Protecting Privilege, Recognizing the Risks of Criminal Liability and Reaping the Benefits of EPA's Audit Policy

by Dan J. Jordanger and Christopher R. Graham

An environmental audit can produce great rewards when planned and carried out properly. A good audit assesses whether a company's operations comply with the law and offers advice and recommendations on achieving compliance in areas where the company may be falling short. Most importantly, when a company's audit program meets the standards that the U.S. Environmental Protection Agency ("EPA") has set forth in its "Audit Policy," timely disclosure of noncompliance discovered during an audit can reduce the possible imposition of gravity-based penalties.

The first step for clients and attorneys alike to consider when structuring an audit is the ultimate goal of the exercise. Certain risks are inherent when a company seeks to identify noncompliance with applicable environmental law. One such risk is that it actually will discover a "violation" for which self-disclosure to a regulator is required by law.[1] Such risks often can be tempered, however, when there are incentives to confront one's own liabilities rather than to wait until someone else finds them. Nevertheless, the dilemmas inherent in voluntarily disclosing noncompliance can be significant. Despite good faith reporting to EPA, violations can result in criminal prosecution or a waiver of privileges that otherwise would protect an audit report. Such dilemmas form the crux of this article's conclusions.

The Benefits of Environmental Audits

EPA issued its final policy on "Incentives for Self-Policing: Discovery, Disclosure, Correction, and Prevention of Violations" ("Audit Policy") on December 22, 1995,[2] and has revised the Audit Policy twice.[3] EPA last revised the policy on April 11, 2000, and those revisions took effect on May 11, 2000.[4]

The Audit Policy is designed to protect human health and the environment by encouraging regulated entities to discover, disclose, correct and prevent violations of federal environmental law voluntarily.[5] The Audit Policy provides incentives—such as reduced penalties to entities that disclose noncompliance discovered during an audit or through a compliance management system. Several industrial sectors and individual companies have benefited from these incentives.

Relief from Penalties

Under the Audit Policy a company can obtain complete relief from gravity-based penalties[6] if it discovers a violation as part of a systematic compliance effort.[7] Regular environmental audits are one type of systematic compliance effort.[8] Where violations are not discovered as part of a systematic effort, a company still may obtain relief from gravity-based penalties, but only a reduction of up to 75% may be authorized.[9] EPA retains the right to assess civil penalties to recoup the economic gain from a company's noncompliance.[10]

Compliance Management Systems

The Audit Policy offers its penalty reprieve as an incentive for the creation and execution of a compliance management system capable of detecting environmental law violations.[11] Under the policy, a compliance management system consists of a regulated entity's efforts—appropriate to its size and the nature of its operation—to prevent, detect and correct noncompliance through the following:

- policies, standards and procedures that document and identify for employees and agents how to comply with environmental law;
- appointment of a person or persons responsible for assuring compliance with environmental law;
- systems to verify that standards are achieved and procedures are carried out (i.e., routine auditing or monitoring)

and to give employees a mechanism to report violations without fear of reprisal;

- communication to all employees of the company's standard operating procedures to comply with environmental laws;
- incentives for managers and employees to comply with environmental laws; and
- procedures to promptly remedy acts of noncompliance.[12]

To receive credit for disclosure of environmental noncompliance discovered through a compliance management system, a company must document how its program incorporates these criteria.[13]

Substantive Requirements of the Audit Policy

The Audit Policy establishes nine conditions that must be met for a regulated entity to be eligible for 100% mitigation of gravity-based penalties. A regulated entity is eligible for 75% mitigation if it meets conditions 2–9. The nine conditions[14] are:

1. The entity discovered a violation through an environmental audit or an established compliance management system;
2. The entity identified the violation voluntarily, and not through a monitoring, sampling or auditing procedure required by statute, regulation, permit, judicial or administrative order or consent agreement;
3. The entity notified EPA in writing within 21 calendar days after the discovery of the violation;[15]
4. The entity discovered and identified the violation before EPA or another government agency identified or likely would have identified the problem through the agency's own investigative work or from information received from a third party;
5. Within 60 calendar days from the date of discovery, the entity remedied all harm that the violation caused, and the entity certified in writing that it has cured the violation;[16]
6. The entity has taken or has agreed to take steps to prevent the recurrence of violations after disclosure;
7. The disclosed violation is not a repeat violation;
8. The violation did not result in serious actual harm to the environment and did not present an imminent and substantial endangerment to public health or the environment; and
9. The entity cooperates with EPA and provides it with all information it requires to determine that the Audit Policy is applicable.[17]

Since adoption of the Audit Policy in 1995, more than 1,150 entities at more than 5,400 facilities[18] had disclosed violations to EPA.[19] Of the 153 cases settled under the Audit Policy by early 1999, penalties had been reduced or waived for 166 companies (126 with no penalties) at 936 facilities.[20] In January 2001, EPA reported that, during fiscal year 2000, 430 companies disclosed potential violations at 2,200 facilities.[21] EPA also reported that it found 80 companies that disclosed violations voluntarily during 1999 to be ineligible for relief under the Audit Policy.[22] EPA did not identify in writing the reasons why these companies were not found to be eligible for relief; suffice to say, however, that not all companies are rewarded for their voluntary disclosures with reduced or waived penalties. This somewhat unsettling fact leaves us with the view that the prospect of being rewarded for voluntary disclosure, while valuable, must be tempered by other considerations, two of which are: protecting audit materials from disclosure, and potential criminal liability for violations of environmental law that may exist even when such violations are voluntarily disclosed.

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Audit Policy Benefits

The following examples show some of the rewards available under the Audit Policy:

- On July 13, 1998, EPA reached a settlement with East Ohio Gas after it disclosed a series of polychlorinated biphenyl-related violations. EPA initially proposed a $1,247,460 fine, but due to its disclosure under the Audit Policy, East Ohio Gas settled for $193,260 (a savings of $1,054,200).[23]
- After conducting environmental audits, six vegetable oil manufacturers (Ag Processing Inc., Bunge Corporation, Central Soya Company, Harvest States, Inc., Riceland Foods, Inc., and Townsends, Inc.) identified and disclosed to EPA Toxic Substances Control Act ("TSCA") violations. Because the companies met the requirements of the Audit Policy, EPA decided not to assess penalties estimated at $493,000.[24]
- Ten telecommunications companies (Cincinnati Bell Telephone Company, Cincinnati Bell Long Distance, Convergys Customer Management Group, Dallas MTA, Houston MTA, PrimeCo Personal Communications, San Antonio MTA, Cellco Partnership, Southwestern Bell Telephone Company, and United States Cellular Corporation) discovered and reported a total of 1,300 violations of the Emergency Planning and Community Right-to-Know Act ("EPCRA") at 400 facilities. EPA waived more than $4.2 million in potential gravity-based penalties.[25]

- EPA waived penalties against three companies that voluntarily disclosed violations of toxic chemical reporting requirements: $55,000 for Carbide/Graphite Group, $188,975 for Dietrich's Milk Products, and $17,300 for Hickman Williams & Co.[26]

- Five other telecommunications companies (AirTouch Communications, AT&T Corp., AT&T Broadband LLC, Nextlink Communications Inc., and Qwest Communications) voluntarily disclosed and agreed to correct a total of 3,457 violations at 1,122 facilities in 45 states and the District of Columbia. The telecommunications companies had violated provisions of EPCRA, the Clean Water Act, the Clean Air Act and the Resource Conservation and Recovery Act. In their settlements with EPA, the companies agreed to pay a total of $349,426 in penalties but avoided $22.4 million in gravity-based penalties.[27]

- Ten cheese companies corrected 264 violations under the Audit Policy, and only one paid a penalty. Most of the violations involved failures to report nitrate and nitric acid releases under EPCRA and could have resulted in fines of up to $100,000 for each of the companies. Nine of the companies paid no fines, and the tenth paid a fine of $10,943 for the economic benefit it received from delaying compliance.[28]

- EPA Region III has reported numerous self-disclosed violations resolved under the Audit Policy during 2000. A table on the Region III Web site indicates that settlements during 2000 resulted in reduced penalties exceeding $1,858,328.[29]

Legal Privileges Applicable to Environmental Audits

When considering whether to undertake an audit, it is important that counsel and clients recognize the legal privileges. Retaining the privileged nature of such documents is critical for several reasons. First, and most important, the prospect of keeping an audit confidential fosters open communication and encourages the free flow of information between the auditor and the client. This is essential to obtain a thorough understanding of a facility's systems, operations and compliance status. Second, treating audits as privileged protects confidential information that has legal protections and is not subject to disclosure. Third, treating audits as confidential gives a company that uncovers noncompliance control over the manner and timing of disclosure, when appropriate, so long as it fulfills legal obligations and the terms of the Audit Policy. In summary, there are several good reasons to protect audit information from disclosure to third parties and government agencies.

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Attorney-Client Privilege

The attorney-client privilege protects from disclosure confidential communications between an attorney and the client.[30] Such communications enjoy virtually complete protection from disclosure, unless the client waives the privilege.[31]

For audits, communications regarding the findings of the audit, counsel's evaluation of compliance with the law and counsel's advice and recommendations are subject to this privilege, if made to obtain or provide legal advice in confidence. The participation in the audit process of a third party such as a consultant, however, can qualify as a waiver of the privilege. Thus, the utility of the attorney-client privilege extends to some, but not all, communications that may constitute part of an environmental audit.

Work Product

The work product doctrine provides protection from discovery of materials prepared in anticipation of litigation.[32] It extends to work product obtained or produced by both lawyers and nonlawyers acting on behalf of a party involved or threatened with litigation.[33] Litigation materials are generally recognized as either "ordinary" (otherwise known as "fact") or "opinion" work product. Different rules apply to each. Ordinary work product consists of factual information that an attorney or representative gathers concerning a particular case.[34] Opinion work product consists of an attorney's mental impressions, conclusions, opinions and legal theories.[35] Generally speaking, ordinary work product is subject to a qualified privilege and is discoverable upon a showing of "substantial need" and an inability "without undue hardship" otherwise to obtain the material.[36] By contrast, opinion work product is almost absolutely privileged.[37]

Most of the information that a consultant would collect at counsel's direction during an environmental audit would be considered work product if collected in anticipation of litigation. Moreover, counsel's analysis of that information would be opinion work product. The information itself, however, might be either ordinary or opinion work product. Commentary by a consultant likely would be opinion work product. Any factual information collected during an audit would appear, at first blush, to be ordinary work product, subject only to a qualified protection. Yet, such information might be opinion work product in a case where it is produced by an experimental (i.e., nonstandard or client-specific) method. In any event, some form of work product protection often applies.

State Environmental Assessment Privileges

Some states have their own statutory privileges that protect the information collected and communicated during an environmental audit. In Virginia, a voluntary environmental assessment privilege may apply to any "voluntary evaluation of activities or facilities." These may be undertaken to provide legal counsel with information necessary to provide legal advice to a client on com-

pliance or liability issues; to "promote compliance"; or to "identify opportunities for improved efficiency or pollution prevention."[38] The privilege will apply, however, only if the document resulting from the evaluation or the information collected does not "demonstrate a clear, imminent and substantial danger to the public health or the environment," is not otherwise required by law, and is not "prepared independently of the voluntary environmental assessment process."[39]

This privilege applies to much of the information collected and communicated during an environmental audit for any of the three reasons provided in the statute. Usually the first purpose—to provide counsel with information needed to give the client legal advice on compliance with regulatory requirements—is directly applicable. Also, in most situations data collected during an environmental audit are unlikely to demonstrate a "clear, imminent and substantial danger." Whether the client will have an obligation under current law to generate the data or to disclose them to state or federal regulators depends upon the type of information discovered and the legal obligations under which the client operates.[40]

Self-Critical Analysis Privilege

The self-critical analysis privilege may protect internal investigation documents from disclosure during civil discovery where information in the documents results from a critical self-analysis undertaken to evaluate or to improve a party's procedures or products; the party intended that the information would remain confidential and demonstrated a strong interest in preserving the free flow of the type of information sought; and discovery would inhibit the free flow of such information.[41] Many courts are reluctant to recognize the privilege and will not apply it unless the internal review that a party conducts clearly benefits the public interest and would be curtailed if subject to disclosure.[42] Courts also have been reluctant to apply the privilege in cases where a party has retained an outside consultant to prepare a report and communications with the consultant were not "confidential communications . . . that [would] be compromised by discovery."[43]

dential. The client could argue that this type of internal review benefits the public interest in accurately assessing a facility's compliance with law, and that disclosure of this information would inhibit the client from conducting frank internal reviews of such compliance.

Limitations of EPA's Audit Program

A company must consider at least two overarching concerns when deciding whether to conduct an audit and how to protect its results from disclosure. First, in order to benefit from the Audit Policy, EPA may compel disclosure of audit materials and even the audit report itself. Because neither EPA nor the Department of Justice ("DOJ") has an express audit report privilege policy, counsel and clients must cautiously weigh the risks of disclosure with the rewards of reducing gravity-based penalties. Second, EPA's Audit Program does not provide a complete shield for violations that are potentially criminal. Not only is EPA broken into civil and criminal enforcement sections, but the DOJ has great independence from either EPA section. To obtain a complete release where criminal liability is concerned, an entity must obtain a recommendation for non-prosecution from EPA, while simultaneously convincing DOJ not to pursue criminal sanctions.

Maintaining Confidentiality

EPA reaffirms in the Audit Policy its position, in effect since 1986, to refrain from routine requests for audit reports.[44] EPA also demands cooperation as a precondition to obtaining audit protection, and, if it has independent evidence of a violation, EPA may require a company to divulge an audit report to demonstrate the extent and nature of the violation and the degree of culpability.[45] The agency asserts a right to request an audit report when it is the only source of information available to determine whether a company has satisfied the terms and conditions of the Audit Policy.[46]

Before electing to disclose noncompliance with the Audit Policy, a company must evaluate the possibility that EPA may require a waiver of confidentiality and/or privilege over audit materials

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When an outside consultant plays a central role in an environmental audit, the self-critical analysis privilege is likely to be of limited value. Nevertheless, in a case in which the consultant assists the process of data-gathering but is not the author of a written audit report, the client might have a reasonable argument that the data collected during an audit should be protected under the self-critical analysis privilege. The argument would be that the information was compiled to evaluate and improve the company's compliance with law, keeping the information confi-

before it grants Audit Policy rewards. In effect, EPA uses the Audit Policy's requirement of cooperation to abrogate legal privileges protecting audit materials. Once disclosed, the information in EPA's possession becomes a matter of public record. At this point, nothing stands between the public and the regulated entity that sought the safe harbor of the Audit Policy. Once disclosed, or obtained through Freedom of Information Act requests, audit reports can be used by third parties to pursue

personal injury or property damage litigation, or to file a citizen suit seeking attorney's fees.

EPA has opposed granting statutory or regulatory privileges to audit materials or to granting some form of audit immunity.[47] From the tone of EPA's notice, the reasons for EPA's opposition ring clear: Environmental groups have expressed the view that the shield of privilege puts the environment at risk by encouraging the regulated community to hide evidence of noncompliance from the public.[48] It is the authors' view, however, that an unwillingness to extend confidentiality protections to audit materials merely penalizes industry in its quest to improve compliance. An inability to protect confidential communications and the privileged analyses of counsel and consultants opens the regulated community to an additional threat beyond the penalties of EPA, or possible criminal prosecution. It produces the simultaneous threat of personal injury, property damage and citizen suit litigation. The regulated community must factor these threats into its analysis when considering whether to conduct audits. EPA claims that audit privilege and immunity laws are unnecessary, undermine law enforcement, impede protection of human health and the environment, and interfere with the public's right to know of potential and existing environmental hazards.[49] But until EPA reforms its views on extending privilege to audit reports, many companies will conclude that it simply is not in their interest to conduct environmental audits.

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EPA's Criminal Recommendations

EPA generally will elect not to recommend criminal prosecution by DOJ, or any other authority, against a disclosing entity that meets, at a minimum, conditions 2–9 of the Audit Policy.[50] On the other hand, EPA has the authority to recommend criminal charges[51] where the violation is part of a pattern or practice demonstrating a management philosophy or practice that conceals or condones environmental noncompliance; or high level officials or managers in the corporation that were consciously involved in, or demonstrated willful blindness to, violations of environmental law.[52] The recommendation not to prosecute is available so long as a company conducts self-policing, discovery and disclosure in good faith, and adopts a systematic approach to preventing recurring violations.[53] EPA also reserves the right to recommend prosecution for the culpable conduct of any individual or subsidiary organization.[54]

EPA asserts that the Audit Policy's treatment of criminal conduct is clear. In its effort to deter violations and to protect public health and the environment, however, EPA has established policies or practices that impose additional burdens upon, and create uncertainties for, the regulated community.

One burden concerns the more thorough review that EPA undertakes to confirm that an entity disclosing a potential criminal violation met all of the terms and conditions of the Audit Policy.[55] In criminal cases, entities typically are required to provide, at a minimum, access to all requested documents; access to all employees of the disclosing entities; assistance in the investigation; access to all other information relevant to the disclosed violations (including any portion of an environmental audit report that reveals an alleged criminal violation); and access to the individual who conducted the audit.[56] These requirements demand disclosure of privileged audit documents and impose greater burdens than those typically required with self-disclosure of civil noncompliance.

Often corporations may seek to resolve a pending criminal matter through a plea agreement with DOJ. The recent trend is for the Government, as part of the settlement, to demand that the corporation hand over all materials developed in any internal investigation—including audit reports.[57] Such Government demands stifle the willingness of employees to participate voluntarily in internal investigations for fear that their candid statements will be given to the Government, thereby subjecting them to a risk of individual prosecution. The forced disclosure also jeopardizes corporations' willingness to conduct internal investigations because the corporate entity effectively cannot reward early and frank disclosure of noncompliance by its employees and therefore cannot expect free, immediate and candid critiquing of company problems.[58]

Second, U.S. Attorney's offices and DOJ always retain authority to exercise their prosecutorial discretion.[59] This often presents a self-disclosing entity with a dilemma: which agency should it notify to report noncompliance? Demonstrating cooperation early is essential to develop a good relationship with the prosecutor in a criminal case. Client and counsel therefore must determine whether notice should be made to EPA or DOJ. Should they sacrifice the well-defined protections of the Audit Policy, which requires a 21-day response, in exchange for more time to investigate, and more control over the investigation? Longer response time may offer employers an opportunity to enhance or maintain relationships with involved employees who might otherwise feel the employer is sacrificing them to the federal government.[60] Establishing and maintaining good relationships with employees in the face of a criminal investigation may help an employer avoid criminal charges in cases where a tactic of government is to convince lower level employees to testify against the company, its officers and directors.

Accordingly, before disclosing potential violations discovered in an audit, companies should weigh the benefits of working with the U.S. Attorney's Office against the potential reduction in gravity-based penalties offered by the Audit Policy. Although corporations may have to cooperate "fully" in the criminal investigation, "full cooperation does not require that the [company] waive legitimate legal privileges available to it."[61] It does require, however, "that any privilege issues raised during the course of the criminal investigation be made in good faith."[62] Companies and counsel therefore must determine at the beginning of an investigation not only what privileges may apply, and how to preserve them, but also how to protect employees or officers from diluted criminal standards of intent. These considerations must play a part when considering whether a company should use the Audit Policy.

Conclusion

Environmental compliance audits provide numerous benefits, but a company should undertake an audit only after assessing all relevant considerations. They include the likely benefits to the company, its employees, its neighbors and the environment; the ability to manage the information generated during an audit in a manner that benefits the company; the availability of the Audit Policy to address noncompliance uncovered during an audit; the possibility that disclosure of privileged materials may be required to obtain Audit Policy relief; and the risks of confronting potential criminal violations, as well as how to manage such risks. In particular, a company should recognize that an audit report might be discoverable—despite the existence of legal privileges and a company's efforts to protect them—if EPA determines that it needs to evaluate whether the terms of the Audit Policy apply to a self-disclosed violation. Perhaps most significantly, criminal implications may exist where an audit reveals a management philosophy that condoned environmental compliance, or worse, the involvement of management in criminal activities. As this article describes, it is too late to address an environmental crime after an audit is complete.

A company should weigh each of these concerns before conducting an audit. It must recognize the inherent benefits of auditing, but plan for and carefully consider risks and issues as they arise, preferably with the assistance of experienced and knowledgeable consultants and counsel.

A much needed change in government policy would increase industry's incentives to conduct audits, and to disclose and correct violations promptly. The better policy would give greater respect to voluntary auditing and self-disclosures, and greater deference to privileged audit documents. This would encourage regulated entities further to conduct audits and would increase the likelihood that violations—both civil and criminal—are detected, corrected and reported voluntarily, without the risks of sacrificing legal rights and enhancing a company's culpability. ⚖

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Endnotes

1 In addition to the voluntary disclosure addressed in this article, many environmental statutes mandate disclosure of certain violations after discovery. *E.g.*, 42 U.S.C. § 9602 (requiring notification to the National Response Center of releases of "reportable quantities" of "hazardous substances"). The risk that an audit will uncover noncompliance for which disclosure is required must be a factor a company evaluates when it decides to undertake an environmental compliance audit program.

2 60 Fed. Reg. 66,706 (Dec. 22, 1995).

3 EPA's recent revisions to the 1995 audit policy lengthened its prompt disclosure period to 21 days, clarified that independent discovery conditions do not automatically preclude relief in multi-facility contexts and clarified how the prompt disclosure and repeat violation conditions apply when considering the acquisitions of regulated entities. *See* 65 Fed. Reg. 19,618 (Apr. 11, 2000).

4 *Id.*

5 *Id.*

6 Under the Audit Policy EPA reserves the right to collect any economic benefit realized due to noncompliance but offers the opportunity to reduce or eliminate gravity-based penalties *Id.* at 19,619-20.

7 *Id.* at 19,625 ("If a regulated entity establishes that it satisfies all the conditions of [the Audit Policy], EPA will not seek gravity-based penalties for violations of Federal environmental requirements discovered and disclosed by the entity.").

8 EPA defines an "environmental audit" as "a systematic, documented, periodic and objective review by regulated entities of facility operations and practices related to meeting environmental requirements." *Id.* Other types of authorized compliance management systems are discussed below.

9 *Id.* ("If a regulated entity establishes that it satisfies all the conditions of [the Audit Policy except for] systematic discovery—EPA will reduce by 75% gravity-based penalties for violations of environmental requirements discovered and disclosed by the entity.").

10 This standard applies even where the entity meets all other Audit Policy conditions. *Id.* at 19,619-20. Only in situations where EPA determines that the non-compliance is economically insignificant will it waive this component of the penalty. *Id.*

11 Along with encouraging application of the Audit Policy, EPA has sought to compel the regulated community to conduct corporate-wide audits and to develop corporate-wide compliance systems. Corporate-wide audit agreements have become effective mechanisms to resolve various corporate-wide

environmental problems uncovered during environmental audits. While many negotiations under the Audit Policy take place between the regulated entity and an EPA regional office, EPA's corporate-wide audit agreement initiative ensures that disclosures for companies with facilities in different regions are processed on the same schedule and with the same EPA point-of-contact. EPA Office of Enforcement and Compliance Assurance (hereinafter "OECA"), *Corporate Wide Audit Agreements: An Effective Approach for Companies to Improve Environmental Compliance*, Audit Policy Update (Sept. 2000). The EPA initiative is designed to offer companies the opportunity to address high volume or multi-media disclosures, to set mutually acceptable schedules of compliance and reporting, to define in advance corporate economic benefit for certain types of violations, to expand terms of disclosure and to address potential concepts of noncompliance with anonymous dialogue. *Id.*

12 65 Fed. Reg. at 19,625.

13 EPA adopted the criteria from existing codes of practice, including the United States Sentencing Guidelines for Organizational Defendants *See id*. at 19,621; *see also* United States Sentencing Guidelines § 8C2.5(f) (granting reduction in sentence for establishment of an "effective program to prevent and detect violations of law"); *id*. § 8A1.2, Commentary ¶ 3(k) (defining "effective program to prevent and detect violations of law").

14 The conditions of EPA's Audit Policy are set forth at 65 Fed. Reg. at 19,620-23.

15 EPA recently has invited different industry sectors to participate in "Audit Policy Incentive Programs" in which the agency offers members of a particular industry an opportunity to report noncompliance under the Audit Policy and, as an added incentive, an exception to its 21-day notice provision.For instance, EPA provided 40 steel mill companies additional time, from August 2000, until February 28, 2001, to notify the agency of noncompliant activity. EPA offered similar initiatives to grain producers, the communications industry and airlines. *OECA Outreach Programs Expand Use of EPA's Audit Policy,* Audit Policy Update (Spring 2001). On a more ominous note, the regulated community often views these incentive programs as a warning of future enforcement initiatives.

16 EPA's incentive programs require strict compliance with this 60-day rule, save for cases when EPA grants prior authorization to exceed it. The 60-day requirement, in both the Audit Policy and the various incentive programs, does not apply, however, to situations where existing law mandates reporting within a specific, shorter time frame (e.g., 40 C.F.R. § 302.6 requires reporting of the release of a "reportable quantity" of a hazardous substance as soon as the "person in charge" has knowledge of the release).

17 At times this cooperation requirement can conflict with counsel's advice in the face of a threat of criminal prosecution or a company's well-founded efforts to prevent disclosure of confidential information such as an audit report. Some of the dilemmas that the cooperation requirement and the other predicaments that the Audit Policy present are discussed in section III, *infra.*

18 This was up substantially from the 211 entities that made voluntary reports for more than 500 facilities as of 1997. *More than 500 Facilities Report Violations Under EPA Policy; Most Involve Paperwork,* BNA's Daily Environment Report (Sept. 10, 1997).

19 OECA *Outreach Programs Expand Use of EPA's Audit Policy*, Audit Policy Update (Spring 2001).

20 *Id*.; OECA, Statement from Steven A. Herman, Assistant Administrator of the OECA, Audit Policy Update (Spring 1999) (hereinafter "Herman Statement").

21 *Fines Totaled $224.6 Million in FY 2000 In Criminal, Civil Actions Pursued by EPA*, BNA's Daily Environment Report (Jan. 23, 2001) (noting that, in FY 1999, 260 companies disclosed violations at 989 facilities).

22 Herman Statement, *supra* note 20.

23 OECA, *East Ohio Gas Self-Discloses and Corrects PCB Violations,* Audit Policy Update (Spring 1999).

24 OECA, *Six Industrial Vegetable Oil Companies Self-Disclose Violations Under Audit Policy*, Audit Policy Update (Spring 1999).

25 OECA, *10 Telecommunications Companies Disclose, Correct Violations Under Audit Policy*, Audit Policy Update (Spring 1999).

26 *EPA Waives Penalties Against Companies that Disclosed Chemical Reporting Violations,* BNA's Daily Environment Report (Apr. 20, 2000).

27 *Five Telecom Companies, Using Audit Policy, Disclose and Correct 3,457 Violations,* BNA's Daily Environment Report (Oct. 24, 2000).

28 *Cheese Companies Correct Violations Using EPA Audit Policy; No Penalty for Most,* BNA's Daily Environment Report (Dec. 27, 2000).

29 US. EPA Region III, *Environmental Audits & Self-Disclosures Resolved Utilizing the Audit Policy, at* **http://www.epa.gov/reg3ecej/audits/cases.htm**.

30 *Henson v. Wyeth Labs., Inc.,* 118 F.R.D. 584, 587 (W.D. Va. 1987).

31 *In re* Martin Marietta Corp., 856 F.2d 619, 622 (4th Cir. 1988), *cert. denied,* 490 U.S. 1011 (1989).

32 *Hickman v. Taylor,* 329 U.S. 495, 510 (1947).

33 *See, e.g.,* Fed. R. Civ. P. 26(b)(3).

34 *E.g., United States v. Leggett & Platt,* 542 F.2d 655, 660 (6th Cir. 1976), *cert. denied,* 430 U.S. 945 (1977) (finding government investigative report prepared in anticipation of litigation to be work product).

35 *E.g.,* Fed. R. Civ. P. 26(b)(3); *James Julian, Inc. v. Raytheon Co.,* 93 F.R.D. 138, 143-44 (D. Del. 1982).

36 Fed R. Civ. P. 26(b)(3).

37 *Upjohn Co. v. United States,* 449 U.S. 383, 401-02 (1981); *Duplan Corp. v. Moulinage et Retorderie de Chavanoz,* 509 F.2d 730, 734 (4th Cir. 1974), *cert. denied,* 420 U.S. 997 (1975).

38 Va. Code Ann. § 10.1-1198 (Repl. Vol. 1998).

39 *Id.*

40 *But see* letters from Richard Cullen, Attorney General of Virginia, to Michael McCabe, Regional Administrator, EPA Region III (Dec. 29, 1997 and Jan. 12, 1998) (concluding that Virginia's environmental assessment privilege does not apply to information the disclosure of which is required under federally delegated regulatory programs).

41 *Etienne v. Mitre Corp.,* 146 F.R.D. 145, 147 (E.D. Va. 1993).

42 *Id.* at 147-48.

43 *Id.* at 148.

44 65 Fed. Reg. at 19,620.

45 *Id.*

46 *Id.* at 19,623.

47 *Id.*.

48 *Id.*

49 *Id.*

50 United States Representative Joel Hefley (Republican from Colorado) introduced a bill in Congress on January 31, 2001, that would establish privileges and immunities for information disclosed as part of a voluntary self-evaluation of compliance with environmental requirements. Voluntary Environmental Self-Evaluation Act, H.R. 352, 107th Cong. (2001). This bill is similar to H.R. 1884, which Hefley introduced in 1997. That bill was sharply criticized by then Vice-President Gore, who said it would "handicap environmental law enforcement by taking away the tools that federal and state prosecutors need to do their jobs." *Rep. Hefley Reintroduces Legislation On Corporate Immunity for Voluntary Efforts,* BNA's Daily Environment Report (Feb. 5. 2001).

51 During FY 2000, federal courts assessed $122 million in fines and sentenced defendants to a total of 146 years in prison for criminal violations of environmental laws. *Fines Totaled $224.6 Million in FY 2000 In Criminal, Civil Actions Pursued by EPA,* BNA's Daily Environment Report (Jan. 23, 2001). Speculation already has begun as to whether the Bush Administration will continue this level of criminal enforcement, but Judson W. Starr, a former head of DOJ's Environmental Crimes Section during the Reagan presidency, indicated during an interview that environmental enforcement is often stronger during Republican administrations because Republicans often must fight the perception that their party goes easy on corporate polluters. *Incoming Administration Will Not Slacken on Enforcement, Reagan DOJ Official Says,* BNA's Daily Environment Report (Jan. 10, 2001).

52 65 Fed. Reg. at 19,625.

53 *See generally id.* at 19,618-19.

54 *See id*. at 19,620.

55 Criminal disclosures under the Audit Policy are handled by the Voluntary Disclosure Board ("VDB"), which EPA established in 1997 to provide for consistent application of the Audit Policy in criminal cases. When the VDB is apprised of noncompliance that may be criminal, it coordinates with EPA's investigative team and the appropriate prosecuting authority. The VDB is chaired by the Deputy Director, Office of Criminal Enforcement, Forensics and Training ("OCEFT"), and includes the Director, Criminal Investigation Division ("CID"), the Director, Legal Counsel and Resource Management Division ("LCRMD"), OCEFT's Special Counsel, a representative from the Environmental Crimes Section, Department of Justice, or their designees. Earl E. Devaney, Office of Criminal Enforcement, Forensics and Training, *Implementation of the Environmental Protection Agency's Self-Policing Policy for Disclosures Involving Potential Criminal Violations* (Oct. 1, 1997). The VDB routinely monitors the progress of investigations to ensure that sufficient facts exist to determine whether to recommend relief under the Audit Policy. After the criminal investigation, the VDB makes its recommendation to the

director of OCEFT, who serves as VDB's deciding official and makes his or her recommendation to the appropriate U.S. Attorney's Office and/or DOJ. Such recommendations are not binding, however, and the U.S. Attorney's Office and DOJ retain full authority to exercise their prosecutorial discretion. 65 Fed. Reg. at 19,624.

56 65 Fed. Reg. at 19,623. EPA has its own policy about maintaining parallel civil and criminal enforcement proceedings. EPA, *Revised Policy on Initiating and Maintaining Parallel Enforcement Proceedings* (June 22, 1994).

57 *See* Starr, Judson W. and Brian L. Flack, *DOJ Must Address White Collar Prosecutors' Disrespect for Privileged Communications,* Washington Legal Foundation's Legal Backgrounder (Feb. 23, 2001).

58 *See id.*

59 65 Fed. Reg. at 19,620, 19,624; *see also* DOJ, *Factors and Decisions on Criminal Prosecutions for Environmental Violations in the Context of Significant Voluntary Compliance or Disclosure Efforts by the Violator* (July 1, 1991); DOJ, Land and Natural Resources Division, Guidelines for Civil and Criminal Parallel Proceedings (Oct. 13, 1987).

60 *See* Kelly, Thomas and Gregory Braker, *Risks and Rewards of Voluntary Disclosure Under EPA's Audit Policy,* Washington Legal Foundation's Contemporary Legal Notes Series, Number 34 (Aug. 2000).

61 OPA Office of Criminal Enforcement, Forensics and Training, *Implementation of EPA's Self-Policing Policy for Disclosures Involving Potential Criminal Violations* (Oct. 1, 1997).

62 *Id.*