Today's Criminal Environmental Enforcement Program: Why You May be Vulnerable and Why You Should Guard Against Prosecution Through an Environmental Audit

Mary Ellen Kris*
Gail L. Vannelli**

INTRODUCTION

Love Canal, Times Beach, Bhopal, Chernobyl, *Exxon Valdez*, torched Kuwaiti oil refineries, medical waste on New Jersey beaches — mass disasters and local accidents such as these have spawned public opinion and paranoia regarding public health and the environment, resulting in political and industry reaction. Pollution politics have led to an unprecedented and seemingly endless proliferation of environmental, health and safety laws at the federal, state and local levels, stepped-up governmental enforcement initiatives,[1] and, within the past five years, expanded

* Mary Ellen Kris is with the New York office of Jones, Day, Reavis & Pogue, where she is a member of the Environmental, Health & Safety Section and the Corporate Criminal Investigations Section of the Litigation Group. For ten years prior to joining Jones Day, she served as an Assistant U.S. Attorney for the Southern District of New York and was Chief of the Environmental Protection Unit in that office. B.A. 1973, J.D. 1976, Fordham University.

** At the time this article was written, Gail L. Vannelli was a senior associate with the Cleveland office of Jones, Day, Reavis & Pogue, where she was a member of the Environmental, Health & Safety Section of the Litigation Group. She has since joined the Portage County (Ohio) Prosecutor's Office. B.A. 1974, Capital University; M.A. 1982, Kent State University; J.D. 1986, University of Southern California.

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1. *See States Maintain Environmental Enforcement Effort Despite Budget Ills*, 21 Env't Rep. (BNA) 1754 (June 1, 1991). *See also* U.S. DEP'T OF JUSTICE, FACTORS IN DECISIONS ON CRIMINAL PROSECUTIONS FOR ENVIRONMENTAL VIOLATIONS IN THE CONTEXT OF SIGNIFICANT VOLUNTARY COMPLIANCE OR DISCLOSURE EFFORTS BY THE VIOLATOR (July 1, 1991) [hereinafter FACTORS IN DECISIONS]; *DOJ Plans To Issue Policy Statement on Use of Corporate Environmental Audits*, 22 Env't Rep. (BNA) 484 (June 21, 1991) [hereinafter *DOJ Plans*].

criminalization of environmental enforcement.[2] The latter phenomenon, which had been predicted by practitioners and enforcement lawyers in the field,[3] is now reported widely in the press.[4]

Just as the Clean Air Act has been viewed for years as "technology forcing,"[5] this expanded criminal environmental enforcement program can best be seen as "best management forcing." Criminal sanctions are now being used not only to prosecute flagrant misconduct, but also to force corporate officers and boards of directors to re-orient their policies and resources concerning environmental management. This latter objective creates vast opportunities for enforcement agencies to second guess management decisions and to impose liability, including criminal prosecution, for those decisions in the event of an environmental incident or catastrophe. The best way to minimize the risk of criminal (and civil) exposure that flows from such result-oriented, after-the-fact reasoning is to establish and fund an effective preventative approach to environmental management.

This article advocates the use of audits as a necessary measure to minimize the risk of criminal (and civil) enforcement and to otherwise mitigate sanctions. Part I summarizes the criminalization of environmental enforcement, including increased enforcement resources, techniques, and legal bases, such as statutory expansion of criminal liability and the government's increased reliance on the responsible corporate officer doctrine for prosecut-

2. *See* Pollution Prosecution Act of 1990, Pub. L. No. 101-593, § 202, 104 Stat. 2962, 2962-63, which mandates the hiring and training of additional criminal investigators by the United States Environmental Protection Agency ("EPA"). By September 30, 1992, at least 72 criminal investigators must be assigned to EPA's Office of Criminal Investigations. That force will increase to at least 200 criminal investigators by October 1, 1995. The Defense Criminal Investigation Service recently announced that it will join forces with EPA and state and local authorities in investigating Department of Defense employees and government contractors who violate environmental laws. *See* Polsky, *Defense Criminal Office to Aid Environmental Law Efforts*, DEFENSE NEWS, July 22, 1991, at 41.

3. *See, e.g.*, Dinkins, *Enforcement of Statutes Governing Disposal and Cleanup of Hazardous Wastes*, 1 PACE ENVTL. L. REV. 1 (1983); Starr, *Countering Environmental Crimes*, 13 B.C. ENVTL. AFF. L. REV. 379 (1985-86).

4. *See, e.g.*, *Cleaning Up; Warning to Polluters: Break law, you'll pay*, USA Today, Apr. 3, 1991, at 13A; Gold, *Increasingly, Prison Term Is Price for Polluters*, N.Y. Times, Feb. 15, 1991, at 1A; Stipp, *Toxic Turpitude: Environmental Crime Can Land Executives in Prison These Days*, Wall St. J., Sept. 10, 1990, at A1.

5. *See, e.g.*, Chemical Mfrs. Ass'n v. Natural Resources Defense Council, 470 U.S. 116, 128 (1985); Oklahoma v. EPA, 908 F.2d 595 (10th Cir. 1990), *cert. granted*, 111 S. Ct. 1412 (1991).

ing upper management officials who fail to inform themselves of environmental considerations or otherwise fail to supervise subordinates who are directly responsible for such matters. Part II proposes the use of environmental audits to reduce the risks of criminal (and civil) exposure, and includes a discussion of the costs and benefits of environmental audits and practical considerations such as the types of records and documents that should be created during an audit, who should be responsible for creating the documents, and what measures should be taken to establish and protect the audit process and records created under the attorney-client and work-product privileges.

I. The Criminalization of Environmental Enforcement

The amount of federal resources devoted to criminal enforcement of environmental laws and the number of federal enactments and convictions have grown dramatically in recent years. Accompanying this growth are changes in the law diminishing the state of mind requirement. The result of all these changes is that corporations and corporate officers face substantial criminal exposure under federal environmental law.

A. *The Expansion of the Federal Criminal Environmental Enforcement Program*[6]

Criminal prosecution for environmental violations is largely a creature born of the last decade. The federal government began its comprehensive effort to establish a program for investigating and prosecuting environmental crime in 1982.[7] At that time, an Environmental Crimes Unit was organized in the Department of Justice, staffed by a handful of experienced criminal and environmental lawyers. During its early years of operation, this Unit returned nearly 180 indictments from October 1983 to March 1986 and obtained 130 convictions. More than sixty percent of these convictions were against company officials in their managerial ca-

6. Although this article describes the federal criminal environmental program, many state criminal programs have experienced similar growth. For example, New Jersey has a state-wide Special Prosecutor to coordinate criminal, civil and administrative enforcement of priority environmental cases in that state, and Connecticut's Chief State Attorney is required to assign at least one Assistant State Attorney to handle criminal environmental cases on a full-time basis. *Environmental Prosecutor Appointed in New Jersey*, 20 Env't Rep. (BNA) 1763 (June 1, 1990); *Connecticut Waste Tax Extended Until 1992*, 21 Env't Rep. (BNA) 302 (Feb. 9, 1990).

7. Starr, *supra* note 3, at 380.

pacities rather than against the corporation itself. Sentencing resulted in the assessment of over $1.5 million in fines and the imposition of slightly more than 10 accumulated years of actually-served jail time.[8]

In the last four years, the Environmental Crimes Unit of the Department of Justice has been elevated to the status of a Section and its size has expanded, resulting in a commensurate increase in environmental prosecutions. In January 1991, Dick Thornburgh, Attorney General of the United States, reported that since the founding of the Environmental Crimes Section, the prosecutors have returned a total of 761 indictments, resulting in 549 convictions — more than quadrupling their efforts of the previous three years.[9] Significantly, the vast majority of these convictions were obtained in the last two years. These convictions resulted in the assessment of over $57 million in penalties, restitutions and forfeitures and the imposition of more than 348 years of jail time.[10] In 1990, the conviction rate was ninety-five percent, with fifty-five percent of convicted individuals sentenced to prison.[11]

The aggressive nature of the federal government's approach to environmental enforcement is further demonstrated by Congress' receptivity to increasingly harsher sentences. Major environmental statutes have been amended in recent years to implement stricter penalty provisions.[12] The Federal Sentencing Guidelines

8. *Id.*

9. *See* D. Thornburgh, *Our Blue Planet: A Law Enforcement Challenge*, Keynote Address at 1991 Department of Justice Environmental Law Enforcement Conference (Jan. 8, 1991) [hereinafter Thornburgh Address]; *see also* OFFICE OF ENFORCEMENT, COMPLIANCE POLICY AND PLANNING BRANCH, EPA, NATIONAL PENALTY REPORT: OVERVIEW OF EPA FEDERAL PENALTY PRACTICES FY 1990 (Apr. 1991); *DOJ Plans*, *supra* note 1, at 484 ("DOJ has increased its staff from four environmental prosecutors in 1981 to thirty-four in 1991.").

10. Thornburgh Address, *supra* note 9, at 5. EPA recently announced a record-breaking $3 million criminal fine against United Technologies Corporation, which pled guilty to six felony violations under RCRA. *Record Criminal Fine Assessed Under RCRA For Six Waste Felonies by Connecticut Firm*, 22 Env't Rep. (BNA) 123 (May 17, 1991) [hereinafter *Record Criminal Fine*]. This record was subsequently eclipsed by a $3.75 million criminal fine imposed by the New York State Department of Environmental Conservation in a plea bargain with the Aluminum Company of America, which pled guilty to four misdemeanor violations involving the possession, shipment manifest and disposal of hazardous waste. Two employees pled guilty to misdemeanor violations, and the company also agreed to pay $3.75 million in civil penalties. *Alcoa Agrees to Pay State $7.5 Million in Fines for Environmental Violations*, 22 Env't Rep. (BNA) 663 (July 19, 1991).

11. Thornburgh Address, *supra* note 9, at 5. *See also DOJ Plans*, *supra* note 1, at 484 (asserting 98% conviction rate).

12. *See, e.g.*, Clean Air Act Amendments of 1990, Pub. L. No. 101-549, § 701, 104 Stat. 2399, 2675-76 (codified as amended at 42 U.S.C.A. § 7413(c)(5)(A)) (West Supp.

for individual defendants mandate substantial terms of imprisonment for environmental crimes,[13] and abolished parole "to ensure that the sentence imposed . . . is the sentence the offender will serve."[14] These guidelines also severely restrict the use of probation for individuals,[15] which was once the norm for environmental crimes.[16] In November of 1990, the United States Sentencing Commission proposed sentencing guidelines for corporations, which included a schedule of criminal penalties more stringent than the guidelines that already apply to individuals.[17] Although the Sentencing Commission recently withdrew the environmental fines portion of the 1990 proposed corporate guidelines — reportedly in response to industry criticism — it retained the provisions with respect to probation, restitution and remediation.[18] Moreover, despite the deletion of the environ-

1991))(prescribes up to fifteen years imprisonment for "knowing endangerment" — a person who knowingly releases an air pollutant and who knows that such a release will place another person in imminent danger of death or serious bodily injury); Water Quality Act of 1987, § 312, 33 U.S.C. § 1319(c)(3) (1988) (prescribes up to fifteen years imprisonment and/or a $250,000 fine for individuals, or up to a $1 million fine for a corporation, for knowing endangerment), § 1319(c)(2) (prescribes up to three years imprisonment and/or a $250,000 fine for knowing discharge in violation of the Clean Water Act). Similarly, the federal Environmental Crimes Act of 1989, H.R. 3641, 101st Cong., 1st Sess., which was not reported out of the House Judiciary Committee in October 1990, would have created two new criminal offenses for persons violating one of the twenty-four listed federal environmental statutes. The two new offenses, involving knowing or reckless conduct (§ 731) or negligent conduct (§ 732), would prescribe stiff penalty provisions, including environmental audits managed by court-appointed experts. As of this writing, no revised version of the bill has been introduced during the current legislative session.

13. UNITED STATE SENTENCING COMMISSION, FEDERAL SENTENCING GUIDELINES MANUAL (1991). *See, e.g.*, United States v. Mills, No. 88-03100-WEA (N.D. Fla., Apr. 17, 1989), discussed in *Water Act Violators Given Prison Terms in First Application of Sentencing Guidelines*, 19 Env't Rep. (BNA) 2633 (April 21, 1989) (two individuals sentenced to 21 months imprisonment for filling wetlands). Except for one guideline dealing with the calculation of fines for antitrust violations, the current sentencing guidelines do not apply to the sentencing of organizations.

14. Starr & Kelly, *Environmental Crimes and the Sentencing Guidelines: The Time Has Come . . . and It Is Hard Time*, 20 Envtl. L. Rep. (Envtl. L. Inst.) 10,096, 10,100 (Mar. 1990).

15. UNITED STATES SENTENCING COMMISSION, *supra* note 13, at § 5B1.1 (probation authorized only if minimum term of imprisonment specified by the sentencing table is zero to six months).

16. Starr & Kelly, *supra* note 14, at 10,097.

17. 55 Fed. Reg. 46,600 (1990).

18. *See* United States Sentencing Commission's Notice of Amendments to the Sentencing Guidelines to Congress, 56 Fed. Reg. 22,762 (1991) (to be codified as Chapter Eight of the United States Sentencing Commission Guidelines Manual). *See also* U.S. Sentencing Commission, *Sentencing Guidelines for Organizational Defendants*, 49 Crim. L. Rep. (BNA) 2059, 2067 (May 8, 1991); *Sentencing Commission Sends Corporate Crime Guidelines to Congress*, 5 CORP. CRIME REP. No. 18, at 1 (1991); *Commission Excludes Environmental Crimes from Sentenc-*

mental penalties provision, the Proposed Corporate Sentencing Guidelines contain a policy statement indicating that an upward departure from fines set in accordance with federal sentencing statutes may be warranted for an offense that threatens the environment.[19] In addition, the Chairman of the Sentencing Commission reportedly announced that a working group will be formed " 'to address sentencing of environmental crimes on both the individual and corporate levels,' "[20] and, in a letter to the Natural Resources Defense Council, stated that the Commission hopes to extend the guidelines to environmental crimes by next year.[21]

In sum, as evidenced by this move for increasingly harsher criminal sanctions, there is no longer any doubt that environmental offenses can result in substantial monetary losses, stiff terms of imprisonment, and increased judicial oversight of corporate compliance with environmental laws.

B. *Affirmative Misconduct*

Federal environmental statutes generally require some degree of intent for criminal liability, although persons can be prosecuted under certain federal statutes — the Clean Water Act ("CWA") and the Clean Air Act ("CAA"), as amended in 1990 — for simple negligent acts without a demonstration of intent.[22] Where "intent" is an element of the offense, the intent requirement is commonly expressed in the statute as "knowing"[23] or

ing Guidelines Sent to Congress, 22 Env't Rep. (BNA) 11 (May 3, 1991) [hereinafter *Commission Excludes*].

19. U.S. Sentencing Commission, *supra* note 18, § 8C4.4, at 2083 (Policy Statement); *see also id.* § 8C2.10, at 2079 (Determining the Fine for Other Counts).

20. *Commission Excludes*, *supra* note 18, at 11.

21. *Id.*

22. Clean Water Act (CWA), 33 U.S.C. § 1319(c)(1) (1988); 1990 Clean Air Act Amendments of 1990 (CAA) Amendments, Pub. L. No. 101-549, § 701, 104 Stat. 2399, 2675 (codified at 42 U.S.C.A. § 7413(c) (Supp. 1991)); *see also* Memorandum from Thomas Adams, Assistant Adminstrator, EPA Office of Enforcement and Compliance Monitoring, to Assistant Administrators, *et al.*, EPA, titled "Environmental Criminal Conduct Coming to the Attention of Agency Officials and Employees," at 1-2 (Sept. 21, 1987) [hereinafter Adams].

23. *See, e.g.*, Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6928(d) (1988); Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. § 9603(c) (1988); CWA, 33 U.S.C. §§ 1319(c) and 1321(b)(5) (1988); Clean Air Act (CAA), 42 U.S.C.A. § 7413(c) (West Supp. 1991); and Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), 7 U.S.C. § 1361(b) (1988).

"willful" conduct.[24] In proving intent, the government generally need demonstrate only that a person knew what he was doing and that he did it voluntarily, not accidentally. Normally it is not necessary to show that he actually knew what the law required or that he acted with the specific purpose of violating that law.[25] Moreover, the knowledge necessary for conviction may be proven by circumstantial evidence[26] and, for a corporation, by aggregating the knowledge of all of its employees under the collective knowledge doctrine.[27] Unfortunately, inferences drawn from surrounding circumstances can often be operationally and/or technically complex and ambiguous.

The criminal environmental enforcement program originally targeted acts of flagrant affirmative misconduct — such as so-called "midnight dumping."[28] This type of misconduct, which often involves intentional concealment such as burying drums of hazardous waste,[29] pouring chemicals into a manhole,[30] or dumping truckloads of materials into illegal landfills,[31] involves activity that is clearly recognized as being on the wrong side of the law.

24. *See* Toxic Substances Control Act (TSCA), 15 U.S.C. §§ 2614, 2615(b) (1988) (knowing or willful).

25. *See, e.g.*, United States v. Hayes Int'l Corp., 786 F.2d 1499 (11th Cir. 1986) (court upheld plant employee conviction, finding that so long as there is knowledge that the waste is not innocuous, the knowledge requirement is satisfied; the government is not required to prove knowledge of its classification as hazardous nor knowledge that a permit is required for its disposal).

26. *Id.* at 1504-05; United States v. Ward, 676 F.2d 94 (4th Cir.), *cert. denied*, 459 U.S 835 (1982).

27. United States v. Bank of New England, 821 F.2d 844, 856 (1st Cir.), *cert. denied*, 108 S. Ct. 328 (1987); Adams, *supra* note 22, at 1.

28. *See* Cleaves, *White-Collar Crimes: Emerging Trends in Corporate Criminal Liability*, 5 Me. B. J. 28 (Jan. 1990); Gold, *supra* note 4, at 1; Riesel, *Criminal Prosecution and the Regulation of Hazardous Substances*, 21 CHEM. WASTE LITIG. REP. 964 (1991) (detailing criminalization of environmental regulation as "easy targets" such as midnight dumpers have disappeared). In announcing the record-breaking criminal fine against United Technologies Corporation, see *supra* note 10, EPA Region I Administrator Julie Belaga said "it should now be abundantly clear that criminal sanctions are not reserved only for the flagrant and deliberate violations of the environmental laws, but also for violations that result from a company's plain or institutional indifference to meet its legal responsibility." *Record Criminal Fine*, *supra* note 10, at 124.

29. *See, e.g.*, United States v. Bogas, 731 F. Supp. 242 (N.D. Ohio), *remanded*, 920 F.2d 363 (6th Cir. 1990) (defendant dug a pit and buried barrels of chemicals therein).

30. *See, e.g.*, United States v. Distler, No. 77-00108-1 (W.D. Ky. Sept. 14, 1979) (discussed at 9 Envtl. L. Rep. (Env. L. Inst.) 20,700 (Sept. 1979)), *aff'd*, 671 F.2d 954 (6th Cir.), *cert. denied*, 454 U.S. 827 (1981) (defendant charged with dumping toxic contaminants into manholes leading to city sewers).

31. *See, e.g.*, United States v. Mills, No. 88-03100-WEA (N.D. Fla. Apr. 17, 1989) (defendant discharged materials into wetlands).

In more recent times, the types of affirmative misconduct investigated include acts or omissions which have not traditionally been viewed as "criminal," such as the steps taken or omitted by the waste generator company in selecting the hauler that disposed of the waste illegally,[32] the steps taken or omitted in opening or failing to close a valve that results in an accidental discharge to a sewer, or the conduct of employees in failing to recognize that a discharge or other operational upset may have occurred. In these types of situations, the conduct under scrutiny may involve a lack of due diligence, or a delay in investigating, reporting, or taking action to correct an actual or potential discharge or release.[33]

Another type of affirmative misconduct that can take an otherwise civil or administrative case into the criminal arena involves omissions, understatements and other face-saving characterizations of the facts made in reports or other information provided to the government concerning an environmental event. For example, if a report of an accidental release is filed ten days late and also arguably understates the quantity of material released, the coupling of the limited delay in reporting with a relatively minor understatement in amounts could lead to greater scrutiny of the company, including commencement of a criminal investigation. Similarly, if a company chooses to self-report past practices or violations of law, and in so doing, arguably omits or misstates certain facts or otherwise mischaracterizes the nature or extent of the reported activity, the self-report may well be viewed as an affirmative act of concealment, rather than as a voluntary disclosure for which the company should be applauded.[34] EPA's rationale for

32. *See, e.g.*, United States v. Hoflin, 880 F.2d 1033 (9th Cir. 1989), *cert. denied*, 110 S. Ct. 1143 (1990); United States v. Hayes Int'l Corp., 786 F.2d 1499, 1501.

33. *See DOJ Plans*, *supra* note 1, at 484 ("Most of the executives DOJ goes after are not typical criminals, but acted irresponsibly . . . .").

34. *See* FACTORS IN DECISIONS, *supra* note 1, at 8-10. The decision whether to voluntarily self-report environmental problems or violations, in the absence of a legal obligation to do so, requires careful weighing of the risks of disclosure against the benefits to be gained. EPA's policy is that the likelihood of prosecution is reduced if the company "has diligent reporting and environmental compliance policies . . . [and] is forthcoming on a regular basis in its dealings with the government . . . .". Habicht, *The Federal Perspective on Environment Enforcement: How to Remain on the Civil Side*, 17 Envtl. L. Rep. (Envtl. L. Inst.) 10,478, 10,481 (Dec. 1987). EPA's general policy is likely to be impacted significantly by the new DOJ policy. See FACTORS IN DECISIONS, *supra* note 1, at 1-2. A governmental policy of leniency for voluntary disclosure is not, however, a guarantee that self-disclosure will not ultimately result in prosecution, particularly if disclosure is not made in a timely manner. *See, e.g.*, United States v. Rockwell Int'l Corp., 924 F.2d 928 (9th Cir. 1991) (defendant defense contractor, who claimed to have made disclosures under the Department of De-

punishing such acts is that "[m]any of EPA's regulatory systems rely heavily on complete and accurate voluntary reporting from the regulated community. When information or documents . . . are falsified, concealed or intentionally destroyed, the integrity of the system is in danger."[35] The degree to which an act may have actually threatened or damaged the regulatory system is a factor that can be weighed in the decision to prosecute, but it is not a requirement.[36]

C. *Significant Harm Or Threat Of Harm To Public Health Or The Environment*

A more recent and more controversial aspect of the exercise of prosecutorial discretion focuses on the nature of the harm or potential harm, rather than on the conduct of the actors. Although the conduct of the actors is material and relevant to the analysis of whether to proceed criminally, the degree of harm element recognizes that an incident itself, such as an explosion in the sewers or major diversion of sewage from a sewer system as a result of a significant discharge of flammables into the sewer, may be of sufficient import to trigger an inquiry despite the absence of clear affirmative misconduct — particularly if the harm is later perceived as having been avoidable.[37] Where affirmative misconduct is also present, the likelihood of a case proceeding criminally is that much greater. However, in more and more cases, grand ju-

fense's Voluntary Disclosure Program, was indicted for fraud — disclosures were allegedly made on the eve of indictment). Moreover, the new DOJ policy, while ostensibly favoring voluntary disclosures and self-audits, sets such a high standard of conduct that it may offer only limited sanctuary from enforcement. *See* FACTORS IN DECISIONS, *supra* note 1, at 6-11. But voluntary disclosures may serve to significantly mitigate penalties in the event of prosecution. *See, e.g., Judge Reduces $2.6 Million Fine by 95 Percent in PMN Penalty Case; EPA Promptly Files Appeal*, 14 Chem. Reg. Rep. (BNA) 1243 (Nov. 16, 1990) (penalty on manufacturer violating TSCA reduced fifty percent for prompt and voluntary disclosure, good attitude and immediately shutting down operations); *Settlement Includes Training Program, Fine Reduced From $3.5 million to $150,000*, 14 Chem. Reg. Rep. (BNA) 343 (June 1, 1990) (EPA reduced penalty eighty percent for prompt and voluntary disclosure, cooperation and good attitude, and taking steps to mitigate). For additional discussion of voluntary disclosure, see, *e.g.*, R. Ogren, *The DoD Volunteer Disclosure Program*, ABA NAT'L INST. - WHITE COLLAR CRIME 499 (1991); *New Policy for TSCA Section 5 Violations Reduces Penalties For Voluntary Disclosure*, 12 Chem. Reg. Rep. (BNA) 715 (Aug. 12, 1988).

35. Adams, *supra* note 22, at 2. *See* FACTORS IN DECISIONS, *supra* note 1, at 11-12.

36. Adams, *supra* note 22, at 2; FACTORS IN DECISIONS, *supra* note 1, at 11-12.

37. *See, e.g.*, Adams, *supra* note 22, at 2 ("The extent or threat of harm to human health or the environment is another factor that is reviewed to determine whether a case should be prosecuted. Prosecutors may look at the duration of the harm or threat, the toxicity of the pollutants involved, and the proximity to population centers, among others.").

ries are being convened to determine whether corporations and individuals should be criminally charged for management or employee failure to take sufficient prophylactic steps.[38] Scrutinized conduct of this type includes alleged overdelegation to or inadequate supervision of subordinates; inadequate training with respect to environmental, health and safety requirements and reporting obligations; inadequate monitoring of compliance with environmental, health and safety laws and company policies on such matters; insufficient funding and availability of other resources to support an adequate maintenance and compliance program; absence of environmental, health and safety audits; failure to follow recommendations of such audits; failure to develop standard operating procedures with respect to operations posing significant environmental, health and safety risks; and failure to adhere to standard operating procedures or best management practices.[39]

For example, Ashland Oil Company was prosecuted for the collapse of a large above-ground oil tank which resulted in 700,000 gallons of oil being discharged into the Monongahela River.[40] The government's case was premised upon the theory that if the tank had been monitored, maintained and repaired on a more frequent basis, the unfortunate accident would not have occurred. As United States Attorney General Thornburgh stated: "What was Ashland's crime? A 48-year old oil storage tank had suddenly collapsed — because of Ashland's negligent inattention . . . ."[41] Ashland was fined $2.5 million under the Alternative Fines provision of the Sentencing Reform Act for violations of the Clean Water Act and Refuse Act — at that time constituting the largest criminal penalty for Clean Water Act offenses.[42]

Similarly, Exxon Corporation was criminally charged with felony and misdemeanor violations under the Ports and Waterways Safety Act, the Dangerous Cargo Act, the Clean Water Act, the Rivers and Harbors Act, and the Migratory Bird Treaty Act arising out of a ten million gallon spill of crude oil when the tanker

38. *See, e.g.*, United States v. Ashland Oil, Inc., 705 F. Supp. 270, 272-73 (W.D. Pa. 1989).

39. *Id. See also* the Exxon case referred to in notes 43-47, *infra*, and accompanying text; FACTORS IN DECISIONS, *supra* note 1, at 5-9.

40. *See* 705 F. Supp. at 272-73.

41. Thornburgh Address, *supra* note 9, at 7.

42. *Id.*

Exxon Valdez ran aground at Prince William Sound, Alaska.[43] The felony counts, which cited "willful and knowing" conduct in Exxon's hiring an allegedly incompetent crew, were to have been dropped as part of the plea agreement filed in federal court on March 13, 1991, requiring Exxon to pay a criminal fine of $100 million.[44] Richard Stewart, then the Assistant Attorney General in charge of the Environment and Natural Resources Division of the Department of Justice, defended the appropriateness of the criminal felony indictment, calling the *Exxon Valdez* the "environmental equivalent of a nuclear bomb."[45] Attorney General Dick Thornburgh acknowledged that the felony charges made for "a unique case which requires some innovative legal approaches which are never without risk."[46] In late April of 1991, Federal Chief District Judge H. Russel Holland rejected the proposed $100 million criminal fine as too small, and the Alaska House of Representatives rejected a $1 billion civil settlement shortly thereafter.[47]

Prosecutions such as Ashland and Exxon are driven by the environmental result rather than the intent of the actors.[48] To the extent that state of mind is an element of the offenses charged in such cases, that element, particularly with respect to the corporation itself, may be imputed or inferred from the acts or omissions that are seen as having caused or exacerbated the incident.

D. *The Responsible Corporate Officer Doctrine*

As evidenced by the statistics on the imposition of jail sentences, the targets for environmental criminal prosecutions are often individual employees of the corporation, in addition to the corporate entity itself. Such targeted individuals include not only environmental managers and engineers, but also corporate

43. *See Federal Grand Jury Indicts Exxon After Alaska Rejects Proposed Plea*, 20 Env't Rep. (BNA) 1811 (Mar. 2, 1990); *Lawsuits Allege Billions in Damages From Exxon Oil Spill, Cleanup in Alaska*, 19 Env't Rep. (BNA) 2588 (Apr. 14, 1989).

44. *Exxon Agrees To Pay Up To $1.1 Billion To Settle Governments' Oil Spill Cleanup Claims*, 21 Env't Rep. (BNA) 2027 (Mar. 13, 1991); Crovitz, *Justice For The Birds: Exxon Forgot To Get A Hunting License*, Wall St. J., March 20, 1991, at A23.

45. Crovitz, *supra* note 44.

46. *Id.*

47. *Alaska House Rejects Settlement for Exxon Spill*, N.Y. Times, May 3, 1991, at A14.

48. *See also* the proposed Environmental Crimes Act, *supra* note 12, which would have created two new environmental crimes relating to "environmental catastrophe" (one based on knowing and reckless conduct and the other based on negligence).

officers with broad responsibilities for development of corporate policies and capacity to influence compliance with company policies and procedures and environmental law.[49] Indeed, the Department of Justice policy for environmental criminal investigations includes "identifying, prosecuting and convicting the highest-ranking, truly responsible corporate officials."[50]

In targeting upper management for criminal prosecution, the government increasingly relies upon the "responsible corporate officer" doctrine to define and prove individual culpability. This doctrine allows the government to prove "knowing" conduct inferentially, based upon the defendant's relative position in the company, coupled with failure to learn certain facts or take appropriate action. The doctrine originated with *United States v. Dotterweich*,[51] a non-environmental case in which a corporate president was criminally charged even though there was no evidence that he was aware of the unlawful conduct. In *Dotterweich*, the United States Supreme Court held that "[t]he offense is committed . . . by all who do have such a responsible share in the furtherance of the transaction which the statute outlaws," and suggested that corporate officers have a duty to learn the facts if ignorant of them.[52] More recently, the Supreme Court reaffirmed

49. In 1989, the convictions of the president and vice-president of Astro Circuit Corporation, a Massachusetts electro-plating firm, surprised business leaders and attracted widespread public attention. *See, e.g.*, Cleaves, *supra* note 28, at 28; Neuffer, *Jail Terms For Polluters Spark Cheers, Concern*, Boston Globe, Aug. 12, 1989, at 1; *Massachusetts Businessman Indicted on Environmental Charges*, P.R. Newswire (Feb. 1, 1989) [hereinafter *Businessman Indicted*]; Starr & Kelly, *supra* note 14, at 10,096. The sixty-year-old company president was described as a former head of the Lowell, Massachusetts Chamber of Commerce and a Korean War veteran. The vice-president was his thirty-three-year old son. Neuffer, *supra*, at 1. The defendants were charged with several violations of the Clean Water Act due to the failure of their "state of the art" treatment plant to remove toxic metals from waste before discharging to the sewer system and river. *Businessman Indicted*, *supra*, at 1; Neuffer, *supra*, at 1. The president and his son received a combined total of seven months imprisonment and six months probation. The Department of Justice labeled the prosecution a "watershed case" because "businessmen will have to know that they will not only have to pay fines . . . but they will also have to be behind bars." Cleaves, *supra* note 28, at 28. The defense attorney, who noted that the defendants had not only admitted to the offense but also had taken steps to address the pollution, stated that "they're going to be prosecuting the best, and the worst are going to be getting away." Neuffer, *supra*, at 1.

50. Habicht, *supra* note 34, at 10,480.

51. 320 U.S. 277 (1943). The president and general manager were criminally charged under the Federal Food, Drug and Cosmetic Act (FDCA) for misbranding and adulterating certain drugs.

52. *Id.* at 284.

that doctrine in another food and drug case, *United States v. Park*,[53] where it upheld a criminal conviction of a corporate officer under the Federal Food, Drug and Cosmetic Act, holding that the government need only prove that the manager had the responsibility and the power to prevent or correct a violation of the statute.[54]

This prosecutorial tool, imputing knowledge of legal violations to responsible managers where direct evidence is lacking, is now being used to prosecute officers under various environmental statutes.[55] At least one appellate court has applied this doctrine in an environmental setting. In *United States v. Johnson & Towers, Inc.*,[56] the Third Circuit upheld the criminal convictions of a plant foreman and service manager, finding that the RCRA penalty provisions apply to "responsible corporate officers," who include employees, as well as operators, "if they knew or should have known that there had been no compliance with the permit requirement . . . ."[57] The broad application of the "responsible corporate officer" doctrine is supported by the criminal provisions of certain federal environmental laws.[58]

More recently, however, in *United States v. MacDonald & Watson Oil Co.*,[59] a different appellate court declined to extend the reach of the responsible corporate officer doctrine to permit knowledge to be inferred solely from the defendant's corporate position. In *MacDonald & Watson*, the First Circuit held that "a mere showing of official responsibility" does not by itself constitute sufficient

53. 421 U.S. 658 (1975).

54. *Id.* at 671.

55. *See, e.g.*, United States v. Johnson & Towers, Inc., 741 F.2d 662 (3d Cir. 1984), *cert. denied*, 469 U.S. 1208 (1985); United States v. Frezzo Bros., 602 F.2d 1123, 1130 n.11 (3d Cir. 1979), *cert. denied*, 444 U.S. 1074 (1980) (in upholding criminal convictions of corporate officers charged with CWA violations, court noted that government argued the case on the responsible corporate officer doctrine and that it perceived no error in the trial court's instruction on this theory). *See also* Zarky, *The Responsible Corporate Officer Doctrine*, 5 Toxics L. Rep. (BNA) 983, 987 (Jan. 9, 1991); Cleaves, *supra* note 28, at 33.

56. 741 F.2d 662 (3d Cir. 1984), *cert. denied*, 469 U.S. 1208 (1985).

57. *Id.* at 664-65.

58. Cleaves, *supra* note 28, at 29. *See also* CWA, § 309(c)(6), 33 U.S.C. § 1319(c)(6) (1988) (expressly provides for criminal liability for "any responsible corporate officer"); CAA, § 113(c)(3), 42 U.S.C. § 7413(c)(3) (1988) (expressly provides that penalty provisions apply to "any responsible corporate officer"); Clean Air Act Amendments of 1990, Pub. L. No. 101-549, § 701, 104 Stat. 2399, 2677 (codified at 42 U.S.C.A. § 7413(c)(6) (West Supp. 1991)) ("the term 'person' includes . . . any responsible corporate officer"). *But see* Zarky, *supra* note 55, at 987 (arguing that neither environmental statutes nor existing case law supports a broad application of the responsible corporate officer doctrine to environmental violations).

59. 933 F.2d 35, 55 (1st Cir. 1991).

proof of culpability with regard to criminal offenses that have an express "knowledge" or scienter requirement. Distinguishing *Johnson & Towers*, where the issue involved knowledge of the law, *i.e.*, permit requirements, the *MacDonald & Watson* court held that a company officer could be held liable under the doctrine only if the government proved knowledge of facts relative to the violation charged. However, the court acknowledged that such knowledge could be proven inferentially by circumstantial evidence, including "willful blindness" to the facts.[60] Notwithstanding the careful application of the responsible corporate officer doctrine in *MacDonald & Watson*, the responsible corporate officer doctrine remains available to pursue corporate officers with direct, or even indirect, responsibility for environmental matters. Failure of upper level managers to apprise themselves of the acts and omissions of their delegates relating to environmental housekeeping may result in their own criminal indictment and conviction, along with that of their subordinates and the company.

II. ENVIRONMENTAL AUDITS: REDUCING THE RISK OF CRIMINAL (AND CIVIL) EXPOSURE

Achieving and maintaining compliance with the numerous and often complex array of federal, state and local environmental laws and regulations requires planning and an ever-increasing commitment of resources. Consequently, many companies have already recognized the need to undertake and increase the scope and frequency of environmental, health and safety compliance audits. For those companies that have not done so, the new DOJ policy, which may in practice be used to penalize companies that do not have proactive voluntary audit programs,[61] and the aggressive use of the responsible corporate officer doctrine, as well as pressure by public interest groups,[62] should counsel in favor of reexamining company policy concerning such audits.

An environmental audit will usually include an examination of all records and permits relating to air emissions, hazardous waste storage, handling and transportation, water discharges, and workplace safety conditions. Air, water and soil testing may also be conducted to determine if on-site contamination exists. The com-

60. *Id.*

61. *See* FACTORS IN DECISIONS, *supra* note 1, at 8-9.

62. *See, e.g.*, Jones & De Vore, *Companies Eye Valdez Principles*, Nat'l L.J., Sept. 2, 1991, at 23.

pleted audit provides an overview of the facility's compliance with applicable regulations and a "snapshot" of existing environmental problems. A well-conceived program of periodic audits also reveals a facility's ongoing compliance with its own policies and procedures, the adequacy of its employee training program, the efficacy of its programs and policies for self-reporting and the adequacy of its equipment maintenance program.

A. *Benefits of Environmental Audits*

There are several benefits to implementing an environmental audit program. First, it assists a company — and its officers, directors and employees — in reducing the risk of civil or criminal enforcement actions by identifying, and providing an opportunity to correct, environmental problems before the government initiates action. Adoption of a preventative audit program is especially desirable given the tendency of enforcement agencies to sue or indict responsible corporate officers and environmental managers in enforcement actions. Just as the purchaser of contaminated property will not be considered an "innocent landowner" for purposes of federal Superfund liability unless it has conducted sufficiently thorough due diligence in advance of an acquisition to make a reasoned determination as to whether there is contamination,[63] so, too, owners and managers of a plant that has had an operational upset or other environmental occurrence may not be considered "innocent" if they have not been reasonably diligent in trying to anticipate and prevent such occurrences.

Second, as already noted, the trend in government is toward encouraging or requiring such audits. In 1986, EPA issued a policy statement encouraging the use of audits to help regulated companies comply with environmental laws and to encourage them to identify and correct unregulated environmental hazards.[64] This enforcement policy permits EPA to "take into ac-

63. The federal Innocent Landowner Defense is found at section 101(35)(A) of CERCLA, 42 U.S.C. §§ 9601(35)(A) and 9607(b)(3) (1988). *See also* Mays, *The Blessed State of Innocence: The Innocent Landowner Defense Under Superfund*, 18 Chem. Waste Litig. Rep. (Computer L. Rep.) 864 (Oct. 1989); Leifer, *EPA's Innocent Landowner Policy: A Practical Approach To Liability Under Superfund*, 20 Env't Rep. (BNA) 646 (Aug. 4, 1989); BCW Associates, Ltd. v Occidental Chem. Corp., 1988 U.S. Dist. LEXIS 11275, at *56 (E.D. Pa. Sept. 29, 1988) (although purchaser and subsequent lessee had pre-acquisition audits performed by independent consultants, court denied innocent purchaser defense because investigation was inadequate).

64. EPA Environmental Auditing Policy Statement, 51 Fed. Reg. 25,004 (1986).

count, on a case-by-case basis, the honest and genuine efforts of regulated entities to avoid and promptly correct violations and underlying environmental problems."[65] The new DOJ policy, developed in collaboration with EPA, can be read as not merely encouraging but compelling the use of such audits as part of a comprehensive compliance program, lest the absence of such "voluntary" measures be held against the company if it ends up in an enforcement proceeding.[66] Moreover, the government is negotiating audit requirements into consent decrees, and courts are including audit requirements in sentences imposed on corporations convicted of crimes relating to the environment.[67]

Recent legislation also appears to favor environmental audit programs. For example, the new amendments to the Clean Air Act encourage audits by allowing facilities that can demonstrate early reductions of emissions of air toxics to meet an alternative emission level.[68] Proposed legislation imposing probation that includes court-imposed audits and court-appointed monitors also mirrors this trend,[69] as do EPA's initiatives to encourage pollu-

65. 51 Fed. Reg. at 25,007. In determining if "honest and genuine efforts" were made, the EPA looks to see if the company took "reasonable precaution" to avoid noncompliance, "expeditiously corrected . . . problems discovered through audits," and implemented new measures to prevent recurrence. *Id.* *See* discussion at part B, *infra*, regarding the risks to the self-auditing company posed by the affirmative use of audits against the company by the government and other third parties.

66. *See* FACTORS IN DECISIONS, *supra* note 1, at 13-14; *DOJ Plans*, *supra* note 1, at 484.

67. For example, as highlighted in Attorney General Thornburgh's "Blue Planet" speech, the Unichem Corporation, in addition to being fined $1.5 million for three felony violations under RCRA, was also sentenced to "an unspecified period of probation, during which its engineers must conduct an environmental audit . . . at its three blending facilities." Unichem must then implement all reasonable recommendations made through the audit to ensure compliance with RCRA, CERCLA and CWA. Thornburgh Address, *supra* note 9, at 6-7.

68. Clean Air Act Amendments of 1990, Pub. L. No. 101-549, § 112(i)(5), 104 Stat. 2399, 2547. *See also More Prosecutions Under New Air Bill Predicted by Justice Department, EPA*, 21 Env't Rep. (BNA) 421 (June 29, 1990).

69. In July 1991, the Senate approved an amendment to the Violent Crime Control Act of 1991, S. 1241, 102d Cong., 1st Sess., that would mandate federal courts to require corporations and organizations convicted of felony environmental offenses to pay for an environmental compliance audit, to be completed by a court-appointed independent expert, and to require that the organization implement the recommendations. Under the bill, the requirement for such an audit would be discretionary for misdemeanor convictions. Failure to comply with the audit recommendations would result in "appropriate sanctions" by the court. *Senate Approves Environmental Audit Amendment to Crime Bill*, 132 Daily Report for Executives (BNA) A-24 (July 10, 1991). For proposed legislation evidencing this trend at the state level, see, *e.g.*, California Senate Bill No. 260, 1991-92 Reg. Sess., § 2 (would authorize sentencing court to place a convicted corporation on probation and impose specific environmentally-related conditions of probation, such as requiring adher-

tion prevention.[70] These governmental trends can only be fueled by the public interest campaign for widespread adoption of the "Valdez Principles" — ten broad principles of corporate environmental management drafted and advocated by the Coalition for Environmentally Responsible Economies in the wake of the *Exxon Valdez* disaster.[71]

In such a climate, companies and their officers, directors and employees run the risk of significant sanctions, including prosecution, where they have failed to inform themselves of potential environmental, health and safety problems and to address them properly. There is also the risk that such failure to be properly informed, when judged by 20/20 hindsight, will be interpreted as "conscious avoidance," that is, deliberately blinding oneself to the facts.[72] Conversely, a vigorous voluntary compliance pro-

ence to a compliance plan, requiring a compliance audit, designating a corporate compliance officer, revising or adopting corporate policies, advertising the facts of the offense and steps taken to prevent a repetition, and appointing a monitor to observe and report to the court the probationer's compliance with the terms of probation); New Jersey Assembly Bill No. 1726, 204th Leg., 2d Reg. Sess. (Comprehensive Environmental Crimes Enforcement Act of 1991) (would authorize imposition of probation and appointment of an environmental monitor during the term of the company's probation to propose new methods of deterring recurrence of the corporation's unlawful conduct). In addition, the proposed federal Environmental Crimes Act of 1989, discussed *supra* note 12, would have required a court to place on probation an organization convicted of a felony or repeat misdemeanors, and to require that the organization pay for an audit as a condition of probation. The environmental penalties provision that was withdrawn from the proposed corporate sentencing guidelines would have permitted the sentencing judge to mitigate the sentence if the company had implemented a program "reasonably designed, implemented and enforced so that it will generally be effective in preventing and detecting criminal conduct." 55 Fed. Reg. 46,605 (1990).

70. According to EPA Deputy Administrator F. Henry Habicht, "[i]n enforcement, we are promoting pollution prevention . . . . In a landmark TSCA consent agreement signed in January 1990, a chemical company was required to conduct a pollution prevention project as part of the settlement. Several similar cases have followed." Habicht, *Pollution Prevention*, POLLUTION ENGINEERING, Feb. 1991, at 11-12.

71. *See* Jones & De Vore, *supra* note 62, at 23.

72. *See, e.g.*, *supra* note 60 and accompanying text. *See also* CAA Amendments, Pub. L. No. 101-549, § 701, 104 Stat. 2399, 2677 (1990) (codified at 42 U.S.C.A. § 7413(c)(5)(B) (West Supp. 1991)) (evidence that defendant took "affirmative steps to be shielded from relevant information" may be used to prove defendant's actual knowledge for knowing endangerment violation). *See generally* United States v. Mang Sun Wong, 884 F.2d 1537, 1541-43 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 1140 (1990) (heroin conspiracy); United States v. Civelli, 883 F.2d 191, 194 (2d Cir.), *cert. denied*, 110 S. Ct. 409 (1989) (possession with intent to distribute cocaine); United States v. Gurary, 860 F.2d 521, 526 (2d Cir. 1988), *cert. denied*, 490 U.S. 1035 (1989) (conspiracy to defraud the United States); United States v. Lanza, 790 F.2d 1015, 1020-23 (2d Cir.), *cert. denied*, 479 U.S. 861 (1986) (wire fraud conspiracy).

gram can serve as a mitigating factor in the event a criminal investigation is contemplated or initiated against the company.[73] The existence of such a program is likely to assist in persuading enforcement agencies not to prosecute, to proceed civilly rather than criminally, or to seek penalties that appropriately recognize the company's effort to achieve and maintain voluntary compliance in accordance with the newly announced policy of the Department of Justice.[74] Conversely, the absence of such a program may exacerbate the sanctions sought against violators.[75]

Finally, an audit can reduce cleanup costs by identifying problems before they cause serious environmental damage or require emergency response. A company may also decide to implement environmental upgrades in order to achieve this preventative goal.

B. *Costs and Risks of Environmental Audits*

There are, however, downside risks that must be factored into the decision of whether and how to conduct and document audits. Audits may uncover instances of historical violations, as well as existing violations or prospective problems. Such problems could require substantial expenditures to correct. Once such a discovery is made, the company and its management face the risk of criminal sanctions, as well as civil or administrative enforcement, if the company chooses to continue to operate without cor-

73. *See* FACTORS IN DECISIONS, *supra* note 1, at 10-11; Adams, *supra* note 22, at 3. *See also supra* note 34 and accompanying text, discussing voluntary disclosures.

74. FACTORS IN DECISIONS, *supra* note 1, at 1 ("It is the policy of the Department of Justice to encourage self-auditing, self-policing and voluntary disclosure of environmental violations by the regulated community by indicating that these activities are viewed as mitigating factors in the Department's exercise of criminal environmental enforcement discretion."), 4 ("The attorney for the Department should consider the existence and scope of any regularized, intensive, and comprehensive environmental compliance program; such a program may include an environmental compliance or management audit. Particular consideration should be given to whether the compliance or audit program includes sufficient measures to identify and prevent future noncompliance, and whether the program was adopted in good faith in a timely manner."). Barry Hartman, Deputy Assistant Attorney General for the Environment and Natural Resources Division of the Department of Justice, has been quoted as telling the 84th Annual Meeting of the Air and Waste Management Association that "DOJ is more interested in executives who use audits to cover up problems instead of cleaning them up. 'We are not interested in creating disincentives,' he said. 'If you do a good faith audit you won't be prosecuted.'" *DOJ Plans*, *supra* note 1, at 484.

75. FACTORS IN DECISIONS, *supra* note 1, at 8-9.

recting or abating the violations.[76] Moreover, the audit may produce findings that, in some circumstances, must be reported to enforcement agencies under federal, state or local reporting requirements, which may in turn trigger enforcement action.[77] Finally, and significantly, damaging information in an audit report can be ammunition in the hands of the government or other third party in the event of litigation and may, in some instances, even make the adverse party's case.[78]

C. *Protecting Your Audit Findings*

Notwithstanding the potential costs and risks associated with environmental audits, a compelling case can be made that the benefits of a strong environmental audit program, and the downside risks of not having one in place, outweigh the costs and risks of such a program, assuming that the company is prepared to address each significant problem discovered during the course of an audit. If not, it would be better off not to proceed with the audit.[79] In developing an audit program, the company should proceed in a manner that minimizes as many of the potential risks as possible, including the risks of disclosure.[80]

1. Establishing and Maintaining Privileged Information

In any situation in which a company creates documentation that may contain information that could be used by an adverse party as admissions against the company[81] — including reports devel-

76. "The Department [of Justice] . . . is more interested in prosecuting the corporate executive who ignores the results of an audit that shows problems. Intentionally ignoring environmental problems is known as willful blindness, which DOJ will prosecute in a criminal case . . . ." *DOJ Plans*, *supra* note 1, at 484. *See also* FACTORS IN DECISIONS, *supra* note 1, at 8-9.

77. Indeed, the Department of Justice policy apparently would penalize companies for not self-reporting matters that are not required to be reported. *See* FACTORS IN DECISIONS, *supra* note 1, at 9-11. In fact, under the DOJ policy, "[a] disclosure is not considered voluntary if that disclosure is already specifically required by law, regulation or permit." *Id.* at 3.

78. *See* Friedman, *Is This Job Worth It?*, 8 Envtl. Forum (Envtl. L. Inst.) 20 (May/June 1991) (detailing the tension between obtaining adequate data to correct problems and minimizing legal exposure); *Environmental Audits and Confidentiality: Can What You Know Hurt You As Much As What You Don't Know?*, 13 Envtl. L. Rep. (Envtl. L. Inst.) 10,303 (Dec. 1983).

79. *See* FACTORS IN DECISIONS, *supra* note 1, at 8-11; *DOJ Plans*, *supra* note 1, at 484.

80. *See* Frost & Siegel, *Environmental Audits: How to Protect Them From Disclosure*, 5 Toxic L. Rep. (BNA) 1211 (Feb. 27, 1991).

81. The necessity of protecting audit documentation as privileged would apply, of course, to all audit programs, including those established for transactional purposes (such

oped in the course of an environmental self-evaluation audit — consideration should be given to protecting all or a portion of such documentation as privileged.[82] One important way to maximize the chances of protecting audit information as privileged is to engage outside counsel at the commencement of the audit process to work in close coordination with in-house counsel. While there is no substitute for sophisticated in-house legal capabilities, there are distinct advantages to relying on outside counsel for particularized services in connection with the audit process.

First, because in-house counsel are often called upon to provide business as well as legal advice with respect to matters under investigation, in-house counsel may be viewed by an enforcement agency as a business advisor or an audit team member unless there is clear evidence that corporate counsel was acting as an attorney.[83] Outside counsel's role as a legal advisor is less likely to be successfully challenged. In addition, the use of outside counsel will enhance the objectivity — and perceived objectivity — of the audit. Where misconduct is discovered, the use of outside counsel provides a greater measure of independence and a greater likelihood of determining the precise limits and extent of the misconduct while protecting the company's privilege. In addition, outside counsel can be helpful in screening and retaining a consulting firm to conduct the site assessment or audit.

Several important considerations should be followed in establishing attorney-client privilege. In order for an audit report to fall within this privilege, a company's employees must have been apprised of the nature of their communications prior to commencement of the audit. They must understand that: (a) communications to an outside consultant, who is acting as the agent of counsel, are to remain confidential; (b) the communications are being made at the direction of the employees' corporate superiors; (c) the communications are within the scope of the em-

as for the sale or purchase of property) and those necessitated by releases or threatened releases of contaminants.

82. *See generally* Upjohn Co. v. United States, 449 U.S. 677, 683-86 (1981) (attorney-client privilege extends to communications with middle and lower-level employees as well as the control group, but does not protect disclosure of the underlying facts).

83. In United States v. Chevron, 1989 U.S. Dist. LEXIS 12267, at *17 (E.D. Pa. Oct. 16, 1989), the court rejected a claim of attorney-client privilege and ordered production of audit reports, finding that Chevron had failed to demonstrate that its in-house counsel had been acting in a legal capacity when she participated in the audit and that the communications pertained primarily to legal assistance.

ployees' duties; and (d) the information is being gathered so that the company can obtain legal advice from counsel based upon the information in the audit report.[84]

There are also advantages to retaining an outside consultant. First, an outside audit provides an objective, independent evaluation of a company's compliance status. Thus, the outside audit may be more likely than an internal audit to discover instances of noncompliance or the need to take corrective action. Second, an outside audit is likely to carry greater weight than an internal audit if its credibility should ever be questioned by enforcement agencies or private parties, especially when a facility has a history of environmental occurrences. For example, where a particular plant has had a documented increase in the number of accidental releases, where there is a repetition of incidents or complaints by citizens with respect to a facility, or where the cause of a high profile accident or other incident is likely to be investigated by the government or some other third party, it makes sense to engage independent experts of recognized capability and integrity in the field. Third, an outside audit can provide expertise and sophistication in scientific, technical, and legal issues that company personnel may lack.[85] Fourth, a fresh look at company operations by trained, experienced environmental scientists and engineers can provide options or solutions of which company personnel may be unaware. Finally, it may be easier to assert claims of privilege as to reports prepared by outside consultants, particularly when the outside consultant is assisting counsel.[86]

The consulting firm chosen should have been screened for its skills and sensitivity to the legal issues involved. In order to ensure that the audit report is protected as attorney work-product, counsel should request the consultant to mark the audit report "Privileged and Confidential Attorney-Client Communications

84. The court in *Chevron* held that the attorney-client privilege did not apply to "Corporate Environmental Compliance Review Status Reports" because Chevron did not produce facts demonstrating the existence of the requisite elements for the privilege. *Id.*

85. For the more routine compliance audit, depending upon the level of sophistication of in-house counsel and technical experts, it may still make sense to engage outside counsel and technical experts to review the audit program and provide advice with respect to how to properly record and maintain such information, both for affirmative and defensive purposes.

86. The attorney-client privilege can extend to an environmental consultant's communications if the consultant is an agent of the attorney. The policy behind extending the privilege to agents is that they provide specific expertise, that enables the attorney to render legal advice. *See* Frost & Siegel, *supra* note 80, at 1212-13.

and Work Product Privileges." This does not guarantee, however, that this privilege will be upheld since audits are generally prepared to evaluate the environmental impact of past or current activities rather than in anticipation of litigation. Courts in different jurisdictions have split on whether the mere possibility of litigation is a sufficient basis for concluding that an investigatory report is protected by the work-product privilege.[87]

The consultant should report directly to counsel for purposes of protecting the information gathered as privileged, and to control the type of record being assembled. All draft and final reports should be submitted to outside counsel for review and distribution. Distribution of such reports should be limited within the company on a need-to-know basis, and confidential materials should be labeled and segregated from nonprivileged materials.

The institution of the above-described measures by trained legal and technical specialists will improve the likelihood of sustaining the assertion of the attorney-client and work-product privileges with respect to the audit records.

Additionally, there is another privilege that may be asserted in an effort to protect the audit documentation. In some circumstances, courts have recognized that defendants have a privilege against disclosing "self-evaluative" reports. The policy underlying the "self-evaluation privilege" is to prevent a "chilling" effect on self-analysis and to promote candid and frank self-evaluation, which should lead to the protection of the public interest.[88] The self-evaluation privilege was articulated in *Bredice v. Doctors Hosp. Inc.*,[89] a medical malpractice case in which the court ruled that minutes of a confidential staff meeting, recorded for the purpose of self-improvement, were entitled to a qualified privilege on the basis of an overwhelming public interest.

87. *Compare, e.g.*, Binks Mfg. Co. v Nat'l Presto Indus., Inc., 709 F.2d 1109, 1120 (7th Cir. 1983) (while there may have been the remote prospect of litigation, defendant must nonetheless prove the memoranda were "prepared . . . *because* of the prospect of litigation") and Continental Illinois Nat'l Bank & Trust Co. v. Indemnity Ins. Co., 1989 U.S. Dist. LEXIS 13004, at *10 (N.D. Ill. Oct. 30, 1989) (although potential for litigation existed, defendant must establish that the communication was made because of the litigation and not some other reason) *with* Herbert v. Lando, 73 F.R.D. 387, 402 (S.D.N.Y.), *remanded on other grounds*, 568 F.2d 974 (2d Cir. 1977), *rev'd and remanded on other grounds*, 441 U.S. 153 (1979) (work-product privilege applies to materials prepared in an effort to avoid litigation).

88. Frost & Siegel, *supra* note 80, at 1214.

89. 50 F.R.D. 249 (D.D.C. 1970), *aff'd*, 479 F.2d 920 (D.C. Cir. 1973).

Subsequent court decisions are split on whether to recognize this privilege.[90] In general, the courts look to whether the information sought resulted from an internal review involving confidential self-analysis and whether disclosure of the internal review will serve or harm the public interest. The courts have not yet decided whether environmental audits fall within this privilege. However, in light of the policy underlying the self-evaluation privilege, *i.e.*, to encourage candid and critical self-analysis and evaluation, commentators have suggested that an environmental audit may be protected if the audit: (1) is prepared with an eye toward furthering the public interest and with a statement regarding the company's environmental policy, (2) conforms with and advances internal corporate policy, as well as applicable federal, state and local laws, (3) is held strictly confidential, (4) is written to reflect the internal, self-evaluation and self-analytical nature of the process, and (5) is prepared so that the factual and evaluation portions can be separated.[91] These suggestions make good sense and should be implemented during the preparation of the audit report.[92] Given the salutary purposes served by self-evaluative audits, it is unfortunate that the Department of Justice's policy on the use of audits did not address the privilege issue. Expressly recognizing this privilege should encourage more audits than the policy's implied threat of increased sanctions for violators which have not implemented audit programs to the satisfaction of the government.

90. *See, e.g.*, Emerson Elec. Co. v. Schlesinger, 609 F.2d 898 (8th Cir. 1979) (court rejected the self-evaluation privilege because the information sought was not prepared for internal use); Martin v. Potomac Elec. Power Co., No. 93-0106, slip op. (D.D.C. May 25, 1990) (no self-critical analysis privilege for documents in private employment discrimination case); Roberts v. Nat'l Detroit Corp., 87 F.R.D. 30, 32 (E.D. Mich. 1980) (employee affirmative action plans privileged). Some state courts have also adopted this privilege. *See, e.g.*, Wylie v Mills, 195 N.J. Super. 332, 478 A.2d 1273 (1989) (evaluative portion of internal corporate report of auto accident protected as self-critical analysis — factual portion not protected); Granger v. Nat'l R.R. Passenger Corp., 116 F.R.D. 507, 511 (E.D. Pa. 1987) (evaluative portions of railroad accident investigative report protected).

91. Frost & Siegel, *supra* note 80, at 1216.

92. The Department of Justice and EPA have not taken any formal position as to whether they will recognize the self-evaluation privilege. *See* FACTORS IN DECISIONS, *supra* note 1, at 14-15. *See also* EPA Environmental Auditing Policy Statement, 51 Fed. Reg. 25,004 (1986).

2. Type of Record or Documentation Created

While every effort should be made to preserve audit reports and documentation as privileged, it should also be recognized that there may be circumstances in the future where the privilege may be waived deliberately or inadvertently, or where an assertion of privilege will not be upheld. Accordingly, careful consideration must be given to the type of documentation to be prepared so that, ideally, each record created is written with a view towards being reviewed at a later date by the government or some other third party.

Attention should be paid to the type of information sought through questionnaires. The individuals completing the forms, whether in-house employees or outside auditors, should be trained and counseled as to the implications of particular phraseology in their answers. And counsel, whether in-house, outside or both, should carefully review the completed questionnaires and reports, preferably in draft form, to identify responses that are ambiguous, conclusory, or suffer from some characterization that should be avoided. Counsel's job is not to whitewash or unfairly sanitize, but to be sensitive to imprecision in communication that could come back to haunt a company at a later time. Counsel will have a better understanding of the type of affirmative record which the company should be creating, and the type of negative record it should avoid creating.

Ideally, to the extent that the audit affirms environmental compliance, that portion of the documentation should be reviewed and filed with an eye towards subsequent disclosure to third parties, should it later prove necessary to document that the company and its representatives paid appropriate attention to these matters. Conversely, to the extent that the audit identifies actual or potential problem areas, those matters should be addressed separately in a privileged document and should be responded to promptly by the company. The response to the situation and the corrected condition should be documented carefully, so that the company, if need be, can prove that it acted properly. The emphasis in the documentation should be on documenting the corrective action, rather than memorializing the problem circumstance or condition. In some situations, it may be advisable to obtain another environmental consultant to address areas of concern so that all negative facts accumulated in the course of investigating and addressing those problems can be isolated

within privileged documentation and among individuals who are not otherwise involved in the routine auditing function.

Finally, and most importantly, counsel should be advising the company, and establishing a record thereof, regarding the legal implications of the audit findings. When an audit has been completed, significant findings should be properly communicated to appropriate management representatives so that the company is in the optimal position to respond appropriately to the conditions reported, and so that no individuals within the company can later be faulted for failure to promptly and adequately supervise their subordinates or inform themselves of the relevant facts with respect to environmental compliance.

When proper precautions are implemented for developing and protecting the audit record, it is less likely that the documentation will later become a powerful weapon in the hands of an adverse party. More likely, it will serve to minimize the risk of criminal prosecution to the company and the employees and to enhance the company's ability to manage its relations with the regulators.

Conclusion

With the advent of an ambitious criminal environmental enforcement program has come the troubling realization that corporations — and their managers and employees — are more vulnerable to prosecution for failure to anticipate or recognize problems before they become matters of public concern. While the voluntary environmental audit is not a guarantee against prosecution, a well-conceived and executed audit program provides substantial ability to identify and manage environmental liabilities, and to influence the enforcement authorities to proceed in a rational and even-handed manner.

A carefully drawn audit protocol, designed to properly characterize and document the information being gathered and to protect it from discovery, can be of great import in increasing the value of an auditing program and in decreasing its potential use by the government and other third parties in future adversary proceedings.