50. *Id.* at 46,506.

51. *Id.* at 46,505.

52. *Id.*

- (4) explicit audit program objectives, including scope, resources and frequency;
- (5) a process which collects, analyzes, and interprets documents and information on compliance and management effectiveness sufficient to achieve audit objectives;
- (6) specific procedures to promptly prepare candid, clear and appropriate written reports on audit findings, corrective actions and schedules for implementation; and
- (7) quality assurance procedures to assure that the environmental audits are accurate and thorough.⁵³

The policy emphasizes that ultimate responsibility for the environmental performance of the facility lies with top management, and that independent internal or third party auditors should conduct the audit.⁵⁴ Corporate officials have agreed that top management support and responsibility for environmental decisions are critical to successful auditing programs.⁵⁵

2. Agency requests for audit reports

Second, the policy addresses the extent to which EPA may make requests to obtain audit reports. The extent of Agency access to and use of audit information in enforcement has created the greatest concern among regulated entities.⁵⁶ In addressing this issue, EPA has attempted to balance the use of its broad authority to obtain compliance-related information with these concerns.

EPA can obtain audit generated information in several ways. The major environmental statutes authorize EPA to require extensive monitoring, recordkeeping and reporting schemes relating to compliance with these laws.⁵⁷ Pursuant to this authority, EPA has promulgated regula-

53. *Id.* at 46,507.

54. *Id.* at 46,505.

55. *See, e.g.,* Freedman, *Organizing and Managing Effective Corporate Environmental Protection Programs*, ENVTL. FORUM, May 1984, at 40-41. In describing the Occidental Petroleum Corporation's environmental management program, Mr. Freedman states: "Top corporate management now is strongly committed to and involved in the company's environmental management programs, as perhaps best demonstrated by the Board of Directors' [sic] having taken the relatively unusual step of having established an Environment Committee composed of board members." *Id.* at 41.

56. *See generally* PUBLIC COMMENTS, *supra* note 46.

57. *See, e.g.,* CWA § 308, 33 U.S.C. § 1318 (1982); CAA § 114, 42 U.S.C. § 7414 (1982). In *United States v. Tivian Laboratories, Inc.*, 589 F.2d 49, 55 (1st Cir. 1978), *cert. denied*, 442 U.S. 942 (1979), the court upheld EPA's broad authority to make information requests under these statutes.

tions on monitoring, recordkeeping and governmental access.⁵⁸ Thus, information which is generated by an audit containing required reporting data, such as a Clean Water Act discharge monitoring report, must be reported to EPA or a state agency although it does not have to be reported as part of the audit.⁵⁹ In addition, EPA has authority to request production of audit files and reports where reasonably related to authorized investigations under several statutory provisions, even if the information is not required to be reported.⁶⁰ The Agency can obtain access to information that is relevant to an authorized enforcement investigation, including information used to prepare audits and the audit reports themselves.⁶¹ Finally, audit reports could be obtained by governmental or private parties through discovery in civil litigation.⁶²

Recognizing that routine Agency requests may have some inhibiting effect on auditing programs, the policy statement provides that "EPA will *not* routinely request environmental audit reports."⁶³ At the same time, EPA maintains its authority to request and receive information in audit reports under the various environmental statutes.⁶⁴ EPA may require such reports where consent decrees contain audit provisions with reporting requirements, where a company's management practices are raised as a defense, or where state of mind is a relevant element of inquiry.⁶⁵ Importantly, the policy recognizes that regulated entities have continuing obligations to monitor, record or report information required under environmental statutes, regulations or permits, and that EPA has access to that information.⁶⁶

Industry commentators on the *Environmental Auditing Policy Statement* felt that EPA did not go far enough to limit its policy on access to audit reports. They also felt that access should be limited to bad faith efforts to conceal evidence of violations or criminal investigations.⁶⁷

58. See, e.g., Clean Water Act—National Pollutant Discharge Elimination System (NPDES) regulations, 40 C.F.R. § 122 (1985).

59. See ENVTL. L. INST., ENVIRONMENTAL AUDIT ISSUE PAPER: DUTIES TO REPORT OR DISCLOSE INFORMATION ON THE ENVIRONMENTAL ASPECTS OF BUSINESS ACTIVITIES, REPORT TO U.S. ENVIRONMENTAL PROTECTION AGENCY 4 (1985).

60. *Id.*

61. See *Mobil Oil Corp. v. EPA*, 13 ENVTL. L. REP. (ENVTL. L. INST.) 20,635 (N.D. Ill. 1982), *aff'd*, 716 F.2d 1187 (7th Cir. 1983); *Public Serv. Co. v. EPA*, 509 F. Supp. 720 (S.D. Ind. 1981), *aff'd*, 682 F.2d 626 (7th Cir. 1982), *cert. denied*, 459 U.S. 1127 (1983).

62. See *Reed*, *supra* note 4, at 10,305.

63. Interim Environmental Auditing Policy Statement, *supra* note 3, at 46,505 (emphasis in original).

64. *Id.*

65. *Id.*

66. *Id.*

67. See PUBLIC COMMENTS, *supra* note 46, comments of GPU Service Corp.

EPA rejected this line-drawing since many Agency legal officials felt that such a limited set of circumstances could appear to offer a defense to those unwilling to provide required or requested information, and thus limit circumstances where EPA would request audit reports.

Nonetheless, with counsel's assistance to set up an audit system, regulated entities can take certain steps to protect audit generated information. While the Federal Rules of Civil Procedure would generally favor disclosure of audit information,⁶⁸ a company may attempt to demonstrate that one of the exceptions to the discovery rules applies.⁶⁹ These include the attorney-client privilege,⁷⁰ the work product doctrine⁷¹ and the privilege for self-evaluative documents.⁷² However, it may not be practical to bring the entire audit process within one of these exceptions given the regulated entity's interest in developing corporate-wide support and technical expertise for an audit program.

3. EPA enforcement response to environmental auditing

Next, the *Environmental Auditing Policy Statement* addresses the impact of environmental audit programs on EPA enforcement response. The Agency examined the extent to which it could reduce the potential disincentives for auditing consistent with maintenance of a strong en-

68. FED. R. CIV. P. 26(b)(1) states:

Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

69. For a discussion on protecting the confidentiality of environmental audits, see L. HARRISON, *supra* note 2, at 4-3 to 4-15; Reed, *supra* note 4, at 10,305-07.

70. To demonstrate the attorney-client privilege, the following elements must be present: (1) the communication at issue must have been made as part of legal advice given by an attorney; (2) the communication must be between attorney and client; and (3) the communication must be treated in a confidential manner. The privilege can be waived through voluntary disclosure by the holder of the privilege. MCCORMICK ON EVIDENCE §§ 87-97 (E. Cleary 3d ed. 1984).

71. The work product doctrine applies to documents, notes and other tangible things prepared in anticipation of litigation. The protection is generally lifted if the party seeking discovery has substantial need of the materials in the preparation of his case and is unable without undue hardship to obtain the substantial equivalent by other means. See FED. R. CIV. P. 26(b)(3). An attorney's mental impressions, conclusions, opinions or legal theories may be protected whether or not a showing is made. See *Upjohn Co. v. United States*, 449 U.S. 383 (1981).

72. The self-evaluation privilege may be established by showing: (1) an internal review process serves an important public interest; (2) disclosure would cut off candid reviews; and (3) preparation of the reviews is for internal use only. See Reed, *supra* note 4, at 10,306. However, courts have been unwilling to apply the privilege to prevent disclosure to a government agency. See *Federal Trade Comm'n v. TRW, Inc.*, 628 F.2d 207, 210 (D.C. Cir. 1980).

forcement program.⁷³ In other words, where a violator institutes an environmental auditing program, should the government reduce its compliance monitoring or reduce enforcement responses to violations that are either alleged in an enforcement action or discovered by an audit?

As with EPA access to audit reports, the appropriate EPA enforcement response to environmental auditing does not present the Agency with significant legal constraints. The environmental statutes and case law generally allow EPA flexibility in developing enforcement responses to environmental violations. Several courts have held that the duty to find a violation is not mandatory.⁷⁴ Where EPA makes a finding that a violation exists, EPA generally must take some type of formal enforcement action (i.e., either administrative or judicial) under the Clean Water Act,⁷⁵ under the Clean Air Act⁷⁶ or under RCRA.⁷⁷ All statutes authorize EPA to choose the type of formal enforcement response.⁷⁸ In addition, while the environmental statutes provide EPA with authority to obtain substantial penalties,⁷⁹ the law does not mandate that EPA obtain a certain level of penalty or other relief in an enforcement case.⁸⁰

The *Environmental Auditing Policy Statement* provides that "EPA will not promise to forgo inspections, reduce enforcement responses, or offer other such incentives in exchange for implementation of environmental auditing or other sound environmental practice."⁸¹ While audits may complement inspections, they do not provide a substitute for regulatory oversight.⁸² However, the Agency recognizes that, in setting inspec-

73. See ENVTL. L. INST., ENVIRONMENTAL AUDIT ISSUE PAPER: ENFORCEMENT RESPONSE, REPORT TO U.S. ENVIRONMENTAL PROTECTION AGENCY 4 (1985) [hereinafter cited as ENFORCEMENT RESPONSE].

74. *Sierra Club v. Train*, 557 F.2d 485 (5th Cir. 1977); *Caldwell v. Gurley Ref. Co.*, 533 F. Supp. 252 (E.D. Ark. 1982). *Contra* *South Carolina Wildlife Fed'n v. Alexander*, 457 F. Supp. 118 (D.S.C. 1978).

75. See *South Carolina Wildlife Fed'n v. Alexander*, 457 F. Supp. 118, 131 (D.S.C. 1978); *People ex rel. Scott v. Hoffman*, 425 F. Supp. 71, 77 (S.D. Ill. 1977). *But see* *Sierra Club v. Train*, 557 F.2d 485, 490 (5th Cir. 1977).

76. See *Council of Commuter Orgs. v. Metropolitan Transit Auth.*, 683 F.2d 663 (2d Cir. 1982); *Luckie v. Gorsuch*, 13 ENVTL. L. REP. (ENVTL. L. INST.) 20,400 (D. Ariz. 1983); *Conoco, Inc. v. Gardebring*, 503 F. Supp. 49, 51 (N.D. Ill. 1980). *Contra* *Kentucky ex rel. Hancock v. Ruckelshaus*, 497 F.2d 1172, 1177 (6th Cir. 1974), *aff'd on other grounds sub nom.*, *Hancock v. Train*, 426 U.S. 167 (1976); *New England Legal Found. v. Costle*, 475 F. Supp. 425, 436 (D. Conn. 1979), *aff'd in part, rev'd in part*, 632 F.2d 936 (2d Cir. 1980).

77. See *Luckie v. Gorsuch*, 13 ENVTL. L. REP. (ENVTL. L. INST.) 20,400 (D. Ariz. 1983).

78. See ENFORCEMENT RESPONSE, *supra* note 73, at 9-10.

79. See *supra* notes 19-23.

80. See ENFORCEMENT RESPONSE, *supra* note 73, at 9-10.

81. *Interim Environmental Auditing Policy Statement*, *supra* note 3, at 46,505.

82. *Id.*

tion priorities, "facilities with a good compliance history may be subject to fewer inspections."⁸³

Similarly, EPA states that it will not reduce its enforcement responses or offer other incentives in exchange for auditing.⁸⁴ However, the Agency explains that, in developing a particular enforcement response to violations, "EPA policy is to take into account, on a case-by-case basis, the honest and genuine efforts of regulated entities to avoid and promptly correct environmental problems."⁸⁵ Reasonable efforts to avoid noncompliance, expeditious correction of environmental problems discovered through audits or other means, and implementation of measures that will prevent the recurrence of these problems may be considered by EPA as honest and genuine efforts to assure compliance.⁸⁶

Industry commentators on the *Environmental Auditing Policy Statement* have sought a more definitive statement on the use of discretion in levying penalties where an auditing program exists.⁸⁷ While EPA does not provide such a statement, it has provided additional guidance on enforcement response in related policy statements and has agreed to use some enforcement discretion in negotiating consent decrees with audit provisions.⁸⁸

The *Agencywide Compliance and Enforcement Strategy*⁸⁹ directs EPA to select enforcement responses on a case-by-case basis after considering: (1) the gravity of the violation in terms of environmental impact and effect on EPA's ability to carry out its programs; (2) the reasons why the violation occurred; and (3) the nature of the violator, including its compliance record and the economic benefit it gained as a result of the violation.⁹⁰ Many EPA program-specific enforcement policies further set enforcement priorities for certain categories of violations.⁹¹ For example, under the *RCRA Enforcement Response Policy*, a primary enforcement priority is all Class I groundwater violations.⁹² Further, EPA policy sets categories of violations for which cash penalties must be

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.* at 46,505-06.

87. See PUBLIC COMMENTS, *supra* note 46, comments of GPU Service Corp.

88. For a discussion of environmental audit provisions in EPA consent decrees, see *infra* notes 104-20 and accompanying text.

89. ENVTL. PROTECTION AGENCY, AGENCYWIDE COMPLIANCE AND ENFORCEMENT STRATEGY AND STRATEGY FRAMEWORK FOR EPA COMPLIANCE PROGRAMS (1984).

90. *Id.* at 25.

91. See, e.g., ENVTL. PROTECTION AGENCY, RCRA ENFORCEMENT RESPONSE POLICY 6-14 (1984).

92. Class I violations involve a release or threatened release of hazardous wastes to the

paid.⁹³

EPA has also developed a policy establishing criteria for federal enforcement where initial enforcement of an environmental statute has been delegated to the state.⁹⁴ To generally avoid federal enforcement, states must take "timely and appropriate" enforcement action.⁹⁵ The policy requires initiation of formal legal action by a state within a certain period of time after detection (either through issuance of an administrative order or civil referral), and sets criteria for selecting appropriate state enforcement responses.⁹⁶ Program-specific policies have defined and implemented the "timely and appropriate" concept.⁹⁷

Although it does not explicitly address auditing, EPA's *Policy on Civil Penalties*⁹⁸ also provides some guidance for calculating penalties in administrative and judicial enforcement actions where the violator agrees to perform an activity, such as an audit, as part of a settlement. At a minimum, the penalty must remove the economic benefit for failure to comply⁹⁹ and obtain an additional amount to reflect the seriousness or gravity of the violation.¹⁰⁰ The gravity component of the penalty can be adjusted to reflect the following factors: (1) degree of willfulness; (2) history of noncompliance; (3) ability to pay; and (4) degree of cooperation.¹⁰¹ Statute-specific penalty policies also discuss these adjustment factors.¹⁰² Expedient correction of past compliance problems may result in some mitigation.¹⁰³

Thus, a company's willingness to set up an environmental auditing program as part of a settlement, as well as expeditious correction of new

environment, failure to assure groundwater protection, proper post-closure care, or delivery of wastes to a permitted interim status facility. *Id.* at 11.

93. ENFORCEMENT RESPONSE, *supra* note 73, at 11-13.

94. ENVTL. PROTECTION AGENCY, IMPLEMENTING THE STATE/FEDERAL PARTNERSHIP IN ENFORCEMENT AGREEMENTS (1984).

95. *Id.* at 11-14.

96. *Id.* at 11-12.

97. For example, the *RCRA Enforcement Response Policy* requires administrative action or case referral for certain class I violations within 90 days. RCRA ENFORCEMENT RESPONSE POLICY, *supra* note 91, at 6.

98. ENVTL. PROTECTION AGENCY, POLICY ON CIVIL PENALTIES (1984) [hereinafter cited as POLICY ON CIVIL PENALTIES]. A companion EPA policy document issued on the same day provides guidance on how to write penalty assessment guidelines for a particular environmental program. See IMPLEMENTING EPA'S POLICY ON CIVIL PENALTIES, *supra* note 36.

99. IMPLEMENTING EPA'S POLICY ON CIVIL PENALTIES, *supra* note 36, at 2, 6-14.

100. *Id.* at 2-3, 4-16.

101. *Id.* at 16-24.

102. See, e.g., ENVTL. PROTECTION AGENCY, FINAL RCRA CIVIL PENALTY POLICY 16-21 (1984).

103. IMPLEMENTING EPA'S POLICY ON CIVIL PENALTIES, *supra* note 36, at 21.

audit-discovered violations, could show cooperation, potentially allowing partial mitigation of the penalty amount.¹⁰⁴ Such an approach serves the Agency settlement goal of swift resolution of environmental problems.¹⁰⁵ Of course, any adjustment may not reduce the penalty below an amount which is greater than the stated economic benefit by some nontrivial amount.¹⁰⁶

EPA consent decree guidance¹⁰⁷ also recognizes that defendants may agree to take certain actions, above and beyond those necessary to meet statutory requirements, in order to offset a cash penalty, as long as this type of agreement is explicitly noted in the decree.¹⁰⁸ A well developed audit system could produce additional environmental protection by going beyond current monitoring and reporting requirements.¹⁰⁹

The *TSCA Settlement with Conditions Policy*¹¹⁰ appears to allow for some type of mitigation if the remedy includes an audit. This policy provides that EPA may agree to remit a portion of the proposed civil penalty where the violator agrees to take extensive and specific remedial actions.¹¹¹ The remedial actions may be related not only to the violations discovered by the Agency, but also to other current violations which have not yet been discovered,¹¹² e.g., through an audit of other company facilities where similar violations are suspected.

B. Audit Provisions as Remedies in EPA Enforcement Actions

In addition to encouraging voluntary development of auditing programs, EPA has begun to seek audit provisions as remedies in certain administrative and judicial enforcement actions. The idea of using an enforcement action to negotiate an environmental audit is relatively new.¹¹³

Traditional EPA settlement agreements have required correction of specific violations and assessed penalties. Settlements typically include

104. See *id.* at 19. See also ENFORCEMENT RESPONSE, *supra* note 73, at 15.

105. IMPLEMENTING EPA'S POLICY ON CIVIL PENALTIES, *supra* note 36, at 5.

106. *Id.* at 5-6.

107. ENVTL. PROTECTION AGENCY, GUIDANCE FOR DRAFTING JUDICIAL CONSENT DECREES (1983).

108. *Id.* at 18.

109. See ENVTL. L. INST., ENVIRONMENTAL AUDITING ISSUE PAPER: PROVISION IN CONSENT DECREES, REPORT TO U.S. ENVIRONMENTAL PROTECTION AGENCY (1985) [hereinafter cited as PROVISION IN CONSENT DECREES].

110. *TSCA Settlement with Conditions*, in TSCA COMPLIANCE/ENFORCEMENT GUIDANCE MANUAL app. A (1984).

111. *Id.* at app. A-124.

112. *Id.*

113. Mays, *supra* note 1, at 27.

the following provisions: (1) requiring compliance with applicable statutes or regulations and committing the defendant to a particular remedial course of action by a set date; (2) scheduling a timetable for achieving compliance which requires the greatest degree of remedial action as quickly as possible, including interim dates to allow for Agency monitoring of defendant's progress; (3) monitoring, reporting and sampling provisions; (4) requiring site entry and access and document review; (5) assessing civil penalties for statutory violations; and (6) assessing stipulated penalties for violating the consent decree.¹¹⁴ These settlements may fail to address the lack of a company policy encouraging continuing compliance with environmental laws and regulations, as well as the absence of procedures which would effectively implement such a policy.¹¹⁵

EPA has broad authority to negotiate an audit provision in a consent decree as part of its authority to require self-monitoring as a remedy for violators.¹¹⁶ EPA can obtain remedies not expressly authorized by statute or required under EPA regulations, where the decree's terms do not violate the statute's express prohibitions.¹¹⁷

While EPA consent decree guidance does not explicitly address provisions for environmental audits, the guidance would support an audit as contributing to compliance with applicable statutes and regulations.¹¹⁸ In addition, an audit system can establish a remedial course of action which strengthens the compliance sections of consent decrees by examining a firm's compliance efforts on a continuing basis. Under this guidance, where a firm has a long history of repeated violations, EPA negotiators should consider including more stringent compliance monitoring provisions, particularly provisions requiring more frequent monitoring and testing by the source to ensure continued future compliance.¹¹⁹ Additionally, while EPA enforcement policy encourages remedies which are closely related to the violations at issue, a more extensive management audit may be appropriate if the violations are a result of poor oversight by management.¹²⁰ *The TSCA Settlement With*

114. GUIDANCE FOR DRAFTING JUDICIAL CONSENT DECREES, *supra* note 107, at 10-18, 22-24.

115. *See Mays, supra* note 1, at 27.

116. *See, e.g.,* CWA § 308, 33 U.S.C. § 1318 (1982); CAA § 114, 42 U.S.C. § 7414 (1982). *See also* PROVISION IN CONSENT DECREES, *supra* note 109, at 4.

117. PROVISION IN CONSENT DECREES, *supra* note 109, at 2. *See* United States v. Swift & Co., 286 U.S. 106 (1932).

118. *See* GUIDANCE FOR DRAFTING JUDICIAL CONSENT DECREES, *supra* note 107, at 10.

119. *Id.* at 14.

120. *See* PROVISION IN CONSENT DECREES, *supra* note 109, at 7.

Conditions Policy also implicitly supports incorporation of audit provisions in consent decrees as a broader remedial action to address undiscovered violations.¹²¹

The *Environmental Audit Policy Statement* states that EPA may propose auditing provisions in consent decrees and in other settlement negotiations where: (1) a systematic pattern of violations can be attributed to the absence of, or poor functioning of, an environmental management system; and (2) the type or nature of violations points to the likelihood of similar violations elsewhere in the facility or other facilities operated by the regulated entity.¹²² Audit provisions in consent decrees can be an efficient and effective use of EPA's enforcement resources. Improvements resulting from an audit could apply throughout a multi-facility company, and raise the level of environmental compliance at all facilities.¹²³ In proposing audits in appropriate settlements, EPA also expects to encourage other regulated entities to develop auditing programs.

IV. EPA USE OF AUDITING IN CONSENT DECREES

EPA has recently negotiated environmental audit provisions in several settlement agreements. Most auditing provisions are contained in administrative settlement agreements under TSCA¹²⁴ and RCRA.¹²⁵ In TSCA cases, EPA has generally negotiated environmental audit provisions for polychlorinated biphenyl (PCB) violations where EPA has suspected similar violations at other company facilities which are not the subject of the immediate enforcement action.¹²⁶ Under TSCA, for facilities with PCBs, the regulated entities generally have no affirmative duty to obtain federal use permits, discharge permits or waste manifests,¹²⁷ so a particular facility within a company may have little contact with the regulatory agency. Other company facilities also may not be familiar with TSCA requirements, and may have TSCA violations. In RCRA cases, EPA has negotiated audit provisions to address inadequate hazardous waste management practices, including monitoring, reporting and

121. See *TSCA Settlement with Conditions*, *supra* note 110, at app. A-124.

122. Interim Environmental Auditing Policy Statement, *supra* note 3, at 46,506.

123. See *Mays*, *supra* note 1, at 27.

124. 15 U.S.C. §§ 2601-2629 (1982).

125. 42 U.S.C. §§ 6901-6987 (1982).

126. See, e.g., *In re Owens-Corning Fiberglas Corp.*, No. TSCA-V-C-101 (EPA Reg. V June 8, 1984) (Consent Agreement and Final Order).

127. In addition, unlike statutes which generally regulate individual facilities, TSCA focuses on the testing, pre-manufacturing clearance, and regulation and distribution of individual toxic substances.

recordkeeping requirements.¹²⁸

Environmental audit provisions in consent decrees may be as broad or as narrow as the number, scope and severity of a company's violations seem to require.¹²⁹ EPA has generally negotiated two types of audit provisions: compliance audits and management audits. Compliance audits have been used where EPA finds that violations discovered at a facility may be typical of violations at other company facilities,¹³⁰ given the company officials' apparent lack of familiarity with regulatory requirements. In such cases, the companies have agreed to review the compliance status of all corporate facilities to ensure that similar violations do not exist, and to certify to EPA that all facilities are in compliance.¹³¹ Where a firm does not accurately certify compliance, and EPA subsequently discovers violations at the certified facilities, EPA can proceed with a criminal enforcement action based on knowing and willful falsification of reports.¹³²

Management audits have been negotiated where EPA believed that a pattern of violations resulted in large part from a lack of, or poor functioning of, corporate environmental management or operational controls.¹³³ In developing such controls, a company may be required to go beyond a review of facility compliance status and examine its entire environmental management policies, procedures, and organizational structure and programs affecting all company employees and operations.¹³⁴

*In re Owens-Corning Fiberglas Corp.*¹³⁵ and *In re Crompton & Knowles Corp.*¹³⁶ involved TSCA administrative enforcement actions for PCB violations which resulted in settlement agreements involving compliance audit provisions. In *Crompton*, EPA alleged that the company failed to: (1) affix the required PCB warning label transformers; (2) inspect, record and report leaks to EPA; and (3) develop and maintain

128. See, e.g., *In re Chemical Waste Management, Inc.*, Nos. RCRA-09-84-0037, TSCA-09-84-0009 (EPA Reg. IX Nov. 7, 1985) (Consent Agreement and Final Order).

129. Mays, *Environmental Audits: Addressing Root Causes*, CHEM. WEEK, May 29, 1985, at 4. See also Mays, *supra* note 1, at 27.

130. See Mays, *supra* note 129, at 4.

131. See, e.g., *In re Owens-Corning Fiberglas Corp.*, No. TSCA-V-C-101, at 6-7 (EPA Reg. V June 8, 1984) (Consent Agreement and Final Order).

132. See Reed, *supra* note 4, at 10,304.

133. Mays, *supra* note 1, at 27; Mays, *supra* note 129, at 4.

134. Mays, *supra* note 129, at 4.

135. Administrative Complaint, *In re Owens-Corning Fiberglas Corp.*, No. TSCA-V-C-101 (EPA Reg. V filed Feb. 14, 1983).

136. Administrative Complaint, *In re Crompton & Knowles Corp.*, No. TSCA-PCB-82-0108 (EPA Reg. II filed July 29, 1982).

records on the disposition of PCB and PCB items at the facility.¹³⁷

The consent agreement and final order in *Crompton* assessed a civil penalty and required the company to take the following actions in a compliance audit: (1) certify to EPA that it had conducted an inventory of PCBs, PCB items, heat transfer systems and hydraulic systems at each of its twenty-eight facilities; (2) submit a written report for each facility specifying the location and quantity of PCBs, PCB items, heat transfer systems and hydraulic systems at each of its twenty-eight facilities; (3) describe the audit at each facility; and (4) within sixty days of the effective date of the consent decree, certify by a responsible corporate official that each facility is in compliance with PCB regulations, including the basis upon which it would certify compliance.¹³⁸

Owens-Corning involved a similar PCB compliance audit for sixty-three facilities¹³⁹ while the audit in *In re Potlatch Corp.* covered forty-eight company facilities.¹⁴⁰ The compliance audits in *EPA v. Chem-Security Systems, Inc.*¹⁴¹ were limited to the facility at issue in the administrative enforcement actions, and required Chem-Security to conduct four quarterly TSCA (PCB) and RCRA compliance audits, and to send the audit reports to EPA.¹⁴²

In *In re Diamond Shamrock Chemical Co.*,¹⁴³ EPA alleged that the company failed to notify EPA of its intention to manufacture a chemical substance not on the TSCA inventory and used for commercial purposes an illegally manufactured substance.¹⁴⁴ The consent agreement and order required the company to perform a TSCA compliance audit of all of its forty-three facilities, to evaluate the TSCA compliance status facilities, and to report TSCA violations discovered at those facilities.¹⁴⁵ In addition to reviewing PCB compliance, the audit required Diamond Shamrock to assess compliance with several other TSCA recordkeeping and

137. *In re Crompton & Knowles*, No. TSCA-PCB-82-0108, at 3-4 (EPA Reg. II Sept. 17, 1985) (Consent Agreement and Final Order).

138. *Id.* at app. B.

139. *In re Owens-Corning Fiberglas Corp.*, No. TSCA-V-C-101, app. at 6-7 (EPA Reg. V June 8, 1984) (Consent Agreement and Final Order).

140. *In re Potlatch Corp.*, No. TSCA-V-C-137, at 4 (EPA Reg. V Aug. 3, 1983) (Consent Agreement and Final Order).

141. *EPA v. Chem-Security Sys., Inc.*, No. 1085-07-42-2615P (EPA Reg. X Dec. 26, 1985) (Consent Agreement and Final Order).

142. *Id.* at 3-6.

143. Administrative Complaint, *In re Diamond Shamrock Chem. Co.*, No. TSCA-85-H-03 (EPA Headquarters filed Mar. 18, 1985).

144. *Id.* at 1-7.

145. *In re Diamond Shamrock Chem. Co.*, No. TSCA-85-H-03, Audit Agreement (EPA Headquarters June 28, 1985) (Consent Agreement and Final Order).

reporting requirements and to report all discovered TSCA violations to EPA.¹⁴⁶

In *In re Union Carbide Corp.*,¹⁴⁷ EPA alleged that Union Carbide manufactured and used for a commercial purpose a chemical substance without the required premanufacturing notice, and thus was not on the TSCA inventory in violation of sections 5 and 15 of TSCA.¹⁴⁸ As part of the settlement agreement, Union Carbide agreed to prepare over the following year: (1) an educational program designed to reemphasize premanufacturing notice compliance, which will be presented to a broad company audience; and (2) subsequent to the completion of such educational program, implement a program of not less than five test inputs to monitor responses for TSCA compliance.¹⁴⁹ Such a program will allow the corporation to assess the compliance capability under actual business conditions by responding to artificially created violations.

EPA has negotiated management environmental audits in several other administrative settlements with Chemical Waste Management, Inc. (CWM). In *In re Chemical Waste Management*¹⁵⁰ (Kettleman Hills facility), EPA alleged that CWM committed numerous RCRA violations including failure to implement an adequate groundwater monitoring system, failure to implement an unsaturated zone monitoring program, failure to develop an adequate closure plan, failure to make substantial modifications to the facility,¹⁵¹ as well as violations of section 15 of TSCA.¹⁵² CWM agreed to perform a compliance and management audit covering all RCRA and TSCA requirements at the facility. The con-

146. *Id.* at 2-5.

147. Administrative Complaint, *In re Union Carbide Corp.*, No. TSCA-85-H-06 (EPA Headquarters filed June 17, 1985).

148. *Id.* at 2.

149. *In re Union Carbide Corp.*, No. TSCA-85-H-06, at 6-7 (EPA Headquarters Feb. 26, 1986) (Consent Agreement and Order). Similar TSCA violations formed the basis for an audit in *In re BASF Wyandotte Corp.*, No. TSCA-V-C-410 (EPA Reg. V filed Apr. 25, 1986) (Consent Agreement and Final Order). The audit required BASF to review 13 facilities and certify that all chemicals required to be listed on the TSCA Chemical Substances Inventory were so listed. *Id.* at 2-3.

150. See, *In re Chemical Waste Management, Inc.*, No. RCRA-09-84-0037 (EPA Reg. IX July 3, 1984) (Determination of Violation, Compliance Order and Notice of Right to Request Hearing); *In re Chemical Waste Management, Inc.*, No. RCRA-09-84-0037 (EPA Reg. IX June 6, 1985) (Amended Determination of Violation, Compliance Order and Notice of Right to Request a Hearing).

151. *In re Chemical Waste Management, Inc.*, No. RCRA-09-84-0037, at 5-26 (EPA Reg. IX June 6, 1985) (Amended Determination of Violation, Compliance Order and Notice of Right to Request a Hearing).

152. *In re Chemical Waste Management, Inc.*, No. TSCA-09-84-0009 (EPA Reg. IX filed June 6, 1985) (Administrative Complaint and Notice of Hearing).

sent agreement and final order¹⁵³ included an audit which provided for an independent third party auditor to submit a proposal for the scope of work to EPA to audit waste operations and environmental management systems at the facility and in CWM's corporate environmental management department.¹⁵⁴ Within one year after obtaining a written agreement on the scope of work for the audit, the auditor was required to submit written reports to EPA on RCRA and TSCA compliance. These reports would:

- (1) identify and describe the facility's existing waste management operations, including management systems, policies and prevailing practices;
- (2) evaluate such operations, systems, practices and policies, identifying strengths and weaknesses; and
- (3) identify and describe areas of waste management operations and environmental management systems that could be significantly improved, including personnel training, corporate management and lines of authority, operations and maintenance procedures, interim stabilization, and quality control and assurance.¹⁵⁵

Within ninety days after CWM's receipt of these reports, CWM was required to submit to EPA the portion of the report containing findings and recommendations of the auditor, CWM's evaluation of each option, and specific actions the company would take, as well as a schedule for implementation.¹⁵⁶ The administrative consent agreements in *In re Chemical Waste Management*¹⁵⁷ (Emelle facility) and in *In re Chemical Waste Management*¹⁵⁸ (Vickery facility) involved similar management audit requirements to address RCRA and TSCA violations.

In proposing environmental audit provisions in consent decrees, EPA has addressed concerns on EPA access to audit-generated information and the appropriate EPA response to violations discovered by an audit. Of course, where an audit is conducted pursuant to a settlement agreement, EPA has required greater access to audit data than under a voluntary audit program to ensure compliance with the settlement. EPA

153. *In re Chemical Waste Management, Inc.*, Nos. RCRA-09-84-0037, TSCA-09-84-0009 (EPA Reg. IX Nov. 7, 1985) (Consent Agreement and Final Order) (Kettleman Hills facility).

154. *Id.* at 4-5.

155. *Id.* at 5-7.

156. *Id.*

157. *In re Chemical Waste Management, Inc.*, No. TSCA-84-H-03, at 16-20 (EPA Reg. IV Dec. 19, 1984) (Consent Agreement and Final Order).

158. *In re Chemical Waste Management, Inc.*, Nos. TSCA-V-C-307, RCRA-V-85R-019, at 5-9 (EPA Reg. V Apr. 5, 1985) (Consent Agreement and Final Order).

has generally reserved its right to inspect defendant's facilities to determine the accuracy of compliance verifications and other submittals.¹⁵⁹ In addition, audits may identify and document violations that may otherwise have gone unnoticed by a regulatory agency.¹⁶⁰ In some settlements, reporting of audit-discovered violations has been limited to that necessary to ensure compliance with the terms of the settlement or as otherwise authorized by regulation or statute.¹⁶¹ Some audits have required reporting of all audit-generated violations to EPA.¹⁶²

An audit report may also include information on matters other than the immediate environmental issues, such as the production process, that the company would wish to keep confidential.¹⁶³ In some cases, defendants have been permitted to assert a business confidentiality claim with respect to information submitted in compliance with the settlement.¹⁶⁴ Another settlement specifies that audit-reported information would be treated as confidential by EPA to the extent authorized by the TSCA and RCRA.¹⁶⁵

EPA has assessed penalties in all audit-related settlements for past violations, or those violations which were the subject of the original enforcement action.¹⁶⁶ To encourage environmental auditing in settlement agreements, EPA has been willing to limit somewhat its use of audit reports in prospective enforcement actions. In some settlements, EPA has reserved all enforcement rights regarding prospective violations.¹⁶⁷

Recognizing the significant benefits of continuous compliance at audited facilities, EPA has agreed in certain settlements that the results of an audit would not be used by EPA as direct evidence of violations; how-

159. See, e.g., *In re Owens-Corning Fiberglas Corp.*, No. TSCA-V-C-101, at 7 (EPA Reg. V June 8, 1984) (Consent Agreement and Final Order).

160. See Reed, *supra* note 4, at 10,304.

161. See, e.g., *EPA v. Chem-Security Sys., Inc.*, No. 1085-07-42-2615P (EPA Reg. X Dec. 26, 1985) (Consent Agreement and Final Order); *In re Owens-Corning Fiberglas Corp.*, No. TSCA-V-C-101 (EPA Reg. V June 8, 1984) (Consent Agreement and Final Order).

162. See, e.g., *In re Diamond Shamrock Chem. Corp.*, No. TSCA-85-H-03, Audit Agreement, at 2-3 (EPA Headquarters June 28, 1985) (Consent Agreement and Final Order).

163. See Reed, *supra* note 4, at 10,304.

164. See, e.g., *In re Owens-Corning Fiberglas Corp.*, No. TSCA-V-C-101, at 7 (EPA Reg. V June 8, 1984) (Consent Agreement and Final Order).

165. *In re Chemical Waste Management, Inc.*, Nos. RCRA-09-84-0037, TSCA-09-84-0009, at 7 (EPA Reg. IX Nov. 7, 1985) (Consent Agreement and Final Order) (Kettleman Hills Facility).

166. See, e.g., *In re Chem-Security Sys., Inc.*, No. 1085-07-42-2615P, at 4 (EPA Reg. X Dec. 26, 1985) (Consent Agreement and Final Order).

167. See, e.g., *In re BASF Wyandotte Corp.*, No. TSCA-V-C-410, at 2, 4 (EPA Reg. V filed Apr. 25, 1986) (Consent Agreement and Final Order); *In re Chem-Security Sys., Inc.*, No. 1085-07-42-2615P, at 5-6 (EPA Reg. X Dec. 26, 1985) (Consent Agreement and Final Order).

ever, EPA is not precluded from enforcing against violations discovered independently of the audit.¹⁶⁸ In *In re Chemical Waste Management* (Kettleman Hills facility) EPA allowed a six month grace period after completion of the audit to correct audit-discovered violations with no stipulated penalties, while EPA allowed a six month grace period after the settlement date to discover and remedy violations in *In re Diamond Shamrock Chemicals Co.* After this time period, EPA could enforce against such violations.¹⁶⁹ However, grace periods will probably only be considered where the government will achieve significant compliance benefits from the settlement. Also, a grace period does not preclude EPA from bringing enforcement action to enforce the consent agreement or to seek injunctive relief to abate a condition which may present an imminent and substantial endangerment, or an imminent hazard under TSCA.¹⁷⁰

EPA should be willing to adjust its enforcement response where a company provides more compliance information on its facilities than the Agency would have obtained through its compliance monitoring programs, and where subsequent violations are quickly corrected. This could apply, in particular, where audit-discovered violations involve little or no economic benefit or savings to the violator under agency penalty policy, such as various TSCA reporting and recordkeeping violations. However, where a new violation does involve economic savings, EPA will probably, at a minimum, assess a penalty which reflects such savings, although it may provide some adjustment for the gravity aspect of the violation. To do otherwise would not be fair to the numerous companies within the same industrial category who have paid for the costs of pollution control and would place complying facilities at a competitive disadvantage.

V. CONCLUSION .

Environmental auditing will play a growing role in the Nation's efforts to achieve continuous compliance with the environmental laws. EPA has encouraged the use of environmental auditing by regulated entities through its auditing policy and through use of audit provisions in appropriate settlement agreements. Audit programs serve regulated enti-

168. *In re Chemical Waste Management, Inc.*, Nos. RCRA-09-84-0037, TSCA-09-84-0009, at 7 (EPA Reg. IX Nov. 7, 1985) (Consent Agreement and Final Order).

169. *Id.* See also *In re Diamond Shamrock Chem. Corp.*, No. TSCA-85-H-03, Audit Agreement, at 8 (EPA Headquarters June 28, 1985) (Consent Agreement and Final Order).

170. *In re Diamond Shamrock Chem. Co.*, No. TSCA-85-H-03, Audit Agreement, at 8 (EPA Headquarters June 28, 1985) (Consent Agreement and Final Order).

ties' interest in long-term cost savings and improved cooperation with regulatory agencies, while they complement the compliance efforts of regulatory agencies.

In implementing and refining Agency policy on auditing, EPA needs to be aware of the legitimate interest of regulated entities in disclosure of certain audit generated information and in taking enforcement responses which recognize defendants' genuine compliance efforts. EPA should also continue to obtain environmental audit provisions in consent decrees, particularly where a pattern of multi-facility compliance and environmental management problems exists. Moreover, by maintaining a strong enforcement program and penalty deterrent, EPA will encourage new voluntary environmental audit programs.