Toward An Environmental Voluntary Disclosure Program

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INTRODUCTION

On January 8, 1991, former United States Attorney General Richard L. Thornburgh told a gathering of 900 federal and state environmental law enforcement officials "[o]ver future decades, we as prosecutors are going to be engaged in one of the greatest attempts ever at criminal deterrence: to keep humankind from vandalizing the only home we own - and have fully furnished - in the universe."[1]

These were not hollow words. Since 1982, when the Environmental Crimes Section was established at the Department of Justice ("DOJ"),[2] over 800 indictments have been brought, 605 convictions have been obtained, over 360 years of jail time have been imposed and more than 160 years have actually been served.[3] Companies and individuals have forfeited nearly seventy-five million dollars in criminal penalties to the federal treasury,[4] to say nothing of their loss of good will, the cost of

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1. Address by former Attorney General Richard L. Thornburgh, 1991 Environmental Law Enforcement Conference, New Orleans, La. 13 (Jan. 8, 1991) [hereinafter Thornburgh Address].

2. The Environmental Crimes Section coordinates the national criminal enforcement effort from its headquarters at DOJ, develops policy and training programs, and counsels the Environmental Protection Agency on criminal investigations. In 1987, in recognition of its achievements and rapid growth, the Attorney General upgraded the status of the predecessor Environmental Crimes Unit to an independent section. Today, less than ten years after its founding, the section has a permanent place in the law enforcement community.

3. Memorandum from Peggy Hutchins, Paralegal, Environmental Crimes Section, to Neil S. Cartusciello, Chief, Environmental Crimes Section, DOJ (Sept. 10, 1991).

4. *Id.*

debarment from government contracting, their loss of state or local licenses, and the financial toll of administrative actions and civil suits by irate stockholders and local citizens.

Over the last few years, environmental enforcement efforts have accelerated dramatically. In November 1987, the United States Sentencing Commission published more stringent sentencing rules for environmental crimes,[5] generating substantial criticism from the private bar and the regulated community.[6] On November 15, 1990, the recently renamed Environment and Natural Resources Division ("Environment Division") of the DOJ[7] announced that a record number of criminal prosecutions of environmental violators had been brought during 1990. Then-Attorney General Thornburgh reported that seventy-eight percent of those prosecuted were corporations and their managers.[8] A number of months ago, Exxon Corporation had agreed to plead guilty and pay the largest criminal fines in history for environmental violations in connection with the oil spill in Prince William Sound, only to withdraw the plea after United States District Judge H. Russell Holland announced that the proposed fines "were simply not adequate." Recently the court accepted a revised plea which imposed $150 million in criminal fines.[9]

From its inception, the primary goals of the environmental criminal enforcement program have been punishment and deterrence. The program has been effective in exposing and punishing

5. 52 Fed. Reg. 18,016 (1987).

6. *See, e.g.*, Starr & Kelly, *Environmental Crimes and the Sentencing Guidelines: The Time Has Come . . . and It Is Hard Time*, ABA National Institute on Federal Sentencing Guidelines, Washington, D.C. (May 16-17, 1991), revised version of article originally printed in 20 Envtl. L. Rep. (Envtl. L. Inst.) 10,096, 10,100 (Mar. 1990). Significantly, proposed amendments that would make the sentencing guidelines applicable to corporations (which are currently sentenced in accordance with pre-guideline standards) do not subject corporations to the guidelines for environmental crimes applicable to individuals. *See* United States Sentencing Commission's Notice of Amendments to the Sentencing Guidelines to Congress, 56 Fed. Reg. 22762 (1991) (to be codified as Chapter Eight of the United States Sentencing Commission Guidelines Manual). Unless altered by Congress, these amendments will become effective in November 1991.

7. In order to emphasize its commitment to prosecuting violations of environmental laws, the Department of Justice announced, on last year's Earth Day, April 22, 1990, that the *Lands* and Natural Resources Division had become the *Environment* and Natural Resources Division.

8. Thornburgh Address, *supra* note 1, at 2.

9. United States v. Exxon Corp. & Exxon Shipping Co., No. A-90-015 CR (D. Alaska plea entered Mar. 22, 1990); *see generally* N.Y. Times, Apr. 25, 1991, at A1, col. 4 (reporting rejection of plea). The revised plea was filed September 30, 1991, and was accepted by the court in early October.

the most egregious offenders, the so-called "midnight dumpers" who operate completely outside of the regulatory framework. Additionally, the government's focus on prosecuting individuals, and particularly its determination to target "responsible corporate officers,"[10] has seized the attention of officers and managers in the regulated community. The knowledge that failure to comply with environmental requirements could lead to jail time is indeed sobering. Although no studies compare early compliance levels to current compliance levels, as a practical matter, it is clear that the DOJ's emphasis on individual prosecutions has sensitized corporate management to the importance of environmental compliance.

The public has also gradually begun to view crimes against the environment as seriously as it views crimes against people.[11] Strong public support for harsh punishment of environmental crimes, as well as increased media coverage, are likely to enhance the deterrent effect of the criminal enforcement program. No company aspires to undergo the public vilification and loss of good will certain to result from national media coverage of its environmental violations.

Punishment and deterrence are laudable goals because they help educate companies and individuals on what *not* to do. Experience suggests, however, that punishment and deterrence by themselves do not promote voluntary compliance with the law. Additional measures are needed to encourage companies to develop and institute comprehensive programs to identify and correct potential environmental problems before they arise. As President Bush stated recently:

> Environmental programs that focus on the end of the pipe or the top of the stack, on cleaning up after the damage is done, are no longer adequate. We need new policies, technologies, and processes that prevent or minimize pollution — that stop it from being created in the first place.[12]

10. The Clean Water Act, 33 U.S.C. § 1319(c)(6) (1988) and the Clean Air Act, 42 U.S.C.A. § 7413(c)(6) (West Supp. 1991).

11. In the National Survey of Crime Severity, conducted by the Center for Studies in Criminology and Criminal Law, Wharton School, University of Pennsylvania over a six-month period beginning in July 1977, 60,000 people were asked to rank the severity of particular crimes. In seventh place, after murder, but ahead of drug smuggling and skyjacking, was an environmental crime that resulted in harm. *See* Habicht, *The Federal Perspective on Environmental Criminal Enforcement: How to Remain on the Civil Side*, 17 Envtl. L. Rep. (Envtl. L. Inst.) 10,478, 10,485 n.64 (Dec. 1987).

12. Bush, *A New Era of Environmental Stewardship*, 16 EPA J., Sept.- Oct. 1990, at 2.

The DOJ recognizes that the existing enforcement policy does not place sufficient emphasis on the promotion of voluntary compliance with environmental statutes. In a speech given at the same January gathering of federal enforcement officials addressed by former Attorney General Thornburgh, former Assistant Attorney General Richard Stewart discussed what he referred to as the "carrots and sticks in enforcement," noting that "the system only works if voluntary compliance is the norm."[13] Acknowledging that most environmental violators are not bank robbers or drug dealers, but legitimate business enterprises which make important contributions to the national welfare, Stewart went on to discuss the need for "a careful balanced approach to environmental auditing" and a rational enforcement policy which ensures "that regulated entities have an incentive to monitor their environmental compliance without immunizing environmental violations simply because they are recorded in an audit."[14]

The internal audits discussed by Stewart are one of the most important ways in which regulated entities police their environmental compliance. Environmental auditing has been described as a "systematic, documented, periodic and objective review by regulated entities of facility operations and practices related to meeting environmental requirements."[15] It has been more broadly defined as an independent appraisal of a company's environmental control systems, assets and liabilities, designed to enable management to make rational decisions relating to environmental matters.[16] Environmental auditing has the effect of "verifying that management practices are in place, functioning and adequate."[17]

This article suggests that the time has come for the establishment of a voluntary disclosure program by EPA and DOJ. Part I discusses the current absence of incentives for self-monitoring

13. Address by former Assistant Attorney General Richard Stewart, 1991 Environmental Law Enforcement Conference, New Orleans, La. 4 (Jan. 8, 1991).

14. *Id.* at 13-14.

15. EPA Environmental Auditing Policy Statement, 51 Fed. Reg. 25,004, 25,006 (1986) (footnote omitted) [hereinafter 1986 EPA Statement].

16. *See* Price and Danzig, *Environmental Auditing: Developing A "Preventive Medicine" Approach to Environmental Compliance*, 19 LOY. L.A.L. REV. 1189, 1190 (1986) [hereinafter Price and Danzig] (citing Reed, *Environmental Audits and Confidentiality: Can What You Know Hurt You As Much As What You Don't Know?*, 13 Envtl. L. Rep. (Envtl. L. Inst.) 10,303 (Oct. 1983).

17. *See* Price and Danzig, *supra* note 16, at 1190 (quoting EPA Interim Environmental Auditing Policy Statement, 50 Fed. Reg. 46,504 (1985)).

and voluntary disclosure given the current absence of a voluntary disclosure program. In Part II it is argued that the government atmosphere may be hospitable to adoption of such a program today because environmental enforcement policy appears to be shifting away from punishment and toward prevention. It proposes that a voluntary disclosure program could be based on the Department of Defense's program, or at least could draw from that and other similar programs already functioning well in other branches of government.

I. Present Lack of A Comprehensive Program for Encouraging Voluntary Environmental Auditing and Disclosure

The federal environmental laws do not currently require a regulated facility to have an internal auditing program. Nor is it EPA's policy to mandate environmental auditing.[18] Instead, EPA only encourages "the use of environmental auditing by regulated entities to help achieve and maintain compliance with environmental laws and regulations, as well as to help identify and correct unregulated environmental hazards."[19] As EPA has stated, voluntary environmental auditing and enforcement efforts have distinct but complementary functions.[20] Enforcement encourages the regulated community to increase compliance. In turn, auditing helps the regulated community manage its environmental problems and thereby avoid the necessity of enforcement.

In addition, notwithstanding the obvious benefits accompanying voluntary auditing programs, EPA's expressed support for the practice of environmental auditing, and DOJ's recognition of the need for "carrots and sticks" to promote active compliance, there is no comprehensive program governing the treatment of environmental violations discovered in the course of a voluntary internal audit. A DOJ memorandum issued this past summer, discussed below, is a first step in setting such a policy, but falls far short of ensuring that disclosed violations, which the memorandum does not define or distinguish, receive uniform treatment. As environmental criminal enforcement efforts increase, there is

18. 1986 EPA Statement, *supra* note 15, at 25,006-07. *See also* Reed, *Environmental Audits and Confidentiality: Can What You Know Hurt You As Much As What You Don't Know?* 13 Envtl. L. Rep. (Envtl. L. Inst.) 10,303 (Oct. 1983).

19. 1986 EPA Statement, *supra* note 15, at 25,004.

20. *Id.* at 25,007.

legitimate concern on the part of members of the regulated community that environmental violations uncovered by a voluntary corporate environmental audit will result in criminal prosecutions. Therefore, the critical question is what a company is supposed to do when its voluntary audit reveals potential criminal violations of which the government is not yet aware, and which the company is not already obligated to report under existing legal requirements. The absence of a uniform policy subscribed to by DOJ and EPA, both of which are charged with criminal enforcement authority, gives understandable pause to the regulated community in its efforts to answer this question. The ultimate goal of a safe and clean environment cannot be readily achieved if the only answer is "call your lawyer and prepare to mount a defense."

A second question raised, but not addressed by the current enforcement policy, is why a regulated entity should conduct an internal audit when a plausible result is a criminal prosecution that might never have occurred absent the audit. Consider the example of one company, which was criminally prosecuted for and pleaded guilty to Clean Water Act violations discovered in its internal audit reports even though the violations had already been remedied.[21] Irrational enforcement such as this not only creates a strong incentive to the institution not to engage in self-policing mechanisms but arguably undermines efforts of criminal prosecutors to deter future violations.

Thus far, the government has consistently refused to restrict its use of environmental audit results in criminal enforcement cases and has challenged assertions that audit results are privileged or constitute attorney work product.[22] The skittishness of regulated entities about the advisability of continuing environmental auditing has been exacerbated by recent developments. For example, while the legislative history of the 1990 Clean Air Act Amendments ("CAA Amendments")[23] demonstrates that Congress has become cognizant of the need to encourage environmental audit-

21. United States v. Weyerhaeuser Co., No. CR90-298S (W.D. Wash. Nov. 16, 1990).

22. *See* Address by George Van Cleve, former Deputy Assistant Attorney General, Environment and Natural Resources Division, DOJ, at Benjamin N. Cardozo School of Law Conference on Corporate Governance: Beyond the Transactional Audit 23 (Sept. 17, 1990) [hereinafter Van Cleve Address] (citing United States v. Eagle-Picher Industries, No. 87-5100-CV-SW-8 (W.D. Mo. consent decree entered July 12, 1990).

23. Pub. L. No. 101-549, 104 Stat. 2399 (1990).

ing,[24] this is not clearly reflected in the statute and is therefore not binding on EPA. Moreover, although the legislative history of the CAA Amendments recognizes the need to protect individuals or companies who disclose audit findings to regulators, these protections are vague and left largely undefined. Finally, EPA's policy statements on environmental auditing demonstrate reluctance to provide concrete incentives for the disclosure of violations uncovered by voluntary audits.[25] EPA's position has been that it does not want to reward what it views as disclosures already required by law. As a result, members of the defense bar are becoming increasingly vocal in their view that it may be risky for regulated entities routinely to perform environmental audits.[26]

II. Implementation of a Voluntary Environmental Auditing and Disclosure Program

In determining the types of "carrots and sticks" needed to promote compliance with environmental laws, DOJ and EPA should consider whether current enforcement policies burden internal auditing with too much risk. One incentive successfully adopted by other government agencies is a system of voluntary disclosure, which allows violators to "confess their sins" and remedy the violations with the assurance that they will receive some sort of credit for coming forward beyond the vague uncertainties of DOJ's present policy.[27] The implementation of an agency-wide environmental voluntary disclosure program like those already in place and functioning successfully in other government agencies,

24. H.R. Conf. Rep. No. 101-952, 101st Cong. 2d Sess. at 348 (Oct. 26, 1990) [hereinafter House Conference Report]. The Report also noted:

> Nothing in subsection 113(a) [the criminal enforcement provision] is intended to discourage owners or operators of sources subject to this Act from conducting self-evaluations or self-audits and acting to correct any problems identified. On the contrary, the environmental benefits from such review and prompt corrective action are substantial and section 113 should be read to encourage self-evaluation and self-audits.
>
> Owners and operators of sources are in the best position to identify deficiencies and correct them, and should be encouraged to adopt procedures where internal compliance audits are performed and management is informed. Such internal audits will improve the owners' and operators' ability to identify and correct problems before, rather than after, government inspections and other enforcement actions are needed.

25. 1986 EPA Policy Statement, *supra* note 15, at 25,004.

26. *See, e.g.*, Moore & Dabrowsky, *EPA Enforcement Auditing Policy and Federal Criminal Enforcement*, ALI-ABA Conference on Enforcement of Environmental Laws, Washington, D.C. (Apr. 11-12, 1991); Reed, *Environmental Audits and Confidentiality: Can What You Know Hurt You As Much As What You Don't Know?*, 13 Envtl. L. Rep. (Envtl. L. Inst.) 10,303 (Oct. 1983).

27. *See generally* Wolff, *Voluntary Disclosure Programs*, 47 Fordham L. Rev. 1057 (1979).

such as the Department of Defense, the Internal Revenue Service, and the Securities and Exchange Commission, would further the goal of achieving environmental compliance. The government, after all, lacks the resources to prosecute every potential violation, and voluntary disclosure programs are a recognized means of achieving the desired end, be it in the form of the payment of taxes, accurate reporting, or honesty in federal procurement, without the necessity of expending precious enforcement dollars.

A. *Advantages*

Although existing government audits, and criminal and administrative investigations and inspections serve a decidedly important purpose, a voluntary disclosure program would supplement these enforcement mechanisms and could provide many advantages to the government. One such advantage is access to information about environmental violations that the government might not otherwise be able to obtain, or would only obtain at a much later time, after the environment had already been irreversibly harmed or the public's health and safety threatened. Further, certain environmental violations are very difficult and expensive to detect and investigate. A program of voluntary disclosure would assist the government by decreasing its investigative costs and by expediting the implementation of remedial measures.

The ability to disclose violations voluntarily within an established framework would also encourage a cooperative, rather than adversarial, relationship between the company and the government. Companies would be encouraged to take corrective and remedial actions on their own because disclosure of past violations would be less costly in terms of both civil and criminal penalties. As a result, they could begin to expend more time and energy on remedying violations than on developing defenses to prosecution.

A voluntary disclosure program would also assist the government in establishing standards for identifying conduct that constitutes criminal behavior, and thus provide clear notice to the regulated community of what type of conduct will be investigated. The knowledge that failure to institute internal procedures to seek out, detect and report environmental violations might result in harsher penalties (for violations which could easily have been detected had internal auditing and other procedures been

established) will prompt companies to institute self-policing mechanisms.

B. *Government Atmosphere*

There have been some recent indications from EPA, DOJ and Congress that a system of voluntary disclosure is indeed the appropriate next step. Although the approach to date has been piecemeal, these efforts bear mentioning, as they may provide the basis for an agency-wide environmental voluntary disclosure program. As noted above, Congress recognized the need to encourage auditing by stating in the Conference Report accompanying the 1990 CAA Amendments that:

> [t]he Criminal Penalties available should not be applied in a situation where a person acting in good faith, promptly reports the results of an audit and promptly acts to correct any deviation. Knowledge gained by an individual solely in conducting any deficiencies identified in the audit or the audit report itself should not ordinarily form the basis of the intent which results in criminal penalties.[28]

In other words, Congress has suggested that where a company establishes a bona fide audit/compliance program that provides for prompt response to findings of noncompliance and, at least in cases of serious, potentially criminal non-compliance, voluntarily discloses such findings to EPA, the government should not "ordinarily" be permitted to use these audits and voluntary disclosures as a means of establishing the company's criminal knowledge.

Congress's support of voluntary disclosure is also reflected to some extent in the provisions of the amended CAA itself. Congress has codified the factors that EPA is to consider in assessing monetary penalties.[29] In addition to factors such as the benefit reaped by noncompliance and the seriousness of the violation, Congress specifically cites the "violator's full compliance history and good faith efforts to comply, [and] the duration of the violation as established by any credible evidence."[30] Echoing the legislative history, Congress has effectively directed EPA to give companies credit for the establishment and implementation of an internal environmental compliance program.

28. House Conference Report, *supra* note 24.

29. Clean Air Act Amendments of 1990 § 701, 42 U.S.C.A. § 7413(e)(1) (West Supp. 1991).

30. *Id.*

This summer, then Assistant Attorney General Richard Stewart issued a guidance memorandum to all United States Attorneys addressing the exercise of criminal prosecutorial discretion for environmental violations where the violator has undertaken voluntary compliance efforts or made voluntary disclosure.[31] The memorandum specifies a number of factors that DOJ will consider in determining whether to pursue a criminal prosecution, "so that such prosecutions do not create a disincentive to or undermine the goal of encouraging critical self-auditing, self-policing, and voluntary disclosure."[32] The memorandum lists the following factors to be considered in determining "whether and how to prosecute": (1) voluntary disclosure of the matter under investigation, particularly whether such disclosure substantially aids the investigatory process; (2) cooperation with the investigation, including the degree and timeliness of such cooperation; (3) the scope of any "regularized, intensive and comprehensive and intensive environmental compliance program" the violator may have, *e.g.*, environmental compliance or management audits; and (4) numerous "additional factors," such as the pervasiveness of non-compliance, any internal disciplinary action taken as a result of discovery of the violation, and subsequent compliance efforts after disclosure of the violation.[33] A number of hypothetical examples of circumstances which may result in "prosecution leniency" are also provided. Overall, the memorandum demonstrates DOJ's recognition of the problems created by the absence of a clear, established policy guiding the exercise of prosecutorial discretion in the environmental cases. Notably, the memorandum also anticipates the revision of EPA's environmental auditing policy statement.[34]

The memorandum, which is addressed to criminal prosecutors as guidance, essentially begs the questions lingering in the regulated community. For example, while the memorandum speaks of "voluntary disclosure" as a factor in determining whether and how to prosecute, it does not identify any authority in EPA, DOJ

31. *See* Memorandum from Richard B. Stewart, former Assistant Attorney General, to all United States Attorneys, attaching July 1, 1991 Memorandum: "Factors in Decisions on Criminal Prosecutions for Environmental Violations in the Context of Significant Voluntary Compliance Disclosure Efforts by the Violator" (June 3, 1991).

32. *Id.*

33. *Id.*

34. *Id.*

or elsewhere to whom violations discovered in the auditing process should be disclosed. Nor does the memorandum describe the type of disclosed violations to which "prosecutorial leniency" may apply, or establish any standards for determining which violations will be pursued criminally as opposed to civilly or administratively. In these respects, the memorandum is inadequate as a means of promoting voluntary disclosure and simply serves further to highlight the need for the establishment of a government-wide program.

Further, in a recent speech, George Van Cleve, then a Deputy Assistant Attorney General for Environment and Natural Resources, acknowledged that while the government should encourage environmental auditing, EPA has to date provided insufficient incentives for companies to audit.[35] Van Cleve noted that recent DOJ settlements in fact reflect specific acknowledgement of prompt, good-faith efforts by environmental defendants to disclose and remedy environmental violations, and that DOJ has agreed not to use such audit-related commitments as evidence in grand jury proceedings.[36] These statements indicate that a promising opportunity now exists to obtain auditing incentives from EPA and DOJ.[37]

EPA is also exploring a fundamentally new approach to environmental compliance. Administrator William Reilly has announced a program designed to approach environmental protection on an "integrated" basis, across environmental media, using innovative enforcement methods.[38] The focus of this program is *pollution prevention*, rather than simply after-the-fact punishment of non-compliance. One of EPA's initiatives is to incorporate pollution prevention conditions in enforcement settlements and to communicate this new approach to the regulated

35. *See* Van Cleve Address, *supra* note 22.

36. *Id.*

37. It is anticipated that, in an effort to respond to Congress's stated intent, the revised United States Attorney's Manual, the handbook of procedures for coordination between DOJ Headquarters and local U.S. Attorneys on proposed prosecutions, will provide that U.S. Attorneys will not use voluntarily disclosed audit findings as the basis for either civil or criminal prosecutions.

38. Draft memorandum from H. Habicht, Deputy Administrator, EPA, to Assistant Regional Administrators (regarding "Regional Implementation of the Administrator's Multi-Media Enforcement Goals . . . .") (Nov. 7, 1990). *See also* EPA Pollution Prevention Strategy, 56 Fed. Reg. 7849-64 (1991).

community.[39] A cross-media pollution prevention initiative[40] is likely to affect substances and practices for which reporting is not currently required, but which internal environmental audits frequently cover. Accordingly, EPA will probably have to support its initiative with incentives for the voluntary disclosure of environmental audits.[41] Although the inclusion of pollution prevention conditions in settlement agreements has until now been done on a case-by-case basis, EPA's Office of Enforcement is in the process of developing an interim policy on the inclusion of such conditions in EPA civil and administrative enforcement settlements.[42]

Finally, EPA has established a partial precedent for a voluntary disclosure program with respect to civil violations under the Toxic Substances Control Act ("TSCA").[43] This program permits an automatic 25% penalty reduction when a TSCA § 5 violation is disclosed prior to the company's notification of a pending inspection and EPA's receipt of information about the violation.[44] A company which reports potential violations within thirty days of learning that they may exist is eligible to receive an additional

39. 56 Fed. Reg. 7849-64 (1991). At the same time, DOJ is actively incorporating pollution prevention provisions in enforcement settlements. In addition to monetary penalties and imposition of compliance schedules, recent consent decrees require the violator to conduct multi-media, in-house audits of the non-complying facilities and to correct any conditions discovered. Several of these decrees reportedly include assurances that the audit will not ordinarily have to be disclosed. *See, e.g.*, United States v. Eagle-Picher, No. 875100-CV-SW-8 (W.D. Mo. entered July 12, 1990) (consent decree); United States v. Menominee Paper Co., No. M88-108 CA 2 (W.D. Mich. entered July 20, 1990) (consent decree); *see also* United States v. Browning Ferris Industries, No. 88-0718-LC (W.D. La. entered Aug. 16, 1990) (consent decree) (required audit not to be used in civil enforcement actions but may be used in criminal enforcement).

40. EPA Pollution Prevention Strategy, 56 Fed. Reg. 7849-64 (1991).

41. EPA is unlikely to offer benefits for increased environmental auditing, such as protection from liability for audit findings that have been remedied and disclosed, unless its own programs are concretely benefitted. Such a benefit would be provided by its receiving a new source of compliance data: not just disclosure where a company is seeking to avert criminal liability, but broad disclosure of compliance data across industries. It will for this reason likely mandate disclosure of all audit results. It will also likely only promise protection from liability where disclosed audit results reflect a serious audit/compliance framework. Some movement in a related area is indicated by EPA's recent program under Section 8(e) of the Toxic Substances Control Act, 15 U.S.C. § 2607(e) (1988), requiring reporting of information suggesting a substantial risk of injury to human health or the environment. 56 Fed. Reg. 4128 (1991). Under the program, EPA agrees to limit (though not waive) the liability of companies that review their files for significant risk reports that should have previously been submitted.

42. EPA Pollution Prevention Strategy, 58 Fed. Reg. No. 7849, 7859 (1991).

43. OFFICE OF COMPLIANCE MONITORING, OFFICE OF PESTICIDES AND TOXIC SUBSTANCES, EPA, TSCA SECTION 5, ENFORCEMENT RESPONSE POLICY 17 (Aug. 5, 1988).

44. *Id.*

25% penalty reduction.[45] And, at EPA's discretion, the penalty may be further reduced by an additional 15% if the company takes all steps reasonably expected and requested to mitigate the violation.[46]

As each of these developments demonstrates, the focus of environmental enforcement policy may be shifting away from the goal of simply catching criminals and toward catching violations before they do irreversible harm to the environment. Congress, DOJ, and EPA have begun to realize that the policy of punishment, while effective, is to a large degree inadequate. It is appropriate at this time for the enforcement community to take the next step: to develop an agency-wide environmental voluntary disclosure program.

C. *Department of Defense Model*

The Department of Defense's ("DOD") voluntary disclosure program, which has been functioning successfully since July 1986, provides a good model for the type of program DOJ and EPA should begin to establish. DOD established its voluntary disclosure program as part of an overall rehabilitation of federal procurement. DOD's program provides incentives for disclosure but does not guarantee that a company making disclosures will not be prosecuted, suspended or debarred from government contracts.[47] Between 1986 and 1989, the program received over one hundred and sixty disclosures. The disclosures resulted in the government's recovery of $82.8 million from contractors.[48]

In order to determine if a contractor's disclosure is truly voluntary, DOD established four criteria that must be met: (1) the disclosure must not have been about to be revealed by some other means; (2) the disclosure must be made on behalf of the entire company, not just a few culpable individuals; (3) the company must take prompt action to rectify the situation; and (4) the contractor must agree to cooperate fully with the government in its efforts to investigate the matter.[49] If these conditions are satis-

45. *Id.*

46. *Id.*

47. *See* Memorandum from William C. Hendricks III, Chief, Fraud Section, Criminal Division, DOJ, to all United States Attorneys (July 17, 1987).

48. Klubes, *The Department of Defense Voluntary Disclosure Program*, 19 PUB. CONT. L.J. 504, 519 (1990).

49. *See Report of the Committee On Voluntary Disclosure*, 1987 A.B.A. Sec. Pub. Cont. L. 20-21.

fied, DOD and the contractor negotiate a written agreement which outlines the contractor's reporting requirements. The agreement may include a provision that the contractor's reports will not be introduced during later court proceedings.[50]

Any environmental voluntary disclosure program should take into account the vast experiences of DOD and other agencies already operating successful programs and the accumulated knowledge of the groups which assisted in their development and refinement. Government and private sector members of the American Bar Association's Public Contract Law Section Subcommittee on Voluntary Disclosure are well suited to this purpose.[51] They have thoroughly studied the issues surrounding voluntary disclosure and are poised to offer their assistance to DOJ and EPA in developing a program that promotes the goal of full compliance. A panel or committee consisting of participants from DOJ, DOD, EPA and members of the regulated community could also be created to assist in the development of a workable, responsive program.

CONCLUSION

The ultimate goal of environmental criminal enforcement should be compliance and the promotion of a clean environment, rather than punishment after the pollution has already occurred. While the growing number of environmental criminal convictions and financial penalties in one sense evidences the success of the enforcement program, in another sense it is a measure of failure. Compliance with environmental laws and rules would be substantially enhanced if regulated entities could conduct voluntary internal environmental audits of, and establish compliance programs within, their facilities without the fear that the violations they uncovered would prompt criminal prosecution. Government cannot be as effective in applying external coercion as a company's own management can be in reviewing its internal operations. It is time for DOJ and EPA to take steps toward the establishment of an environmental voluntary disclosure program

50. *Id.* at 17.

51. The subcommittee consists of numerous corporate officers, government officials and attorneys specializing in the area of government contracts.

which promotes, in the words of former Attorney General Thornburgh, "the present upkeep and future condition of this blue planet."[52]

52. *See* Thornburgh Address, *supra* note 1, at 2.