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ENVIRONMENTAL AUDITS:
How Uncooperative Federalism Undermines Environmental Protection

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How Uncooperative Federalism
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They need to get past that philosophy and theology and see the law is working. It is providing environmental benefits for the state.

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Colorado environmental official,
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INTRODUCTION

If the states are truly "laboratories of democracy,"' then environmental audit laws are classic examples of innovative and potentially beneficial experiments. Yet, like all pioneering efforts, state environmental audit laws have faced obstacles created by those who fear change, are intent on maintaining control to the exclusion of all others, and fail to appreciate the benefits that truly innovative efforts such as these can yield. In spite of an lack of credible evidence that these audit protections have been used improperly to shield wrongdoers from deserved liability, the United States Environmental Protection Agency (EPA), joined by the Department of Justice (DOJ), has initiated an increasingly aggressive campaign to eliminate state laws that provide limited protection to regulated entities that, in good faith engage in self-critical evaluations that seek to discovery, prevent and eliminate conditions that constitute, or might lead to violations of environmental laws.

This paper revisits a topic we first discussed six years ago, by reviewing the decade-long debate over environmental audit protection laws, describing the spoken and unspoken policies that drive the debate, and how the federal government's increasingly aggressive efforts to prevent these laws from even being tested, have undermined them.. The paper concludes that there are ways of testing audit laws as a means of proactively preventing adverse environmental conditions, without creating undue risk to the environment. Federal enforcement officials should allow states to see whether audit laws increase compliance before attacking those laws. Because the executive branch has been unwilling to consider even a test period to evaluate the possible benefits of these laws, and have instead assaulted these laws with every weapon in their arsenal, the only solution that may remain is enactment of federal legislation allowing states to continue their valuable experiments.

Overview

Even after ten years, the definition of an environmental audit remains unsettled. For purposes of this paper, an environmental audit is simply a systematic means of investigating, discovering, preventing and correcting conditions that do or could result in adverse environmental conditions or consequences, or violations of legal requirements. Other, more narrow, definitions have been suggested, but most seem to be driven by the agenda of the defining party. For example, EPA advances a narrow description of an environmental audit, excluding anything other than a "systematic, documented, periodic and objective review by regulated facility operations and practices related to meeting environmental requirements."

Notwithstanding the differences in definition, the essential purpose of environmental audits is not in dispute: to provide a mechanism to help ensure that business operates in a manner that prevents or minimizes adverse environmental consequences resulting from its activities. Unfortunately, environmental audits also can act as a road map for prosecutors, and often an admission, of potential or existing violations of law. As such, environmental audits present law enforcement officials with a fertile source of valuable information, often resulting in enforcement actions against businesses and providing convenient evidence upon which it can be argued that someone "knew" of a violation of environmental law, and, therefore, committed a felony.

To encourage beneficial environmental audits, and to prevent companies from being "hoisted on their own petard," a number of states have implemented a variety of laws protecting environmental audits. Some laws create a legal privilege, allowing businesses to keep the results of their audit confidential (as is done with attorney-client privileged material), so that the audit report is never disclosed and, therefore, cannot be used in some enforcement proceedings, if certain conditions are met. Other laws require disclosure of the audit to law enforcement officials, but, if certain conditions are met, immunize the disclosing company from certain types of liability based on the audit. In both instances, audits must be conducted in good faith, and businesses must correct any problems identified in the audit quickly and effectively. Thus, the goal of environmental audits - the immediate and timely prevention or correction of existing or potential adverse environmental conditions - takes precedence over law enforcement officials' desire to put another notch in their belts. Necessarily, these laws grant courts the ultimate authority to determine whether the conditions justifying the privilege or immunity have been met. Even when an audit is protected, however, law enforcement authorities retain extensive authority to prosecute criminal violations, and to prove violations with evidence gathered independently of the audit.

conditions justifying the privilege or immunity have been met. Even when an audit is protected, however, law enforcement authorities retain extensive authority to prosecute criminal violations, and to prove violations with evidence gathered independently of the audit.

Unfortunately, just as Galileo was persecuted by the Inquisition for his novel views, so too are these enlightened pilot programs subject to serious obstacles borne of the traditional and ingrained views of regulatory authorities that is grounded in their inherent distrust of the business community. The EPA believes that it should have the unfettered discretion to decide whether, when, and how to use voluntary environmental audits as a basis for prosecuting those who conduct the audit, arguing that it will always act reasonably. As state interest in developing laws promoting environmental audits has grown, there has been a corresponding rise in the frequency and vitriol of EPA attacks upon such laws. The centerpiece of these attacks is the EPA's threatened withdrawal from states of "delegated enforcement authority" over most environmental laws." The other EPA weapon is "overfiling" against companies that have conducted environmental audits in reliance upon state environmental audit privilege or immunity laws. Both EPA actions effectively destroy any incentive created by state audit protection laws to conduct environmental audits.

In addition to discouraging the prospective performance of environmental audits, the EPA's actions may jeopardize audits that already have been completed. By overfiling and forcing states to repeal their audit laws, the EPA undermines progressive environmental policy-making, and perpetuates the command-and-control approach to environmental protection. The EPA's implicit belief that regulated entities that conduct protected environmental audits must be "getting away with something" is representative of a false stereotype that the EPA has expressly denied employing.

Legislation introduced in Congress over the last several years would force a resolution to this policy impasse. It would protect environmental audit materials by creating a federal environmental audit privilege and immunity and by prohibiting the EPA from meddling with state environmental audit privilege and immunity laws. This legislation would end the EPA's assault on state audit laws and would restore industry confidence in environmental auditing, thereby expanding its use. By encouraging self-policing and self-correction and by providing a legally enforceable means of promoting audits without punishing good actors or rewarding bad ones, this legislation represents an appropriate and sorely needed means of continuing state experiments with different approaches to environmental policy. Best of all, the pending legislation would encourage critical self-examination beyond what the law requires and increase environmental compliance.

This article reviews the decade-old debate over and the recent congressional response to environmental audit laws by (i) discussing the policy arguments underlying the debate; (ii) analyzing the wide variety of environmental audit privilege and immunity laws enacted by the states; (iii) tracing the EPA's progressively more antagonistic responses to state environmental audit laws, detailing its current audit policy and noting the growing campaign to end the debate, not through compromise, but by forcing the elimination of state audit laws entirely; and (iv) analyzing the practical effect of the EPA's position on companies that have conducted or are considering conducting environmental audits.

POLICY ISSUES UNDERLYING ENVIRONMENTAL AUDIT LEGISLATION

This section discusses the main policy issues driving the debate over environmental audit laws. First, we review the policy issues common to both privilege laws and immunity laws. We then briefly review the particular policy bases unique to each approach. Finally, we conclude that, at a policy level, there are good reasons to believe that the benefits of using these tools to encourage auditing far outweigh the risk that "bad actors" will somehow escape punishment for wrongdoing.

The Policy Debate Concerning All Environmental Audit Laws

Proponents of environmental audit protection argue that this protection increases compliance without protecting wrongdoers. Companies that are free to engage in wide-ranging, detailed, and self-critical analysis of their environmental performance are more likely to discover, correct and, in the long run, prevent negative environmental consequences. This freedom cannot exist without adequate legal protection. Without adequate protection, even good faith audits can be used as roadmaps for parties seeking to impose civil and criminal liability, whether they are governmental enforcement agents or private tort claimants. As a result, few companies will choose to take the extra step of voluntarily conducting complete and exhaustive environmental audits." Forced to choose between lack of knowledge and certain lawsuits, many companies choose the former.

It might be suggested that ignorance of a condition or practice constitutes willful blindness or "conscious disregard," which is considered by some courts to be tantamount to a "knowing" violation." Thus, one is equally liable whether or not one performs a voluntary audit, so one might as well perform the audit. This rationale is defective for two reasons. First, there are no reported cases of persons or companies found to have consciously disregarded violations where *only* a voluntary audit would have uncovered them. For companies that do perform voluntary environmental audits, fear of liability restricts the distribution of audit reports and creates an incentive to "sanitize" reports, thereby diminishing their usefulness within the organization. Second, the value of an audit to a prosecutor is not that it contains technical evidence of violations such as permit exceedances that is reported anyway. Rather, the value lies in the narrative portions of audits that might describe, explain or predict practices that led or could lead to violations. The information could never be known to prosecutors at all as it tends to be subjective, opinion-based and subject to spin control. Few people would willingly jeopardize their own freedom by being so frank.

Of the companies that presently perform environmental audits, most try to protect audit materials with some sort of privilege, usually the attorney-client privilege. This is a largely unsatisfactory mechanism. The main drawbacks of relying on the attorney-client privilege are uncertainty, cost, and strict limitations on the distribution of materials. Uncertainty over whether the privilege

attaches to audits reduces the number and quality of audit reports. Because the attorney-client privilege may be waived by extensive dissemination of audit reports, companies limit the distribution of these reports. This limited distribution hinders companies in their effort to implement audit recommendations.

Without an audit privilege, narrative portions of audits would be carefully crafted, rendering them less effective as tools for internal change. One commentator noted that managers who seek additional funds for correcting compliance problems are severely disadvantaged if they rely on watered down audit reports.

Remedying past oversights requires the advocate who seeks corrective action first to get the attention of senior managers, and then to emphasize the benefits of rapid corrective action. Advocacy does not occur in a vacuum but in a dynamic competition for limited funds. To succeed, the auditor must bluntly lay out the harms that could occur from a decision not to invest in such corrective action.

Businesses appear to agree with this observation and have expressed a need for a higher level of certainty before they will undertake the optimal level of full and frank environmental audits.

Opponents of environmental audit protection, which generally include government agencies like the EPA, as well as environmental groups that traditionally bring enforcement actions under "citizen suit" provisions, argue that audit laws shield wrongdoers. They believe a company discovering violations through a voluntary audit should be punished for those violations, not rewarded for the discovery. At best, they concede that such disclosures should mitigate the penalty. Under this approach, while the incidence of liability is absolute, the degree of penalty imposed may be reflective of good-faith efforts by companies to discover and correct problems. Opponents also fear that wrongdoers will conduct *post hoc* "audits" to conceal known violations and to thwart legitimate information gathering by enforcement authorities.

While these arguments have some merit, from the perspective of law enforcement, the debate concerning audit laws is really about something quite different: the proper role of prosecutors and judges. Prosecutors always have had the discretion to decline to bring a case if the facts and circumstances permit. This is the essence of prosecutorial discretion. It is unfettered, and essentially unreviewable by any court, other than in the context of defending against a formal civil or criminal enforcement action. Thus, if a company conducts an audit, discovers wrongdoing, and reports it immediately, it is possible that a prosecutor may decide not to bring charges at all, or will reduce the charges brought, or penalty sought.

A law that accords legal protection to an audit either in the form of a privilege to prevent disclosure, or immunity from prosecution once disclosed, results in a court rather than a prosecutor having the final word on whether and how the audit will be used. Prosecutors remain free to decline to use an audit as evidence in a case, or to decline to prosecute a business based on an audit. But ultimately a court will decide if the audit is privileged and should be excluded from trial, or if the company is immune and prosecution based on the audit should be barred. Such a ruling in effect limits the prosecutor's discretion. Businesses, on the other hand, view courts as somewhat more objective arbiters of whether an audit should be used as evidence. Arguably the court's agenda is to apply the law objectively, regardless of the outcome; a prosecutor is driven to win.

In sum, opponents perceive audit protection laws as taking away prosecutorial power. The fear of this deprivation drives the EPA as well as the United States Department of Justice ("DOJ") and others to oppose vehemently any legislative proposals to privilege or immunize environmental audits.

The Policy Debate over Privileges for Environmental Audit Materials

The fundamental rationale for according some degree of privileged status to an audit is the belief that certain relationships, such as that between attorneys and their clients, doctors and their patients, and spouses, will either be destroyed or wholly undermined if not afforded some degree of confidentiality. Thus, communications arising out of those relationships are preserved, absent extremely compelling circumstances. A client can tell his lawyer that he committed a crime without fear that that admission will be disclosed, because otherwise he may not be able to realize his constitutional right to counsel. A patient can inform her doctor that she used illegal drugs without fear of public disclosure, because such trust is essential to good health care. Each reflects a social judgment that the benefits accruing from the relationship outweigh the costs of inaccessible evidence of potential criminal and civil violations. In the case of environmental audits, the question is whether the beneficial effects of encouraging a company to voluntarily discover, prevent, and correct potential environmental wrongdoing that otherwise would probably not be discovered until harm had been done, are outweighed by the costs of keeping those audit materials secret.

Opponents of audit privilege laws argue that these laws allow companies to hide evidence of violations, thereby rewarding bad actors and keeping regulators and the public in the dark. By definition, prosecutors who are denied access to privileged materials cannot fully assess the legitimacy of the privilege claim. For this reason, opponents claim that the privilege can be "misused to shield bad actors or to frustrate access to crucial factual information. Further, they claim that the "[p]rivilege runs counter to efforts to open up environmental decision making and [to] encourage the public's participation in matters that affect their homes, workplaces and communities." They fear that companies will use the privilege as a shield for all damaging information, including information that was not generated in the course of a bona fide audit. According to this theory, such companies would initiate "audits" after discovering violations to shield all incriminating evidence. Alternatively, companies would label all information gathering activities "audits," and attempt to assert the privilege over all potentially incriminating materials. If successful, these companies would be able to prevent regulators and the public from ever discovering violations. Thus, bad actors would be rewarded, enforcement authorities would be thwarted, and the public would be endangered by companies under no obligation to tell it about potential environmental hazards.

companies would be able to prevent regulators and the public from ever discovering violations. Thus, bad actors would be rewarded, enforcement authorities would be thwarted, and the public would be endangered by companies under no obligation to tell it about potential environmental hazards.

Privilege proponents agree that bad actors should not be rewarded and that the public should be informed of impending danger. They also believe that a tailored privilege will encourage auditing without the negative side effects discussed' above. Privilege opponents overlook the need for incentives to perform audits, the detrimental effect that potential disclosure has on the frankness and effectiveness of audits, and the superior position companies are in, vis-a-vis external regulators, to ferret out potential and actual violations within their own facilities. It should not be surprising, therefore, that privilege opponents come to the erroneous conclusion that the costs of environmental audit privileges outweigh the benefits.

In fact, state lawmakers have tailored audit privilege laws to prevent bad actors from benefiting. First, the privilege generally does not apply to information developed independent of the audit or to evidence of violations known to the auditing company prior to the audit. Second, no one has suggested that the privilege applies to information required to be collected by law, regulation, or permit condition. This limit is particularly significant in the environmental context. For example, under the Clean Water Act, every exceedence of an National Pollution Discharge Elimination System (NPDES) permit *must* be reported. The same is true of emissions into the air under Title V of the Clean Air Act, and discharges of certain constituents under the Resource Conservation and Recovery Act. None of these violations could be protected under audit laws. Third, the privilege does not apply unless the auditing company promptly takes steps to correct any violations discovered by the audit. Finally, the privilege generally does not apply where the information reveals an immediate danger to public health. By so limiting the privilege, companies performing audits in good faith need not disclose evidence of noncompliance revealed by those audits. Bad actors, however, cannot use the privilege in bad faith to avoid disclosure.

Privilege opponents wrongly believe that privileges provide bad actors with economic benefits. This concern overlooks the fact that privilege laws do not prevent prosecution for violations. These laws merely limit regulators' access to audit reports. Regulators remain free to seek penalties for violations based on evidence discovered independently of the audit. These penalties can include an "economic benefit of non-compliance" component, just as they could prior to the enactment of audit privilege laws. Indeed, prosecutors have extensive experience collecting independent evidence of violation of law that might otherwise be protected or immunized from disclosure.

Audit privilege laws allow disinterested judges, rather than victory-minded prosecutors, to decide what information should be protected. Under EPA's nonbinding enforcement policy, prosecutors determine whether a company should be punished for violations uncovered through voluntary audits. Because prosecutors are evaluated and promoted based more on victories than on restraint, prosecutors have a significant incentive to prosecute all violations regardless of whether the target company discovered those violations through a voluntary audit. Audit laws solve this problem by allowing prosecutors to decide initially whether to accord protection to the audit but ultimately placing the decision in the hands of neutral judges. By performing in camera reviews, judges can dispassionately determine whether a company has satisfied the statutory requirements for privilege or immunity. This third-party review offsets the inherent (and understandable) inclinations of ambitious prosecutors while protecting society's interest in punishing bad actors.

Fairness dictates against punishing companies that seek to improve compliance through good faith, critical environmental audits. Companies with audit programs will discover more compliance problems than similar companies not conducting audits. If audit reports may be used against these companies, then they will necessarily be subject to greater liability and penalties. Companies that do more than the law requires to ferret out compliance problems should be rewarded, not punished.

The Policy Debate over Granting Immunity for Violations Uncovered by Environmental Audits

Immunity proposals seek to encourage audits using an approach entirely different from privileges. Here, the company is immunized from prosecution, but only if it fully discloses the results of the audit in a timely fashion, and undertakes efforts to remediate any problems in good faith. Opponents of immunity fear that criminal actors could intentionally violate the law, conduct bad faith pretextual audits, disclose those audits, and then gain immunity for their actions. Narrowly tailored immunity laws address these concerns.

Audit immunity laws should be- and generally are- limited to companies that first discover violations through an audit and then promptly report and correct those violations. Immunity laws do not extend to violations the company knew about before initiating the audit. Nor do these laws protect companies failing to report and correct violations.

By offering an incentive for companies to voluntarily identify, disclose, and correct compliance problems, regulators can focus scarce enforcement resources on willful violators. Without the specter of enforcement actions, responsible companies are more likely to expand their efforts to seek out and correct environmental violations. As more companies self-examine and self-correct environmental violations, limited governmental enforcement resources can be shifted toward truly irresponsible companies.

This approach marks a shift away from the "command and control" system of environmental regulation, where punishing violators - including inadvertent violators - acted as the primary method of preventing environmental crimes and served as the primary arbiter of the regulator's success. In jurisdictions offering immunity for violations uncovered by audits, a more mature regulatory system has evolved. This new system recognizes the value of providing incentives for voluntary compliance. It also recognizes that, under some circumstances, the old regime created clear profit incentives for companies to take only those measures prescribed by law. States have embraced this progressive approach, adopting a wide variety of audit privilege and immunity laws. We discuss these laws in the following section.

incentives for companies to take only those measures prescribed by law. States have embraced this progressive approach, adopting a wide variety of audit privilege and immunity laws. We discuss these laws in the following section.

STATES ENACT WIDE VARIETY OF AUDIT LAWS

Lawmakers in twenty-one states have enacted legislation providing a privilege against admissibility of environmental audit materials in administrative, civil, or criminal proceedings. Many states also offer immunity from administrative and civil action or criminal prosecution upon voluntary disclosure and remediation of environmental problems. A third, overlapping group of states offers reduced civil and criminal penalties to companies that disclose violations and engage in remedial measures. Several additional states and the United States Congress have considered or are now considering similar legislation. This section reviews the main attributes of each type of state legislation. First, we analyze the privilege for environmental audit reports and supporting materials. Next we discuss immunity for companies that voluntarily disclose and correct violations uncovered by environmental audits. Finally, we review how reduced penalties could serve as an alternative to immunity or a privilege.

The Privilege for Environmental Audit. Reports and Supporting Materials

Several states have deemed certain types of environmental audit reports and supporting materials privileged. The scope of the privilege varies with each state. Although some states extend it to criminal prosecution, many states limit the privilege to civil administrative and judicial actions arising out of the materials contained in the environmental audit report.

Privileged materials generally include the audit report itself, information collected or developed for the audit report, memoranda discussing the report, plans for corrective action, and other documents arising from the audit process. Many states allow the following supporting information to be included as appendices or exhibits to the audit report:

- interviews with current or former employees;
- field notes and records of observations;
- findings, opinions, suggestions, conclusions, guidance, notes, drafts, and memoranda;
- legal analyses;
- drawings;
- photographs;
- laboratory analyses and other analytical data;
- computer-generated or, electronically recorded information;
- maps, charts, graphs, and surveys; and
- other communications associated with an environmental or health safety audit.

Although the contents of the audit may be privileged, the fact that an audit was conducted may not be. For example, Colorado's environmental audit statute provides specifically that "the existence of an environmental audit report shall be subject to discovery proceedings . . . . Similarly, New Hampshire excepts from privilege "[t]he fact that an environmental audit is being or has been performed or that an environmental audit report is being or has been prepared.

Many states require each privileged document to bear the legend "Environmental Audit Report: Privileged Document," or something similar. Placing such a label on all privileged materials seems prudent, even in those states where it is not required, because it shows that the information is part of an environmental audit, displays a belief that the parties intend the communication to be confidential, and helps to prevent inadvertent disclosure by employees. These requirements again parallel the attorney-client privilege, where such labels show the party's intent to keep the audit confidential.

Although the privilege extends to documents created in the course of an environmental audit, it does not extend to the facts underlying those documents, which may be independently discovered. For example, if tests conducted in the course of an audit reveal a violation, and if this violation is noted in the audit report, the test results and the audit report are privileged. The fact that the violation occurred, however, is not, if an opposing party is able to obtain independent evidence of the violation. Adverse parties obtaining audit reports can use these reports as a road map for

violation occurred, however, is not, if an opposing party is able to obtain independent evidence of the violation. Adverse parties obtaining audit reports can use these reports as a road map for conducting independent tests and investigations. For this reason, the privilege is effective only as long as it keeps audit materials completely out of the hands of opposing parties or, alternatively, suppresses evidence derived from those materials. Otherwise, adverse parties arguably could conduct their own tests or gather existing proof discussed in the audit report to prove a violation.

State privilege laws generally exclude four types of information from protection. The first is information that is either statutorily required to be produced or is obtained from sources independent of the audit. For example, Illinois law excepts from the privilege:

- Documents, communications . . . or other information required to be collected, developed . . . or otherwise made available to a regulatory agency under this Act or federal, State, or local ordinance, regulation, permit or order.
- Information obtained by observation, sampling, or monitoring by any regulatory agency.
- Information obtained from a source independent of the environmental audit.

This exclusion effectively prevents companies from using the privilege to protect evidence of most if not all violations of law, and certainly all violations involving discharges or releases of regulated pollutants. For example, permits typically require companies to report every exceedance or discharge that violates the permit. Because all violations must be reported, no violation would qualify for the privilege. But while companies may not avoid disclosing permit violations, they can avoid disclosing evidence and circumstances surrounding the violation that may lead to increased sanctions. For example, an audit report may show that a company placed an inexperienced employee in a position where he caused a permit violation. Although the company could not claim the privilege for the violation itself, it could claim the privilege for the portion of the report stating that its failure to hire experienced personnel may have contributed to the violation. In the hands of prosecutors, this fact could lead to additional penalties and possible criminal charges.

Second, privilege laws typically contain an exception denying the privilege for audits committed for a fraudulent purpose or in bad faith. Environmental audit statutes do not define "fraudulent purpose" or "bad faith," leaving definition of those terms to other code provisions or to the common law. Similarly, some states exclude from privilege environmental audits commenced after notice of an impending investigation.

Third, the privilege may not apply to evidence of willful or reckless acts. Although some statutes are silent on the issue of whether the privilege applies to evidence of willful or reckless acts, others specifically deny the privilege for such evidence. For example, Kentucky courts may require disclosure if the audit "material contains evidence relevant to commission of [a knowing violation of an environmental law], and the prosecuting authority has a need for the information."

Fourth, several states except evidence of impending, serious danger to health or the environment. For example, Colorado denies the privilege if "the information in the environmental audit report demonstrates a clear, present, and impending danger to the public health or the environment in areas outside of the facility property." While several state statutes have similar provisions, others are silent on the issue.

The privilege generally prevents regulators or private parties from obtaining protected information in any proceeding. For example, Colorado law states that

[a]n environmental audit report is privileged and is not admissible in any legal action or administrative proceeding and is not subject to any discovery pursuant to the rules of civil procedure, criminal procedure, or administrative procedure.

This general prohibition against compelled discovery of environmental audits is subject to two important qualifications. First, several states allow prosecutors to obtain otherwise privileged environmental audit information if they can show a need for the information and an inability to procure it from other sources without undue expense. For example, under Kentucky law, a court may require disclosure of otherwise privileged information if "[t]he material contains evidence relevant to commission of an offense …, and the prosecuting authority has a need for the information."

Second, parties seeking to prove the applicability of privilege exceptions may compel the production of privileged materials. Some jurisdictions provide that prosecutors, after obtaining independent evidence amounting to probable cause of the applicability of such an exception, may subpoena environmental audit records. The audit materials are then produced by the defendant for *in camera* review, placed under seal, and may not be publicly disseminated.

While many states expressly exempt audit materials produced for *in camera* review from their public records disclosure laws, some do not. Thus, it is possible that audit materials, voluntarily disclosed in the course of in camera review to a governmental agency, may be made available to private litigants in these states through public records disclosure laws. However, several states criminalize the improper disclosure of environmental audit information previously provided to the government. For example, Colorado imposes liability on private parties for damages caused by dissemination of audit information. It also exposes public entities, employees, and officials to criminal liability including penalties of up to $10,000 for such dissemination.

criminalize the improper disclosure of environmental audit information previously provided to the government. For example, Colorado imposes liability on private parties for damages caused by dissemination of audit information. It also exposes public entities, employees, and officials to criminal liability including penalties of up to $10,000 for such dissemination.

Other states provide lesser protections for environmental audit materials produced in the course of *in camera* proceedings. For example, while most states require the implementation of "appropriate limitations on distribution and review of such materials, many statutes expressly authorize consultation with "enforcement agencies" by the district attorney in preparation for the *in camera* proceeding. Even though most of these statutes mandate that "information used in preparation for the *in camera* hearing shall not be used in any investigation or in any proceeding against the defendant," this mandate provides little comfort to the disclosing party.

Most states addressing the issue place the burden of proving the privilege on the party asserting it. Parties seeking disclosure of an environmental audit report under one of the exceptions listed above generally bear the burden of proving the applicability of the exceptions At least one state considered the preparation of a "written environmental compliance policy" or the adoption of a "plan of action to meet applicable environmental laws" to constitute prima facie evidence that the privilege applies.

Notably, virtually all state environmental audit privilege statutes expressly preserve statutory and common law privileges such as those afforded to attorney-client, work product, and self-evaluative materials.

Immunity Laws

Some states grant immunity to companies that disclose environmental audits. The scope of this immunity varies widely. Many states offer immunity from administrative or civil penalties, but not criminal sanctions. Others immunize companies from all administrative, civil, and criminal penalties. As a general matter, businesses entitled to immunity remain liable for the cost of correcting compliance problems, but are shielded from the additional cost of penalties and litigation. Some states provide explicit protection from private tort actions by preserving the secrecy of information provided to government agencies in conjunction with obtaining immunity. Others do not extend this protection. This stands in contrast to privilege laws, which apply more broadly to private litigation.

States generally impose three conditions on companies seeking immunity from liability based on an environmental audit. First, companies must promptly and voluntarily disclose violations discovered through audits. Many states do not define the term "prompt" with reference to the voluntary disclosure of audit results. Several states, however, require that disclosure be made within thirty days of the completion of the audit. A disclosure is not generally considered "voluntary" if it is made with the knowledge that an investigation is under way. Nor is disclosure generally considered voluntary if the law requires the company to report the information to a regulatory agency.

To secure immunity, disclosure generally must be made to the regulatory agency with enforcement jurisdiction. The extent of the disclosure varies among the states but generally must include, at minimum, the environmental audit report. Some states dictate the contents of the environmental audit report. For example, Montana requires disclosure of

the date of discovery of the violation; the name and location of the regulated entity; identification of the law or rule violated; a description of the conditions relating to or affecting the violation; compliance efforts made to correct or eliminate the violation; recommendations for additional compliance efforts, if necessary, to correct or eliminate the violation; and recommendations necessary to prevent reoccurrence of the violation.

Montana, Nevada, and Rhode Island impose an additional requirement that companies seeking immunity enter into a prior written agreement with a state regulatory agency detailing the terms of the environmental audit.

Second, companies seeking immunity must correct the violations found within a reasonable amount of time. "Reasonable amount of time" has been variously considered by states to encompass anywhere from sixty to ninety days. The term "diligent efforts" has been left undefined by environmental audit statutes. Some states require, in addition, the institution of "appropriate measures designed to prevent the recurrence of the violation."

Third, immunity generally does not extend to willful, intentional, or reckless acts. Texas, for example, denies immunity if "the person who made the disclosure intentionally or knowingly committed . . . the disclosed violation." Many states also deny immunity for acts that are part of a pattern of noncompliance. In a typical statement of the exception for patterns of noncompliance, Wyoming denies immunity "if a person or entity has been found by a court to have committed serious violations that constitute a pattern of continuous or repeated violations of environmental laws . . . within the three year period prior to the date of the disclosure.

Fourth, immunity may be denied if the violation threatened the public health or significantly harmed the environment. Kansas, for example, denies immunity for violations resulting in a "significant environmental harm or public health threat." Some states delineate the spatial reach of their immunity statutes, denying immunity for violations causing damage outside the defendant's property.

Fourth, immunity may be denied if the violation threatened the public health or significantly harmed the environment. Kansas, for example, denies immunity for violations resulting in a "significant environmental harm or public health threat." Some states delineate the spatial reach of their immunity statutes, denying immunity for violations causing damage outside the defendant's property.

Finally, there is a recent trend among states, recognizing EPA's threat to revoke their federally delegated enforcement authority if they dare enact a law granting any immunity for disclosure of environmental violations through an audit, to place significant and vague conditions on such immunity. For example, South Dakota's immunity statute provides that "if a state program is required in writing by a federal agency to assess penalties for a violation in order to maintain primacy over a federally-delegated program . . . the provisions of [this immunity statute] do not apply. "

Reduced Penalties

Companies not entitled to immunity may still receive reduced sanctions as an "incentive" for conducting environmental audits and voluntarily disclosing the results. Several states have adopted such programs, which are administered either through statements of environmental enforcement policy or codified law or regulation. A number of other states are presently considering adopting such programs.

Virtually all penalty reduction programs incorporate many of the same requirements and exceptions as privilege and immunity statutes. The requirements include prompt disclosure, remediation within a stated period of time, and implementation of procedures to prevent recurrence of the violation. Exceptions are made for required disclosures under statutory mandate, disclosures made after commencement of an investigation or for a "fraudulent purpose," violations discovered independently of the audit, willful or intentional violations, violations resulting in "significant environmental harm," and violations that are part of a pattern of recurrent violations.

Penalty reduction programs reduce or eliminate penalties upon completion of an environmental audit and remediation of violations discovered as a result thereof. For example, Mississippi's policy states that if noncompliance is discovered as the result of a voluntary audit and "appropriate corrective action" is taken, "the commission shall, to the greatest extent possible, reduce a penalty, if any . . . to a de minimis amount." Other penalty reduction provisions simply require that the judicial body enter the fact of a voluntary environmental audit into its calculus when considering the imposition of a fine. For example, Nevada's penalty reduction provision states that "a court determining the appropriate criminal penalty to impose shall consider, in mitigation of the penalty, whether an environmental audit was conducted. "

Most states incorporate provisions into their penalty mitigation policies and statutes preventing companies from realizing an "economic or competitive advantage" by participating in a penalty reduction program. These programs "level the playing field" among companies by excepting from the total penalty waived any amounts representing an economic or competitive advantage.

Some penalty reduction programs provide that the state environmental agency will not make criminal recommendations regarding the regulated entity to either the United States Department of Justice or other prosecuting authorities. This policy does not apply to the individual employees of regulated entities and is subject to significant qualifications. For example, California provides that penalty reduction is not available for violations that demonstrate or involve:

i) a prevalent management philosophy or practice that concealed or condoned environmental violations; or

ii) knowing or negligent involvement in or the deliberate ignorance of the violations by high-level corporate officials or managers.

Many states contemplate potential conflicts between penalty reduction programs and their federally delegated environmental enforcement authority. Accordingly, these states' penalty mitigation policies often include explicit provisions that resolve any conflicts between the state and federal programs in favor of the federal program.

The most obvious weakness of these polices is that they are merely advisory in nature and hence not binding on state environmental agency decisions. For example, Pennsylvania's program explicitly states that it "reserves the discretion to deviate from this policy statement if circumstances warrant." As a result, penalty reduction programs create little or no incentive for disclosure because they represent little more than a written formal recognition of prosecutorial discretion. Managers will find it difficult to conclude that the benefits of performing environmental audits outweigh the risk of prosecution. Moreover, businesses that conduct environmental audits in good faith, promptly report the results of those audits to the government, and take reasonable steps to correct any violations should not be sanctioned.

CONCLUSION

The environmental regulatory regime continues to be more complex, comprehensive and confusing. There remain valid and compelling policy reasons to provide companies that are acting in good faith the keep up with and comply with that regime to do so using the effective tool of environmental audits, without the fear that this good faith effort will expose them to prosecution. State laws continue to develop in this area, and should be permitted to do so.

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