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MANDATORY ENVIRONMENTAL AUDITING: A BETTER WAY TO SECURE ENVIRONMENTAL PROTECTION IN THE UNITED STATES AND CANADA

I. Introduction

Since 1970, a "command and control" form of regulation has provided the legal framework for the protection of the environment in North America. In the United States, Congress establishes broad goals, and the Environmental Protection Agency (EPA) promulgates technology based or emissions based standards to which the firms must adhere. [1] If firms meet these standards, the congressional objectives will be achieved and the environment would not pose a threat to human health. The situation is similar in Canada, although the provincial governments are the bodies setting most of the standards to which industries must adhere. [2]

As a result of this system of regulation, the environment is cleaner today than it was in 1970. [3] Yet there are also areas where progress seems to be at a stand still, as well as areas of increasing ***262** deterioration. [4] The problem we now face is that we seem to have maximized our gains from command and control regulations. Most western industrialized nations have experienced these apparent limits of command and control regulation, and have responded in various ways that have not attained environmental protection goals. In North America these approaches include: (1) an attempt to encourage voluntary pollution prevention; [5] (2) an increase in the use of criminal sanctions for violation of environmental regulations; [6] (3) a shift toward more market oriented means of protecting the environment, such as the controversial acid rain control program; and (4) green taxes. [7] For a variety of reasons, none of these responses has been highly successful. [8]

An overlooked approach for increasing environmental compliance is mandatory environmental auditing. This approach is consistent with the commitment these nations have made to ***263** strengthening environmental enforcement and compliance as well as providing mutual support and cooperation in carrying out this mission. [9]

This paper will first examine what environmental auditing is, and second, how voluntary environmental auditing is currently being used in the United States and Canada. Third, it will examine the arguments in favor of a scheme of mandatory environmental auditing. Fourth, it will examine the European Environmental Auditing Scheme as an example of the type of program the North American countries might consider. Finally, it will outline the elements of a proposed environmental auditing statute that could be adopted in the United States and Canada.

II. The Use of Environmental Auditing in the United States

Environmental auditing is defined by EPA as "a systematic, documented, periodic, and objective review by regulated entities of facility operations and practices related to meeting environmental requirements." [10] In recent years, corporations have increased

the use of self-auditing [11] in response to growing recognition of the potential benefits of environmental audits. [12] Regulated entities use the ***264** information gained from environmental audits to reduce the risk of penalties and litigation resulting from environmental violations. This is done by detecting and correcting violations, reducing the magnitude of violations, and preventing future violations. [13] Additionally, industries may use audits as a tool to make production operations more efficient and to educate employees about a regulated entity's impact on the environment and pertinent environmental regulations. [14]

Despite the benefits regulated entities may gain from performing environmental audits, most industries believe significant administrative, civil, and criminal liability risks remain as a deterrent to documenting their environmental compliance status in an audit. [15] In recognition of this fear, environmental regulators and legislators alike have developed policies and passed statutes in an attempt to provide industry with the necessary incentives to perform environmental audits. By doing so, regulators hope to enhance the environment while using scarce enforcement resources wisely. [16] The incentives provided include evidentiary privilege for audit reports; immunities from administrative, civil, or criminal liability; and partial penalty mitigation. While most legislation provides a privilege for environmental audits, the Environmental Audit Policy, developed by EPA, specifically excludes this type of incentive. [17]

***265 III. United States EPA Interim Policy**

During spring of 1995, EPA announced and sought comments on an interim policy to encourage the use of environmental auditing (Interim Policy). When formulating this policy, the major issue was whether the policy needed to provide a blanket privilege for environmental audits. The Interim Policy, viewed by many as a compromise policy, did not provide such a privilege. [18] The policy did, however, provide a reduction in civil penalties for environmental violations by firms that met the following seven criteria: (1) the violation was discovered through a voluntary environmental audit; (2) the violation was fully disclosed, voluntarily, and in writing to federal, state, and local officials as soon as the violation was discovered and before any inspection or notice of a citizen's suit having been filed against the company, or before "the regulated entity's knowledge that the discovery of the violation by a regulatory agency or their party was imminent;" (3) the firm corrected the violation within sixty days of its discovery, or if more time was essential, as soon as was possible; (4) the firm expeditiously remedied any condition that made or might have created "an imminent and substantial endangerment to human health or the environment;" (5) the firm implemented appropriate measures to correct environmental harm caused by the violation and to prevent its recurrence; (6) the firm had taken steps before the discovery of the violation to avoid repeat environmental violations, thereby illustrating that the violation at issue was an isolated incident and not representative of some systemic problem; and (7) the firm cooperated fully with EPA to provide the information "necessary and required by EPA to determine the applicability of the policy to the violation in question." [19]

If a firm met all seven of these criteria, then the firm was not subject to the gravity portion of any civil penalty. Under EPA's Policy on Civil Penalties, the gravity portion is the additional amount of money over the amount necessary to deprive the violator of any economic benefit from the violation that will "ensure that the violator ***266** is economically worse off than if it had obeyed the law." [20] An exception to this policy, however, arose if the violation involved either criminal conduct by the firm or any of its employees, or an imminent and substantial endangerment or actual serious harm to human health or the environment. [21] In such cases, EPA had the discretion to mitigate up to 75 percent of the gravity component. [22]

If the firm met three additional conditions, EPA did not recommend to the Department of Justice that criminal charges be brought. These three conditions are interesting because they involve proving things the firm did not do. Under the first condition, the firm must prove there was not a prevalent corporate management philosophy or practice that concealed or condoned environmental violations. Second, the firm must show that neither high level corporate officials nor managers had any conscious involvement in, or willful blindness to, the violation. Finally, the firm must prove that there was no serious harm to human health or the environment resulting from the violation. [23]

IV. United States Epa Final Policy

On December 18, 1995, EPA's Assistant Administrator for Enforcement and Compliance signed the final policy, a slightly modified version of the interim policy. The primary difference between the final and interim policies is that the interim policy applied to only those violations discovered through a voluntary audit. The final policy applies, at EPA's discretion, to violations discovered through due diligence, which the agency defines as systematic efforts to prevent, detect, and correct violations. Due diligence includes compliance systems. [24] This change sends a strong message to companies that if they have not already implemented some sort of internal compliance program, they need to do so now. [25]

However, the final policy also specifically excludes from consideration for reduced penalties violations by corporate officials "who ***267** are consciously involved in or willfully blind to violations or conceal or condone noncompliance." [26] Also excluded are facilities at which the same or a similar violation has occurred within the past five years, or at which there has been a pattern of repeated violations during the past five years. [27]

The violation must be reported within ten days in all but the most complex cases. Two public reporting requirements were also added by the final policy. First, to get a reduced penalty, a firm may be required to make public a description of its due-diligence efforts. Second, if a company must enter into a written agreement, administrative consent order, or judicial consent order, then those documents must be made public.

While EPA did make several revisions from its Interim Policy, the agency remained consistent in its stance against endorsing evidentiary privilege as an incentive to encourage the use of environmental audits, opting instead to provide penalty mitigation. [28] Similarly, the U.S. Department of Justice's (DOJ) policy on environmental violation enforcement actions, like EPA's, is designed to encourage the use of audits among regulated entities by providing more lenient treatment for those entities which meet certain criteria. [29]

*268 V. Judicially Created Audit Privileges

Federal courts have recently offered some protection to firms engaging in voluntary audits, although success in obtaining such protection through the courts has been relatively limited. In the federal court system, two approaches have been used to protect these audits: (1) the work product doctrine, in conjunction with the attorney-client privilege; and (2) the "self critical analysis privilege." An example of the former approach can be found in the case of Olen Properties Corp. v Sheldahl, Inc. [30] In that case, environmental audit memoranda prepared by an expert to aid attorneys in evaluating a firm's compliance with environmental laws were found to have been "prepared for the purpose of securing an opinion of law," and therefore, was protected under the attorney-client privilege. [31] The expert's notes, prepared for the attorney to assist in the defense of pending action, were protected from discovery under the work-product doctrine. While this doctrine provides a privileged status to some audit documents, neither the underlying facts in the documents nor those audit documents unrelated to an attorney's legal advice are subject to this privilege. [32]

In Reichold Chemicals, Inc. v Textron, Inc. [33] (Textron), the court applied the self-critical analysis privilege approach to protect environmental audits. The Textron court held that the self-critical analysis privilege provided the landowner defendant with a qualified privilege for post hoc nalyses of "past conduct, practices, and occurrences, and the resulting environmental consequences." [34] The court restricted the privilege to those situations where the defendant can prove four conditions: "(1) the information must result from a critical self-analysis undertaken by the party seeking protection; (2) the public must have a strong interest in preserving the free flow of the type of information sought; (3) the information must be of a type whose flow would be curtailed if discovery was allowed;" and (4) the privileged document must have been "prepared with the expectation

that it would ***269** be kept confidential" and has, in fact, been kept confidential.[35] Again, the court's decision applies only to past violations, and it extended limited privileged status to audit documents.[36]

VI. Environmental Audit Statutes

A. State Statutes

Many companies are not relying on the courts for protection, nor hoping that EPA will ultimately come up with strong environmental audit protection. These companies want to use the environmental audit process, and are taking their case to their legislators. They are attempting to get protective legislation that will provide an environment in which the companies will feel comfortable undertaking environmental audits. As of March 1997, twenty states passed environmental audit legislation[37] and thirteen more had pending ***270** environmental audit bills introduced in the 1997 legislative session.[38] In addition, eight states currently have administrative policies in place that provide incentives for regulated entities to perform environmental audits.[39]

Most state statutes fall into one of two general categories: (1) providing evidentiary privilege for environmental audits, or (2) offering ***271** a combination of privilege and immunity when violations discovered as a result of an audit are disclosed and corrected in a timely manner.

Virginia's statute is a typical industries support statute. It falls into the second category and is modeled after statutes that provide a self-critical analysis privilege in the context of health care peer reviews, as well as immunity upon disclosure. The statute provides that the information collected, generated, and developed during the course of an environmental voluntary self-audit is privileged from disclosure under ordinary circumstances.[40] The information is protected regardless of whether the audit is prepared by corporate employees or an independent contractor hired by the owner/operator of the firm. Individuals who prepare the audit document cannot be compelled to testify about its contents or preparation.[41]

The four exceptional circumstances under which the privilege will not be upheld are when: (1) information is uncovered that demonstrates a clear, imminent, and substantial danger to public health or the environment; (2) information contained in the audit is already required by law to be disclosed; (3) information contained in the audit was prepared independent of the voluntary environmental audit; and (4) audit documents, or portions thereof, were compiled in bad faith.[42] Assuming that none of the foregoing exceptional circumstances exist, all the firm must do in order to assert the privilege is to prove that the audit (1) was conducted by or at the behest of the facility owner or operator, (2) was voluntary, and (3) was designed to identify areas of environmental noncompliance with the law, or identify opportunities for improved efficiency or pollution prevention.[43]

As noted above, the Virginia statute also provides immunity from administrative or civil penalties for violations that are voluntarily disclosed.[44] Any person or regulated entity making a voluntary disclosure will be immune from civil and administrative penalties, as long as (1) the disclosure is not required by law; (2) made promptly after discovery; and (3) the violation is corrected in a diligent manner.[45]

The Virginia statute is representative of most state privilege and immunity legislation. Virginia's statute spells out the provisions ***272** required in order to be eligible for an incentive. Several areas within the state legislation, however, remain vague and open to interpretation. For example, Virginia's statute states that documents indicating a "clear, imminent and substantial danger to the public health or environment" are not subject to privilege.[46] The interpretation of "substantial danger" may vary significantly according to the perspective of those involved. This makes it quite difficult for a regulated entity to ensure that its audit will be subject to the privilege it is seeking.

Furthermore, the process of complying with the requirements of incentive statutes may be even more challenging for regulated entities falling under the jurisdiction of two or more states. These companies must attempt to ensure their audits fulfill every applicable requirement in the jurisdiction under which they reside, or risk losing anticipated incentives and profits if penalties result. Moreover, the ambiguity and confusion regarding multiple jurisdictions may be felt most severely by all who must adhere to state statutes or policies, as well as to EPA's Environmental Audit Policy.

Furthermore, as states like Ohio and Michigan are finding out, passage of an environmental audit statute that grants immunity does not necessarily mean that the privilege created by that legislation will be long lasting. In Michigan, a year after that state's environmental audit statute was passed, environmental activists and state and federal government officials reached a compromise on a proposed revision to the environmental audit law. [47] If the revision is passed by the legislature, it would change the law to allow disclosure of the environmental audit report in a criminal investigation, and abolish immunity from criminal fines and penalties for violations resulting in serious harm or which substantially endanger human health or the environment. [48]

Ohio and EPA officials began talks in late July 1997 over Ohio's Environmental Audit Privilege and Immunity Act. [49] Sierra Club and ***273** other environmental groups requested EPA to investigate the laws in Ohio. Those groups wanted to strip Ohio of its federal enforcement authority because the new law would prevent the state from effectively enforcing federal air, water, and hazardous waste pollution laws. [50] If the state of Ohio agrees to change its legislation, then their action may fuel additional challenges to audit privilege statutes in other states. Increased litigation and even greater uncertainty would result.

While state environmental audit legislation and EPA policy share similar goals, the requirements and incentives offered by each vary significantly. Unless a federal bill is passed and signed into law, the situation will likely become more complicated. Courts should expect a flood of litigation in an attempt to clarify subtle--yet significant--differences in law.

VII. Proposed Federal Legislation

In response to this dilemma, industry representatives have lobbied hard to gain passage of a federal environmental audit privilege statute. [51] Congress has been pressured by its industry constituents to pass a federal audit protection bill. In 1995, for example, Representative Joel Hefley, of Colorado, introduced H.R. 1047, which would protect companies from any administrative, civil or criminal penalties for a violation that was discovered during an audit, if the violation was voluntarily disclosed to EPA or another regulatory body. Use of this privilege would be limited to companies that had not had serious environmental violations during the three years prior to the audit. [52]

In the spring of 1995, Senator Hatfield of Oregon and Senator Brown of Colorado introduced the Voluntary Environmental Audit Protection Act. [53] Their bill would protect only those companies that disclosed “inadvertent” violations that were discovered by an audit and quickly remedied. Their bills, however, never made it out of committee. By the end of 1996, the 104th Congress did not pass any legislation ***274** regarding the use of environmental audits that would provide a national, unifying law, clarifying the incentives.

During the summer of 1997, however, the House of Representatives passed a controversial environmental audit bill. [54] Meanwhile, Senator Kay Bailey Hutchinson of Texas introduced an environmental audit protection bill on June 11, 1997. [55] The Senate proposal would have allowed companies to perform environmental audits without being punished for the violations if they corrected them promptly. The Senate, however, did not take action on that proposal before the summer recess. [56]

While no statutes have yet resulted from the U.S. congressional debates, the range of perspectives on this issue has become evident. [57] EPA representatives, for example, testified against the passage of H.R. 1047, emphasizing its stance against evidentiary privilege incentives. [58] This position is also reflected in EPA's interim approval to several states who have passed

environmental audit privilege and immunity provisions,[59] stating such blanket incentives may hinder the state's ability to enforce federal regulations.[60] Many environmental interest organizations, union groups, and community interests have responded similarly, supporting EPA's Final Audit Policy.[61] Those organizations ***275** have also requested that EPA revoke permits from five states whose privilege and immunity laws hamper the states' ability to protect the environment.[62]

In the United States, audit laws are relatively new. An environment has developed that fosters the passage of state laws attempting to provide incentives, without the uniformity that might be helpful in applying such statutes. Since the United States has limited experience with environmental audits, environmental audits should be limited in the manner used. EPA, state legislators, and corporations are interested in promoting the use of environmental audits through different methods. As the legislature continues to debate the effects privilege and immunity policies and regulations will have on the environment and on the regulated community, the courts will likely assist in defining the limits of such incentives. An environmental audit statute would be a welcome addition to our federal scheme of environmental protection.

VIII. The Use of Environmental Audits in Canada

Occasionally, Canadian commentators refer to the use of environmental auditing as being in its infancy in Canada.[63] At least one survey, however, reported that more than 20 percent of Canadian firms were regularly conducting environmental audits by 1992. The use of environmental auditing in Canada varies significantly by industry. For example, the chemical, petroleum, and paper and pulp industries use environmental auditing extensively.

Similar to the United States, as federal and regional governments are increasing the vigor with which they are prosecuting polluters, the use of environmental auditing is increasing.[64] Also like the United States, the Canadian government, at both the provincial and federal levels, recognizes that governmental actions can have a dramatic direct and indirect impact on the development and use of ***276** environmental auditing.[65] Certainly, one method the government, via its judicial branch, has encouraged the use of environmental auditing, has been through its recognition of the due diligence defense[66] when a corporate official is charged with an environmental crime. One way the due diligence defense can be established is to demonstrate that the firm engaged in systematic environmental auditing.[67]

In order to encourage the use of environmental auditing in Canada, the Canadian Environmental Auditing Association/ Association Canadienne de Verification Environnementale (CEAA/ACVE) was created in 1991. The mission of this organization, which became a nonprofit corporation in 1994, is to encourage the development of the environmental auditing profession and improve environmental management of private and public Canadian organizations through the creation and application of generally accepted auditing principles and standards.[68]

The organization has over 450 members, who come from many professions, and include lawyers, engineers, scientists, and accountants, to name a few. Since its inception, the organization has developed a Code of Ethics for its members,[69] provided input into the development ***277** of provincial and federal policies related to environmental auditing, and proposed qualification criteria for auditors. Many of the CEAA/ACVE's members have been involved in the ISO Technical Committee 207, which has been developing the ISO 14000 standards. In 1995, the CEAA/ACVE created a Certification Task Force to develop an accredited certification program for environmental auditors to meet the requirements of the International ISO 14000 Standards. The certification program is now operating, and CEAA/ACVE maintains a registry of certified environmental auditors.

Thus, in Canada, as in the United States, a growing recognition of the usefulness of environmental auditing exists. The government's action can stimulate or restrict the use of this practice.

IX. The Case for Mandatory Environmental Auditing

A. The Potential for Making American Firms More Competitive in the Global Marketplace

While Canada and the United States may have the largest two-way trade relationship in the world, [70] neither country can ignore trade with other nations. Especially in Europe, consumers are increasingly demanding that companies and their manufacturing processes be environmentally sound. [71] Even in the United States, a Gallup Poll found that more than 90 percent of consumers look for "environmentally safe" products or packaging and are willing to pay more for them. [72] Thus, any company expecting to be competitive in a global marketplace must demonstrate compliance with environmental health and safety standards. [73] One way to ensure that a firm complies with such standards is to regularly engage in a process of environmental auditing. ***278** If environmental auditing is mandatory in the United States and Canada, then firms will be required to engage in a process that makes them competitive worldwide. Because environmental auditing imposes a cost on firms, [74] without a legal mandate, some firms might be reluctant to engage in the practice. However, mandatory environmental auditing would force firms to do business in a manner consistent with their long-term interests.

Some firms are requiring that their suppliers be ISO 14000 certified. [75] While ISO 14000 certification requires much more than engaging in regular environmental audits, the adoption of an environmental auditing program is a significant part of meeting the ISO 14000 standards. Once a firm undertakes an environmental auditing program, it would be significantly easier for the firm to undertake the additional steps to achieve such certification.

B. What Management Does Not Know Can Hurt The Corporation

Most corporate managers do not want to violate environmental statutes. As EPA and its state counterparts have increased their use of criminal enforcement actions, firms have increasingly sought to improve their compliance. Recognizing that, in part, companies violate environmental laws because they do not realize they are not in compliance until informed by a government official, many firms turned to environmental audits as a means of determining whether they are in compliance. [76] Industry organizations have already recognized the value of the information-giving function of audits. They have adopted self-regulatory codes of environmental management that include environmental auditing, such as the Responsible Care program. [77] This ***279** program was initiated by the Canadian chemical industry in 1986 and adopted by the Chemical Manufacturers Association in the United States in 1988. [78] The program is now used by most of the chemical industry worldwide. [79] Since the first step in correcting violations is knowing that they exist, a logical first step in attaining compliance is requiring all firms to know whether they are in compliance by doing an environmental audit.

X. Inconsistent State and Federal Policies Cause Confusion

The inconsistency between state and federal policies may not provide strong support for a mandatory environmental auditing policy. However, it does provide support for the need of a uniform, national law on environmental auditing in the United States. Numerous articles have been written stressing the state of confusion that these conflicts have generated. [80] Many corporate counsel are unsure what advice to give their corporate clients in light of the conflicting state and federal policies. A national policy is thus needed to clear up this confusion.

Likewise in Canada, where authority to regulate the environment is shared by both the federal and provincial governments, inconsistent federal and provincial policies only cause confusion. Having consistent policies between Canada and the United States would facilitate firms being able to have operations not only in multiple provinces, but in both nations.

***280 XI. The European Experience**

Environmental auditing has been used most extensively in Europe, through their adoption of the Eco-management and Audit Scheme of the European Union (EMAS). EMAS is voluntary, but it provides strong incentives for corporate participation. Some claim that in the near future EMAS could be considered a mandatory system.

When examining EMAS as a possible model for an environmental auditing scheme for North America, it is important to consider the different context under which European environmental protection legislation developed. When the European Community (EC) was created in 1957, the Treaty establishing the EC [81] did not include any rules on environmental protection. However, this 1957 treaty was amended by the Single European Act [82] and the Treaty on European Union, [83] both of which highlight the importance of protecting the environment. [84] Furthermore, four community action programs on the environment [85] led to approximately 200 pieces of legislation affecting ***281** the environment, [86] and the EC's Fifth Environmental Action Programme [87] offered a new strategy for environmental action programs. Moreover, various directives and regulations have been passed to further the goal of environmental protection. This article focuses on the structure and impact of one of those regulations, EMAS.

EMAS, a scheme offering voluntary participation, was created for "the evaluation and improvement of the environmental performance of industrial activities and the provision of the relevant information to the public." [88] EMAS is considered the first regulation that promotes an expansive, explicit environmental management and audit. The regulation defines an "environmental audit" as "a management tool comprising a systematic, documented, periodic, and objective evaluation of the performance of the organization, management system and ***282** processes designed to protect the environment. . . ." [89] While participation in the scheme is voluntary, in order to be registered, the industries that participate must complete the following tasks: adopt a company environmental policy; conduct an environmental view of the site; introduce an environmental program and environmental management system; perform environmental audits; [90] set objectives to improve environmental performance; prepare environmental ***283** statements; validate policies and procedures; and forward the validated statements. Precise issues must be addressed by the program, environmental policy and environmental audit. EMAS outlines specific requirements regarding the environmental audits. [91]

***284** For instance, each site must be audited at least every three years. Furthermore, while environmental audits may be conducted by auditors within the company, the audit must be verified by an independent accredited environmental verifier. [92] Each member state ***285** establishes a system for accreditation of these independent environmental verifiers. Moreover, this verified information is made available to the public. However, the explicit provisions of EMAS are criticized because they ignore the variance of different businesses. While this scheme was developed in 1993, it did not go into effect until 1995. Although EMAS is presently a voluntary scheme, it was initially proposed as a mandatory program. Nonetheless, EMAS could become mandatory in the future for several reasons. First, the Commission will review the progress of EMAS in 1997-1998. If many companies register under EMAS, the Commission could decide that making the scheme mandatory would cause little harm. However, if most industries do not voluntarily participate, the Commission could decide to make participation mandatory. Second, EMAS could essentially become mandatory for businesses that want to stay competitive. The cultural value of environmentalism could strongly influence an industry's or business' decision to participate in the scheme. Perhaps the main force instigating the participation in EMAS is the disclosure of information to the public. Consequently, EMAS is not as seemingly voluntary as it initially appears. Since EMAS came into effect, 270 sites are registered to EMAS.

A "site" is defined as "all land on which the industrial activities under the control of a company at a given location are carried out, including any connected or associated storage of raw materials, by-products, intermediate products, end products and waste material, and any equipment and infrastructure involved in the activities, whether involved or fixed." This definition is important because it permits a company having fifty sites to register only one site of the fifty, if they choose. This site-based focus has been criticized as a major weakness because of the complexity of site-based focus and Eurocentric approach ***286**

of EMAS.[93] However, one suggested benefit of site-based focus is that the analysis of each site will take place where the pollution actually occurs. Another criticism of EMAS is the variation of standards across the member states. However, the European environmental management standard, an auditing standard that would mitigate the problem of variation of standards, was supposed to be prepared by mid-1996.

Participation in the scheme is considered beneficial for several reasons. First, businesses can improve their credibility with the public. A list of registered sites will be published each year in the EC official journal. Furthermore, the first sites to participate in EMAS have received free "advertising" because these industries have been examined in various articles. Second, industries can use the EMAS statement to announce its participation of registered sites; however, it cannot use the statement to advertise products or on packaging.

XII. A Proposed Environmental Auditing Statute for the United States and Canada

The use of environmental audits needs to be governed by one uniform federal law, in order to clear up the uncertainty about the impact of environmental audits in the United States resulting from the different approaches taken by EPA and the states. A national policy would remove the uncertainty that prevents corporations from undertaking voluntary environmental audits.[94] Federal legislation mandating environmental auditing would provide the necessary ***287** uniformity allowing corporations to move forward using tools that help corporations become solid environmental citizens.

Under the North American Agreement on Environmental Cooperation (NAAEC), the environmental side agreement to the North American Free Trade Agreement, the United States, Canada, and Mexico are proposing a move toward harmonization of their environmental policies. Adopting this proposed legislation would help the United States and Canada accomplish this goal.

To be effective, a national environmental auditing policy act should contain provisions that: (1) define the minimum elements that an audit would include; (2) require that the audit be performed every two years, at a minimum; (3) mandate compliance by industrial firms, although firms in the service or retail sectors could voluntarily participate; (4) require that a summary of the audit be sent to the regional office of EPA in which the facility being audited is located, and to each shareholder of the firm; and (5) require the audit to be followed up by a plan that prepares and implements an appropriate corrective action. Confidentiality of the audit is not an issue in most situations. Most of these provisions will be discussed in detail in the remainder of this section.

A. The Provisions of the Act are Mandatory for Industrial Firms, While Participation by the Service and Retail Industries are Voluntary

The EC had initially proposed to make its program mandatory, but subsequently opted for a voluntary program.[95] Voluntary participation may have been a political compromise, resulting in part from the fact that some member nations of the EC support much more stringent environmental regulations than others. And, as noted above, when EMAS is evaluated, the EC may well decide to mandate the program.

Voluntary programs under the Pollution Prevention Control Act prove that a voluntary program would be less effective than a ***288** mandatory program.[96] If a voluntary program were instituted, the participants would most likely be firms that were already engaging in environmental auditing. Voluntary participants are generally not the firms who most need to be engaging in environmental auditing.[97] Similarly, the participation rate in the EC supports the notion that firms are not eager to jump on the environmental auditing bandwagon under a voluntary scheme. Only 270 firms in the EC were registered to EMAS by the middle of 1996.[98]

Also, as the body of environmental regulations has grown, it has become increasing difficult for EPA and state agencies to comprehensively monitor compliance of every firm. [99] Hence, there is a need to put the burden of monitoring on the firms themselves. And the burden of ensuring compliance can be shifted to the firms only if the auditing process is mandatory.

XIII. Requirements Under the Act

The requirements under the act would be very similar to the requirements for registration under EMAS. The proposed statutory provisions would require that all industrial firms: (a) adopt a company environmental policy which provides for compliance with all relevant regulatory requirements regarding the environment; (b) include commitments aimed at the reasonable continuous improvement of environmental performance, with a view toward reducing environmental impacts to levels not exceeding those corresponding to economically viable application of best available technology; (c) conduct an initial environmental review of the site; (d) introduce an environmental program for the site and an environmental management system applicable to all activities at the site which is aimed at achieving ***289** a continuous improvement of environmental performance; (e) carry out, or cause to be carried out, environmental audits at the site every two years; (f) set objectives at the highest appropriate management level for the continuous improvement of environmental performance, and revise the environmental program to enable the set objectives to be achieved at the site; (g) prepare an environmental statement specific to each site audited; (h) have the environmental policy, program, management system, review or audit procedure and environmental statement or statements examined to verify that they meet the relevant requirements of this regulation; (i) forward the validated environmental statement to the competent body of the (1) regional EPA office (United States version) or (2) regional office of Environment Canada (Canadian version), and to all shareholders of the parent corporation. [100]

While some of these requirements are self-explanatory, a few require additional explanation. The following briefly explains the comprehensive environmental review, environmental statement and sanctions for noncompliance.

A. Comprehensive Environmental Review

The starting point of this scheme is the requirement that the firm do a broad-ranging, environmental review. Under EMAS, from which this requirement is adopted, an "environmental review" is defined as "an initial comprehensive analysis of the environmental issues, impact, and performance related to the activities at a site." [101] This initial review is to be conducted once for each company, and once for each individual plant. This initial review will provide the benchmark from which subsequent environmental audits can measure progress. Information retrieved from this initial review will also provide the basis for the development of the environmental program and environmental management system required under part (d). The initial review is broader and more comprehensive than a compliance audit. It not only examines compliance with existing environmental laws and the company's environmental policy, but also examines all aspects of the firm's operations and policies that may impact on the environment.

***290** B. Environmental Statement

Once the comprehensive review has been completed, and after the completion of each biannual environmental audit, an environmental statement will be prepared and sent to the appropriate government office and to the shareholders of the corporation. The environmental statement is a summary of the results of the audit. It includes an identification of all problems discovered at the site and a plan for correcting these deficiencies. The corrective plan should include a timetable.

The purpose of this statement is to ensure that the firm follows through and corrects its deficiencies. Requiring the filing of the statement rather than the complete audit itself is a compromise between those who wish for environmental audits to remain confidential and those who wish to require that the audits receive an audit privilege. Once the audit statements have been properly filed, the audits would receive a limited privilege. If the firm could demonstrate that they were in the process of correcting all deficiencies that were identified in the statement, the audit itself would remain privileged. If independent evidence, however,

were submitted to the court illustrating that either (a) the site had unreported deficiencies at the time the statement was filed, or (b) the firm was not correcting its deficiencies in accordance with its reported corrective plan, then the audit would be fully discoverable by both government agencies and parties bringing civil actions against the corporation.

C. Sanctions for Noncompliance

One of the most difficult aspects of proposing such a piece of legislation is determining the sanctions available for noncompliance. If the sanctions are not substantial enough, firms will not comply with the act. On the other hand, if the mandated sanctions are not applied, firms will see no reason to comply. [102] Monitoring compliance under this legislation will be easier than most other statutes. The responsible government agency can simply compile a database of all firms within its region, which monitors whether the biannual reports were filed.

***291** The regional authority should be authorized to issue an injunction ordering the firm to comply with the regulation and to issue fines of up to $10,000 per day for noncompliance. Also, if any firm in the United States is prosecuted for violating another environmental law, and it has not met the auditing requirement, then the maximum gravity component of the fine will be issued. In Canada, the firm will be prohibited from raising the due diligence defense.

XIV. Conclusion

Clearly, there is a need to find additional approaches to environmental regulation if the United States and Canada are to achieve the kind of clean environment that we have set out to attain. Mandatory environmental auditing appears to offer that additional approach. A proposal for a mandatory environmental auditing scheme, such as the one set forth in this article, should be adopted in the United States and Canada.

Footnotes

a1 Nancy Kubasek, Professor of Legal Studies, Bowling Green State University. M. Neil Browne, Distinguished Teaching Professor of Economics, Bowling Green State University. Kara Jennings, Research Assistant to Professor Kubasek. Carrie Williamson, Research Assistant to Professor Browne.

1 For an overview of the United States' system of environmental law, see generally Nancy Kubasek, Environmental Law (1996).

2 See Roger Cotton, Environmental Considerations in Canadian Business Transaction, 761 PLI/Corp. 523, 525 (1991) (providing a brief overview of the framework of Canadian environmental law).

3 For example, since the passage of the Clean Air Act in 1970, the gross domestic product of the United States has increased 99 percent while emissions of its six major air pollutants declined by 29 percent. See EPA, Annual EPA Report on National Air Quality Status and Trends (Dec. 17,1996) (statement of Carol M. Browner, EPA Administrator). The five year review of the 1991 United States/ Canada Bilateral Air Quality Agreement shows substantial progress in both nations in reducing emissions and effects of acid rain. The 1995 SO2 levels were actually 3.4 million tons better than required under the Clean Air Act. The report also cited studies showing reduction in surface water sulfates, leading to water quality improvement in the northeastern United States and Canada, as well as a decrease in lake nitrate concentrations in the Adirondacks. See EPA, U.S.-Canada Report Shows Particulate Heath Dangers, Acid Rain Progress, 205-50 (Group Press Release, Oct. 25, 1996).

4 For example, emissions of greenhouse gases in Canada have risen by 9.5 percent since the 1992 Rio Summit. See Vanessa Benedek, Canada's Flawed Environmental Record, Varsity Envtl. Supp., Jan. 21, 1997, at S7.

5 The Pollution Prevention Control Act of 1990 established a national policy of pollution prevention and charged EPA with establishing voluntary programs to implement this policy. Pollution Prevention Strategy, 56 Fed. Reg. 7,849 (1991). For an overview of the provisions of the Pollution Prevention Act, see Stephen M. Johnson, From Reaction to Proaction: The 1990 Pollution Prevention Act, 17 Colum. J. Envtl. L. 153 (1992). One such project was the Industrial Toxics Project, or the “33/50 program,” a program designed

to attain a 33 percent reduction in emissions from 1988 levels by 1995. A major difficulty with this voluntary program was getting firms to participate. By 1994, of the 8,000 firms invited to participate, only 1,200 had agreed to do so. See Seema Arona & Timothy N. Carson, A Voluntary Approach to Environmental Regulation: The 33/50 Program, Resources, at 6-7. Other voluntary initiatives include the 1991 project "green lights," which encourages firms to install energy efficient lighting, and "energy star." "Green lights" had over 400 participating firms by March 1992, resulting in a reduction of air pollution from power plants equivalent to removing 1.5 million cars from the road. Energy star, with it's 15 percent rate of participation, was not seen as highly successful. See Voluntary Pollution Prevention Program Labeled 'Sham' By Environmental Group, 25 Envtl. L. Rep. (BNA), at 280 (June 10, 1994).

6 The latest EPA statistics show a record 262 criminal enforcement actions were taken in 1996, and $76.6 million in criminal fines were assessed. The combined level of criminal, civil, and administrative fines and penalties in 1996 was the highest in EPA history, totaling $173 million. These record levels were set despite the hampering of EPA efforts early in 1996 because of the government shutdowns and congressional funding restrictions. See EPA Press Releases 202-260, (Feb. 26, 1997). Similar trends can be seen in Canada, and more specifically in Ottawa, where the number of fines secured by the Ministry of the Environment in 1986 was $605,668 and by 1994, it had gradually increased to $2,427,833.

7 "A green tax is a tax on polluting behaviors, the revenues from which may be funneled into environmental programs. Supporters of taxes argue that these taxes correct the market's failure to value environmental services." See Kubasek, supra note 1, at 101-2.

8 See Cass R. Sustein, Paradoxes of the Regulatory State, 57 U. Chi. L. Rev. 407, 441 (1990).

9 See generally Scott C. Fulton & Lawrence I. Sperling, The Network of Environmental Enforcement and Compliance Cooperation in North America and the Western Hemisphere, 30 Int'l L. 111 (1996).

10 Environmental Auditing Policy, 51 Fed. Reg. 25,004, 25,006 (1986). Audits of this type are also referred to as compliance audits, as compared to transaction-triggered audits which are completed in response to the sale or transfer of real estate or businesses. Transaction-triggered audits are often less rigorous than compliance audits. See generally Arent Fox Search (visited Mar. 23, 1998) <http://calvin.arentfox.com/search.htm>. A third type of self-review is a management audit, which goes beyond the compliance audit in exploring a regulated entity's environmental compliance record by reviewing the entity's environmental management system as well. See Paula C. Murray, The Environmental Self-Audit Privilege: Growing Movement in the United States Nixed by EPA, 24 Real Est. L.J. 1, 169-70 (1995).

11 According to a Price Waterhouse LLP survey released April 6, 1995, a majority of firms continue to adopt and implement environmental auditing programs. See Enforcement: Elimination of Penalties Could Boost Environmental Self-Auditing, Survey Says, BNA Nat'l. Env't Daily, Apr. 7, 1995, at 1. Furthermore, "75 percent of the 369 companies who responded already conduct audits . . . and one-third of those that don't, plan to do so." Dep't of the Army Pamphlet 27-50-285, USALSA Report: Envtl. L. Div. Notes, Federal Audit Privilege Update, Army L. 29 (Aug. 1996). "A recent survey of the § & P 500 by the Washington-based Investor Responsibility Research Center found that 80 percent of the respondents conduct some sort of environmental auditing." Timothy Aeppel, Firms Reveal More Details of Environmental Efforts But Still Don't Tell All, Wall St. J., Dec. 13, 1993, at B1.

12 See, e.g., Michael Baram, The New Environment for Protecting Corporate Information, Envtl. Rep. 545 (July 22, 1994). There exists a "new corporate view that prevention is more effective than defensive measures to minimize losses, gain customers, win public trust, and stave off further regulations." Id.

13 See Michael Goldsmith & Chad W. King, Policing Corporate Crime: The Dilemma of Internal Compliance Programs, 50 Vand. L. Rev. 1, 12-14 (1997). Goldsmith and King explore the legal benefits of performing audits in depth, noting their use in allowing an entity to explore potential criminal and civil liabilities and evaluate subsequent economic requirements, assist in avoiding prosecution by establishing an entity's good intentions, convince plaintiffs of a weak case or assist in agreeing to a settlement, and allow an entity to defend itself to shareholders and the public. See id. See also Clinton J. Elliott, Kentucky's Environmental Self-Audit Privilege: State Protections or Increased Federal Support? 23 N. Ky. L. Rev. 1, 9-13 (1995).

14 See Murray, supra note 10, at 1.

15 "Twelve percent of corporations stated that audit results were used against them." Also, companies stated they would perform more audits if penalties were eliminated. See Goldsmith & King, supra note 13, at 4.

16 See generally Voluntary Environmental Self-Evaluation Act: Hearings on H.R. 1047 Before the Subcommittee on Commercial and Administrative Law of the Comm. on the Judiciary, 104th Cong., 1st Sess. 13 (1995). See also Enforcement: EPA Urged to Weigh End Results When Looking to Effectiveness of Actions, BNA Nat'l Env't Daily, Mar. 19, 1997, at D8 (gathering information for their National Performance Measures Strategy; EPA heard from environmentalists, state administrators, and industry representatives who noted the need for EPA to use it's enforcement resources wisely; participants noted the effectiveness of using environmental audits as means to comply with environmental regulations).

17 See Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violation, 60 Fed. Reg. 66,706 (1995) (hereinafter Final Policy).

18 See Voluntary Environmental Self-Policing and Self-Disclosure Interim Policy Statement, 60 Fed. Reg. 16,875 (1995) (hereinafter Interim Policy).

19 Id. at 16,877.

20 Policy on Civil Penalties, 17 Envtl. L. Rep. (Envtl. L. Inst.) 35,083 (Feb. 16, 1984).

21 See Interim Policy, supra note 18, at 16,877.

22 See id.

23 See id. at 16,878.

24 See Final Policy, supra note 17, at I E(1).

25 See John Voorhees, Incentives Promote Audits and Management Systems, 15 Preven. L. Rep. 4, at 6 (Spring 1996).

26 See Final Policy, supra note 17, at I. D(3).

27 See Final Policy, supra note 17, at II. C(3)(a)(i)-(ii).

28 For EPA's opposition to providing privileged status for audits, see Final Policy, supra note 17, at F(1)-(6). According to EPA, privilege statutes foster secrecy and impede the agency's ability to enforce environmental regulations; there is no need for such an incentive based on information provided by the Price Waterhouse LLP survey which notes that large and mid-sized companies that do not currently audit do not feel the need to perform them. Furthermore, concerns about an audit's confidentially status are not primary factors in their decision to perform audits; the privilege could be argued to include facts, as well as the audit itself; privilege statutes will foster litigation in an attempt to determine the scope of such privilege; EPA policy to reduce penalties mitigates the need for evidentiary privilege; and privilege statutes are opposed by the enforcement community as well. See id.

29 See DOJ, Factors in Decisions on Criminal Prosecutions for Environmental Violations In the Context of Significant Voluntary Compliance or Disclosure Efforts by the Violator (July 1, 1991) quoted in John T. Kolaga, New York Joins the Battle Over Environmental Audit Reports: Will They Be Protected By Legal Privilege Under the Pataki Administration?, N.Y. St. B.J., Jul./Aug. 1995, at 26. The DOJ considers (1) if the disclosure was voluntary and timely; (2) if the entity cooperated with the DOJ in negotiations; (3) if there was an audit program in place before the discovery; (4) the "pervasiveness" of the violation; (5) whether an internal compliance system was present; and (6) the regulated entity's willingness to correct the violation. See id.

30 24 Envtl. L. Rep. 20,936 (C.D. Cal. Apr. 12, 1994).

31 Id.

32 See David Sorenson, The U.S. Environmental Protection Agency's Recent Environmental Auditing Policy and Potential Conflict With State-Created Environmental Audit Privilege Laws, 9 Tul. Envtl. L.J. 483, 491 (1996).

33 25 Envtl. L. Rep. 20,307 (N.D. Fla. Sept. 20, 1994).

34 Id. at 20,309.

35 Id. at 20,308.

36 See Sorenson, supra note 32, at 492.

37 See Ark. Code Ann. §§ 8-1-301 to 8-1-312 (Michie 1987-1995) (providing a greater scope for civil and administrative proceedings than criminal proceedings; Arkansas' statute specifically states that the public's access to information via the Freedom of Information Act is not hindered by the statute); Colo. Rev. Stat. Ann. §§ 13-25-126.5, 25-7-122, 25-15-309, 25-15-310 (West 1994) (providing environmental audits with evidentiary privilege in administrative, civil, and criminal proceedings; providing penalty reduction or immunity in civil, administrative, and criminal proceedings; allowing a judge to admit an audit into evidence under "compelling circumstances" under section 13-25-126.5(3)(c)); Idaho Code §§ 9-801-811, 9-340, (providing evidentiary privilege and immunity status to audits in civil, administrative, and criminal proceedings); Ill. Rev. Stat. ch. 415, para. 5/52.2 (1994) (granting privilege status in administrative, civil, and criminal proceedings in audits); Ind. Code Ann. §§ 13-28-4-1 to 28-4-10 and §§ 13-11-2-68 to 13-11-2-69 (Burns 1966) (stating privilege is granted in civil, administrative, and criminal proceedings); Kan. Stat. Ann. §§ 60-3332 to 60-3339 (1995) (granting evidentiary privilege status for audit reports completed by companies with a compliance monitoring system in place; section 60-3333a specifies, however, that the audit report is subject to discovery; providing immunities for regulated entities upon disclosure of the violation in civil, administrative, and criminal proceedings); Ky. Rev. Stat. Ann. § 224.01-040 (Michie Supp. 1994)(as amended 1996 Ky. S.B. 281, enacted Apr. 4, 1996) (granting privilege and immunity for civil, administrative, and criminal proceedings); Mich. Stat. Ann. § 324.14801 to 324.14810 (providing evidentiary privilege and immunity in civil, administrative, and criminal proceedings; requiring that a public report be compiled documenting how often regulated entities claimed immunity status, and the general nature of the violation); H.B. 1479, 79th Leg., 1995 Reg. Sess. (enacted May 17, 1995) (establishing a pilot program to promote voluntary audits by providing that audit information is privileged to all but the state; deferring enforcement actions for ninety days if an audit was completed, and penalties are waived if the violation has been corrected within the ninety day period; requiring public disclosure of violator's names and performance schedules); Miss. Code Ann. §§ 49-2-51, 49-17-42, 17-17-29 (providing evidentiary privilege in civil, administrative, and criminal proceedings; providing penalty reduction upon disclosure in section 17-17-29); N.H. Rev. Stat. Ann. §§ 147-E:1 to E:9 (including reduced penalties along with an audit privilege as incentives); N.J. St. Ann. § 13:1D-125 (allowing a grace period for an entity who has discovered and disclosed the violation to correct such violation even though not providing privilege for audits; if the violation is corrected with the grace period, no penalty will be imposed assuming it is a minor violation discovered as a result of voluntary self-discovery); Ohio Rev. Code Ann. § 147-E:1-9 (providing extensive privilege and immunity in civil, administrative and criminal proceedings); Or. Rev. Stat. § 468.963 (1993) (providing a privilege incentive which was the first to pass in 1993); S.C. Code Ann. § 48-57-10 to 48-57-110 (1996) (providing privilege and immunity incentives and expressly states evidence of willful noncompliance is necessary to overturn the privilege); S.D. Codified Laws Ann. §§ 1-40-33-37 (1996) (this statute is the exception, as it does not provide a privileged status to audits; civil and criminal immunities, however, result from disclosure of violations discovered as a result of an audit); Tex. Rev. Civ. Stat. Ann. art. 4447cc (West 1996) (providing privilege and immunity incentives; requiring that regulated entities notify the Texas Natural Resource Conservation Commission before completing an audit in order to be eligible for possible immunity provisions; making any unlawful disclosure of audit information a misdemeanor); Utah Code Ann. §§ 19-7-101 to 19-7-108 (1995) (providing privilege status to audits in administrative and judicial procedures; immunity provision waives civil penalties, but retains the authority to impose penalties which represent the sum of any economic gain the entity may have experienced); Va. Code Ann. §§ 10.1-1198, 10.1-1199 (Michie 1995) (providing privilege status for audits and immunity for regulated entities in administrative and civil proceedings, criminal proceedings are not addressed); and Wyo. Stat. Ann. §§ 35-11-1105-1106 (1977) (S.B. 96, 53rd Leg., 1st Sess. (Mar. 24, 1995) (enacted) (providing privilege and immunity provisions).

38 See Alabama, S. 388, 1997 Reg. Sess. (introduced and to committee Feb. 13, 1997); Alaska, 1997 S. 41, 20th Leg., 1st Sess. (1997) (introduced by Lehman Jan. 13,1997, provides for privilege status and immunities); Delaware, H. 32, 139th Gen. Assembly, 1st Sess. (1997) (introduced Jan. 21, 1997); Georgia, H. 701, 144th Gen. Assembly (1997) (pending as of Jan. 21, 1997); Hawaii, H. 1245, 19th Leg. (1997) (introduced by Yoshinaga Jan. 15, 1997, bill provides for privilege and immunity); Iowa, H. 216, 77th Gen. Assembly, 1st Sess. (1997) (introduced by Bradley and Rants Feb. 12, 1997, to committee on same date); Minnesota, S. 165, 80th Leg., 1997 Sess. (introduced by Morse, Price and Laidig on Jan. 27, 1997 and to committee Jan. 30, 1997); Missouri, S. 48 and S. 125, 89th Gen. Assembly, 1st Reg. Sess. (1997); Montana, H. 293, 55th Leg. (1997) (introduced by Orr on Jan. 18, 1997, to committee on the same date); Nebraska, L. 208 (introduced Jan. 10, 1997 by Preister), L. 395 (introduced by Krestensen and Broon on Jan. 15, 1997), and L. 541 (introduced by Beutler on Jan. 21, 1997), 95th Leg., 1st Reg. Sess. (1997); New York, S. 4870, A. 1183, and A. 3154, 220th Ann. Leg. Sess. (1997); Oklahoma, H. 1814, 46th Leg., 1st Sess. (1997); Pennsylvania, S. 381, 181st Gen. Assembly, Reg. Sess. (1997), and West Virginia, S. 99 and H. 2154, 73d Leg. Sess. (1997).

39 See Cheryl Hogue, State Audit Policies Overview, Nat'l Env't Daily, Mar. 3, 1997, at D4. California, Florida, North Carolina, Oklahoma, Pennsylvania, Tennessee, Vermont, and Washington have administrative policies in place which provide incentives to

regulated entities who perform audits to improve environmental compliance. Delaware, Maryland, New Mexico, and West Virginia are in the process of implementing such policies. See also Office of Regulatory Enforcement, EPA, Audit Policy Interpretive Guidance, Jan. 1997, at attachment three, p. 3. California and Florida are both modeled after EPA administrative policy, and are looked upon favorably by EPA.

40 See Va. Code Ann. § 10.1-1198(A) (Supp. 1995).

41 See id. at § 10.1-1198(B).

42 See id.

43 See id.

44 See id. at 10.1-1199.

45 See Va. Code Ann. § 10.1-1199 (Supp. 1995).

46 Id. at 10.1-1198(A).

47 See Amy Lane, Compromise Reached on Environmental Audits, Crain's Det. Bus., July 7, 1997, available in WESTLAW, 1997 WL 8576287.

48 See id. The new legislative proposal would also preclude immunity for those who violate judicial or administrative orders or for violations that give a firm a substantial economic benefit resulting in a clear advantage over competitors. Firms wishing to do an audit and receive immunity from penalties would be required to notify the state of their intent and must then complete the audit within six months. See id.

49 See Agencies to Discuss Law Letting Polluters Clean Up, Columbus Dispatch, July 18, 1997, at 8C.

50 See id.

51 See Hogue, supra note 39, at D4. Industry lobbied for incentives on both the federal and state levels. In Tennessee, “state officials acknowledged that they adopted a(n environmental audit) policy to circumvent a call for an audit law the business community.” Id.

52 See More States Call Adopt Audit Privilege Laws; EPA Calls Federal Legislation Ill-Advised, 25 Env't Rep. (BNA) 2186 (March 10, 1995).

53 See S. 582, 104th Cong. 1st Sess. § 2 (1995).

54 See Jay Praises Leadership of Tomblin, Kiss, Charleston Gazette & Daily Mail, July 22, 1997, at 1A.

55 See Environmentalists Gear Up to Fight Self-Audit Legislation, Cong. Daily, July 1, available in WESTLAW, 1997 WL 11443282.

56 See id.

57 For example, environmentalists charge that the bills proposed during the summer of 1997 would allow companies to conceal information about their environmental performance from the public and from regulators. The bill has been dubbed the “pollution secrecy” or “right not to know” bill. Supporters of the legislation claim that without the protections offered by these bills, third parties and government agencies would have access to information that would allow them to easily sue companies long after the violations had already been corrected. Id.

58 See Voluntary Environmental Self-Evaluation Act: Hearings on H.R. 1047 Before the Subcommittee on the Judiciary, supra note 16.

59 See 61 Fed. Reg. 32,391 (1996) (to be codified at 40 C.F.R. pt. 70); 61 Fed. Reg. 64,622 (1996) (to be codified at 40 C.F.R. pt. 70). See Cheryl Hogue, EPA Action On Michigan Air Program Adds to Tension Over State Audit Laws, BNA Nat'l Env't Daily, Jan. 10, 1997, at D2.

60 See Final Policy, supra note 17. See EPA Lays Out Criteria for Judging Effects of State Audit Laws on Program Delegation, BNA Nat'l Env't Daily, Feb. 24, 1997, at D5. EPA established criteria that apply under the following statutes: Clean Air Act; Clean Water Act; Resource Conservation and Recovery Act; and Safe Drinking Water Act.

61 See Environmental Defense Fund, EDF Praises EPA Environmental Audit Policy (last modified Dec. 18, 1995) <http:// www.edf.org/pubs/NewsReleases/1995/dec/epaaud.html>. See also Hogue, supra note 39, at D4. "A lobbyist for environmental groups in Tennessee said adoption of an administrative policy takes the wind out of the sails of businesses seeking audit privilege or immunity legislation." Id.

62 See Environmental Groups Seek Reform of Audit Privilege Law in Texas Legislature, BNA Nat'l. Env't Daily, Dec. 23, 1996, at D10; Bebe Raupe, Ohio Groups Seek Revocation by EPA of State Enforcement Power Due to Law, BNA Nat'l Env't Daily, Jan. 30, 1997, at D3; Colorado Groups Petition EPA Over State's Audit Privilege Law, BNA Nat'l Env't Daily, Jan. 30, 1997, at D3. See, e.g., Cheryl Hogue, Activists Angry That Company Asserting Ohio Audit Privilege in Federal Court Case, BNA Nat'l Env't Daily, Jan. 30, 1997, at D1.

63 See generally Cotton, supra note 2.

64 See id.

65 See id.

66 The use of this defense stems from two cases. The first is Regina v. Saulte Ste. Marie, 85 D.L.R. 3d 161 (1978). The second, and the one that has received the most attention, is Regina v. Bata Industries, 11 C.F.L.R. (N.S.) 208 (1992).

67 See Nancy Kubasek, Following Canada's Lead: Preventing Prosecution for Environmental Crimes, 39 Bus. Hor. 64, 66-67 (1996) (discussing how to establish the due diligence defense). The establishment of this defense requires active environmental policies and practices on the part of the firm and the responsible individuals it employs. See id. at 66.

68 See Canadian Environmental Auditing Association, Backgrounder (visited Mar. 23, 1998) <http://www.mgmt14k.com/ceaa/backgr.htm>.

69 The CEAA's Code of Ethics:
Each CEAA member will endeavor to:
* Be honest and candid, and perform professional services with integrity and due care; * Be competent, having the required skills, knowledge, and experience to perform the services undertaken; * Continually seek to maintain and improve professional knowledge of skills; * Serve the client in a conscientious, diligent, and efficient manner; * Hold in strict confidence, except as required by law, all information concerning the business and affairs of the client acquired in the course of the professional relationship and not use this information for personal gain; * Commit to honest, thorough, and straightforward communication in the performance of professional duties; * Not be associated with any report statement, or representation know to be false or misleading; * Not advertise in a misleading manner or in a manner that is injurious to the profession; * Conduct him or herself toward other professional auditors with courtesy and good faith; * Endeavor at all times to enhance the public regard for the profession.
Id.

70 In 1995, United States trade with Canada totaled more than $333 billion. Canada's purchases of Unired States goods amounted to about $4,309 per capita, while the United States' purchases of Canadian goods amounted to approximately $562 per capita. See Canada-United States: The World's Largest Trading Relationship, Embassy of Canada (1996).

71 See Maryellen McPhee Frawley, International Audit Protocols Help Multimational Companies Keep Pace with Global Regulatory Change, Env. Reg. & Permitting 13 (Spring 1996). According to a recent study, the third most important reason why a product is purchased in Europe is that the company that produced it is "green." Id.

72 See Frank Lautenberg, Pulling the 'Green' Over Our Eyes, N.Y. Times, Apr. 22, 1991, at A17.

73 See id.

74 According to a survey conducted by Price Waterhouse LLP, the average cost of an environmental auditing program is $367,285 and the average cost to audit one facility is $15,401. See The Voluntary Environmental Audit Survey of U.S. Business, (Price Waterhouse LLP, Mar. 1995).

75 For a thorough discussion of the potential impacts of ISO 14000, see Genevieve Mullett, ISO 14000: Harmonizing Environmental Standards and Certification Worldwide, 6 Minn. J. Global Trade 379 (Winter 1997).

76 See Margaret Murphy & Emily Conant, Environmental Audits: The Battle Among EPA, Congress, and the State Legislatures, 8 Env't Claims J. 95 (Winter 1995/1996).

77 See Michael S. Baram, Multinational Corporations, Private Codes, and Technology Transfer for Sustainable Development, 24 Envtl. L. Rep. (BNA) 33, 47-49 (1994) (describing Responsible Care program as one of "the most advanced new codes of environmental conduct"); see also Paul Abrahams, Survey of Chemicals and the Environment, Fin. Times, June 18, 1993, § III, at I. Ninety percent of U.S. chemical companies, which are represented in the 180-member Chemical Manufacturers Association, espouse the basic principles of the Responsible Care program. See Stephen Barr, Role for Workers in Plant Safety Debated, N.Y. Times, Nov. 25, 1990, § 12 NJ, at 1. In the United Kingdom, the program has been adopted by all but three members of the 215 member Chemical Industries Association, a group representing most chemical manufacturers. See Clive Cookson, Chemical Monitor Accepted, Fin. Times, Mar. 8, 1991, § I, at 6. Forty-nine industry groups and 168 companies have embraced Responsible Care in Japan. See Michiyo Nakamoto, Responsible Care in Japan, Fin. Times, June 18, 1993, § III, at 6.

78 See id.

79 See id.

80 See, e.g., Joseph L. Miller, Environmental Audits at Federal Facilities: EPA Policy or State Audit Statutes, 1996 Fed. Fac. Envtl. J. 79 (Autumn 1996); John T. Kolaga, New York Joins the Battle Over Environmental Audit Reports: Will They Be Protected By Legal Privilege Under the Pataki Administration?, 1995 N.Y. St. Bar J. 36 (August 1995); Clinton J. Elliott, Kentucky's Environmental Self-Audit Privilege: State Protection or Increased Federal Scrutiny?, 23 N. Ky. L. Rev. 1 (1995).

81 Previously referred to as the Treaty of Rome.

82 Final Act of the Conference of Representatives of the European Communities' Member States with Treaty Modifications Concerning Community Institutions, Monetary Cooperation, Research and Technology, Environmental Protection, Social Policy, and Foreign Policy Coordination, Feb. 17 and 28, 1986, 25 I.L.M. 503 (sometimes called the Single European Act) (hereinafter Single European Act).

83 Treaty on European Union, Feb. 7, 1992, 31 I.L.M. 247 (also referred to as the Maastrict Treaty on European Union).

84 31 I.L.M. at 285. "Community policy on the environment shall contribute to pursuit of the following objectives: preserving, protecting, and improving the quality of the environment; protecting human health; prudent and rational utilisation of natural resources; promoting measures at international level to deal with regional or worldwide environmental problems". Id. at art. 130r(1). "Community policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Community. It shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay. Environmental protection requirements must be integrated into the definition and implementation of other Community policies". Id. at art. 130r(2). For a discussion of the historical development of environmental policy, see David Vogel, Environmental Policy in the European Community, in Environmental Politics in the International Arena: Movements, Parties, Organizations, and Policy 181 (Sheldon Kamieniecki ed., 1993).

85 See Programme of Action of the European Communities on the Environment, in Annex to the Declaration of the Council of the European Communities and of the Representatives of the Governments of the Member States Meeting in the Council of 22 November 1971 on the Programme of Action of the European Communities on the Environment, 1973 O.J. (C 112), 1; European Community Action Programme on the Environment (1977 to 1981), in Annex to the Resolution of the Council of the European Communities and of the Representatives of the Governments of the Member States Meeting within the Council of 17 May 1977 on the continuation and implementation of a European Community policy and action programme on the environment, 1977 O.J. (C 139), 1; Action Programme of the European Communities on the Environment (1982 to 1986) in Annex to the Resolution of the Council of the

European Communities and of the Representatives of the Governments of the Member States Meeting Within the Council of 7 February 1983 on the Continuation and Implementation of a European Community Policy and Action Programme on the Environment (1982 to 1986), 1983 O.J. (C 46), 1; EEC Fourth Environmental Action Programme (1987-1992), in Annex to the Resolution of the Council of the European Communities and of the Representatives of the Governments of the Member States Meeting Within the Council of 19 October 1987 on the Continuation and Implementation of a European Community Policy and Action Programme on the Environment (1987-1992), 1987 O.J. (C 328), 1.

86 See Council Resolution, 1993 O.J. (C 138), 1, all reprinted in Principles of International Environmental Law III: Documents in European Community Environmental Law 24-137 (Philippe Sands & Richard G. Tarasofsky eds., 1995) (hereinafter Principles of International Environmental Law). "Over the past two decades, four Community Action Programmes on the Environment have given rise to about 200 pieces of legislation covering pollution of the atmosphere, water and soil, waste management, safeguards in relation to chemicals and biotechnology, product standards, environmental impact assessments and protection of nature." Id. at 30. For a discussion of the institutions involved in creating and enforcing environmental legislation and the basis for this legislation, see Richard C. Visek, Implementation and Enforcement of EC Environmental Law, 7 Geo. Int'l Envtl. L. Rev. 377, 378-95 (Spring 1995).

87 See id.

88 Id. at art. 1. Article 1 states:
1. A community scheme allowing voluntary participation by companies performing industrial activities . . . is hereby established for the evaluation and improvement of the environmental performance of industrial activities and the provision of the relevant information to the public. 2. The objective of the scheme shall be to promote continuous improvements in the environmental performance of industrial activities by: (a) the establishment and implementation of environmental policies, programmes and management systems by companies in relation to their sites; (b) the systematic, objective and periodic evaluation of the performance of such elements; (c) the provision of information of environmental performance to the public.
Principles of International Environmental Law, supra note 86, at 291.

89 Council Regulation 1836/93, at art. 2(f); Principles of International Environmental Law, supra note 86 at 291. Helpful definitions include:
(A)uditor shall mean a individual or a team, belonging to company personnel or external to the company, acting on behalf of company top management, possessing, individually or collectively, the competencies referred to in Annex II paragraph C and being sufficiently independent of the activities they audit to make an objective judgement. . . . (A)ccredited environmental verifier shall mean any person or organization independent of the company being verified, who has obtained accreditation, in line with the conditions and procedures referred to in Article 6.
Id. at 292.

90 See id. For a site to be registered in the scheme the company must:
(a) adopt a company environmental policy, in accordance with the relevant requirements in Annex I, which, in addition to providing for compliance with all relevant regulatory requirements regarding the environment, must include commitments aimed at the reasonable continuous improvement of environmental performance, with a view to reducing environmental impacts to levels not exceeding those corresponding to economically viable application of best available technology; (b) conduct an environmental review of the site on the aspects referred to in Annex I, part C; (c) introduce, in the light of the results of that review, an environmental programme for the site and an environmental management system applicable to all activities at the site. The environmental programme will be aimed at achieving the commitments contained in the company environmental policy towards continuous improvement of environmental performance. The environmental management system must comply with the requirement of Annex I; (d) carry out, or cause to be carried out, in accordance with Article 4, environmental audits at the site concerned; (e) set objectives at the highest appropriate management level, aimed at the continuous improvement of environmental performance in the light of the findings of the audit, and appropriately revise the environmental programme to enable the set objectives to be achieved at the site; (f) prepare, in accordance with Article 5, an environmental statement specific to each site audited. The first statement must also include the information referred to in Annex V; (g) have the environmental policy, programme, management system, review or audit procedure and environmental statement or statements examined to verify that they meet the relevant requirements of this Regulation and the environmental statements validated in accordance with Article 4 and Annex III; (h) forward the validated environmental statement to the competent body of the Member State where the site is located and disseminate it as appropriate to the public in that State after registration of the site in question is in accordance with Article 8.
Id. at 292-93.

91 See id. at 301-03. The EMAS requires:

The audit will be planned and executed in the light of the relevant guidelines in the ISO 10011 international standard . . . and other relevant international standards, and within the framework of the specific principles and requirements of this Regulation. In particular:

A. Objectives. The site's environmental auditing programmes will define in writing the objectives of each audit or audit cycle including the audit frequency for each activity. The objectives must include, in particular, assessing the management systems in place, and determining conformity with company policies and the site programme, which must include compliance with relevant environmental regulatory requirements.

B. Scope. The overall scope of the individual audits, or of each stage of an audit cycle where appropriate, must be clearly defined and must explicitly specify the: 1. subject areas covered; 2. activities to be audited; 3. environmental standards to be considered; 4. period covered by audit. Environmental audit includes assessment of the factual data necessary to evaluate performance.

C. Organization and resources. Environmental audits must be performed by persons or groups of persons with appropriate knowledge of the sectors and fields audited, including knowledge and experience on the relevant environmental management, technical, environmental and regulatory issues, and sufficient training and proficiency in the specific skills of auditing to achieve the stated objectives. The resources and time allocated to the audit must be commensurate with the scope and objectives of the audit. The top company management shall support the auditing. The auditors shall be sufficiently independent of the activities they audit to make an objective and impartial judgement.

D. Planning and preparation for a site audit. Each audit will be planned and prepared with the objectives, in particular, of; ensuring the appropriate resources are allocated and ensuring that each individual involved in the audit process (including auditors, site management, and staff) understands his or her role and responsibilities. Preparation will include familiarization with activities on the site and with the environmental management system established there and review of the findings and conclusions of previous audits.

E. Audit Activities. 1. On-site audit activities will include discussions with site personnel, inspection of operating conditions and equipment and reviewing of records, written procedures and other relevant documentation, with the objective of evaluating environmental performance at the site by determining whether the site meets the applicable standards and whether the system in place to manage environmental responsibilities is effective and appropriate. 2. The following steps, in particular, will be included in the audit process: (a) understanding of the management systems; (b) assessing strengths and weaknesses of the management systems; (c) gathering relevant evidence; (d) evaluating audit findings; e) preparing audit conclusions; (f) reporting audit findings and conclusions.

F. Reporting audit findings and conclusions. 1. A written audit report of the appropriate form and content will be prepared by the auditors to ensure full, formal submission of the findings and conclusions of the audit, at the end of each audit and audit cycle. The findings and conclusions of the audit must be formally communicated to the top company management. 2. The fundamental objectives of a written audit report are: (a) to document the scope of the audit; (b) to provide management with information on the state of compliance with the company's environmental policy and the environmental progress at the site; (c) to provide management with information on the effectiveness and reliability of the arrangements for monitoring environmental impacts at the site; (d) to demonstrate the need for corrective action, where appropriate.

G. Audit follow-up. The audit process will culminate in the preparation and implementation of a plan of appropriate corrective action. Appropriate mechanisms must be in place and in operation to ensure that the audit results are followed up.

H. Audit Frequency. The audit will be executed, or the audit cycle will be completed, as appropriate, at intervals no longer than three years. The frequency for each activity at a site will be established by the top company management, taking account of the potential overall environmental impact of the activities at the site, and of the site's environmental programme depending, in particular, on the following elements: (a) nature, scale and complexity of the activities; (b) nature and scale of emissions, waste, raw material and energy consumption and, in general, of interaction with the environment; (c) importance and urgency of the problems detected; (d) history of environmental problems.

Id.

92 See id. at 293.

1. The internal environmental audit of a site may be conducted by either auditors belonging to the company or external persons or organizations acting on its behalf. In both cases the audit shall be performed in line with the criteria set out in part C of Annex I and Annex II.

2. The audit frequency shall be determined in accordance with the criteria set out in Annex II H on the basis of guidelines established by the Commission in accordance with the procedure laid down in Article 19.

3. The environmental policies, programmes, management systems, reviews or audit procedures and the environmental statements shall be examined to verify that they meet the requirements of this Regulation, and the environmental statements shall be validated, by the independent accredited environmental verifier, on the basis of Annex III.

4. The accredited environmental verifier must be independent of the site's auditor.

5. For the purposes of paragraph 3 and without prejudice to the competence of the enforcement authorities in the Member States with regard to regulatory requirements, the accredited environmental verifier shall check; (a) whether an environmental policy has been established and if it meets the requirements of Article 3 and the relevant requirements in Annex I; (b) whether an environmental management system and programme are in place and operational at the site and whether they comply with the relevant requirements in Annex I; (c) whether the environmental review and audit are carried out in accordance with the relevant requirements in Annex I and III; (d) whether the data and information in the environmental statement are reliable and whether the statement adequately covers all the significant environmental issues of relevance to the site.
6. The environmental statement shall be validated by the accredited environmental verifier only if the conditions referred to in paragraphs 3 and 5 are met.
7. External auditors and accredited environmental verifiers shall not divulge, without authorization from the company management, any information or data obtained in the course of their auditing or verification activities.
Id.

93 See Eric Orts, Reflexive Environmental Law, 89 Nw. U. L. Rev. at 1227, 1297 (1995). "The site-based nature of the EMAS regulation may prove its greatest weakness. It can be criticized on several grounds. An initial criticism focuses on the complicated levels of participation. . . . (T)he variety of different notations leads one to question whether businesses, governments, and the public will be able to distinguish among the various levels of participation. . . . Not only is the EMAS site-based, it is site-based in Europe. Although the fourth (greenest) level of participation permits a multinational company to claim that all of its sites are registered in the EMAS, . . . the Eurocentric approach of the EMAS poses problems. First, many management decisions are not site-based. For instance, consideration of environmental effects at the planning stage for new products may influence decisions about whether to produce items at one site or another. . . . One also worries about possible public relations manipulation. A company might accurately claim EMAS registration for all of its operations in Europe, but employ 'dirty' industrial processes overseas." Id. at 1297-98.

94 See generally Marianne Lavelle, Enforcement: New Policy Creates Uncertainty, Obstacles to Audits, Industry Counsel Says, Nat'l L.J., Apr. 17, 1995, at A6.

95 But see Juan Xiberta, The Eco-Management and Audit Scheme, 3 Eur. Envtl. L. Rev. 85 (1994) (arguing voluntary international environmental management system standards as a means of improving a firm's environmental compliance may be much more effective than traditional methods).

96 See Seema Arona & Timothy N. Carson, A Voluntary Approach to Environmental Regulation: The 33/50 Program, Resources (Summer 1994) at 6-7; Report Says Relatively Few Companies Join Voluntary Effort to Cut Chemical Emissions, 23 Envtl. L. Rep. (BNA) 1507 (Oct. 2, 1992); and Voluntary Pollution Prevention Program Labeled 'Sham' By Environmental Group, 25 Envtl. L. Rep. (BNA) 280 (June 10, 1994).

97 See generally C. Foster Knight, Voluntary Environmental Standards vs. Mandatory Environmental Regulations and Enforcement in the NAFTA Market, 12 Ariz. J. Int'l & Comp. L. 619 (1995) (discussing voluntary versus mandatory techniques for attaining compliance with environmental standards).

98 See Kara Sissel, Acceptance Varies Worldwide, Chemical Week, Sept. 25, 1996, at 53.

99 See John P. Kaisersatt, Criminal Enforcement as a Disincentive to Environmental Compliance: Is a Federal Environmental Audit Privilege the Right Answer?, 23 Am. J. Crim. L. 405 (1966).

100 See Principles of Environmental Law, supra note 90 for a comparison to the provisions of the European regulation.

101 Council Regulation 1836/93, 2(b), at 2, 1993 O.J. (L 168) 1, at 3.

102 See generally Alan E. Boyle, Saving the World? Implementation and Enforcement of International Environmental Law Through International Institutions, 3 J. Envtl. L. 229 (1991).

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