

ENVIRONMENTAL
STUDIES PROGRAM

**ENVIRONMENTAL AUDITS:
STATE CARROTS VERSUS FEDERAL STICKS
IN ENVIRONMENTAL ENFORCEMENT**

BEN LIEBERMAN

March 1997

ISSN# 1085-9047

ENVIRONMENTAL AUDITS

STATE CARROTS VERSUS FEDERAL STICKS IN ENVIRONMENTAL ENFORCEMENT

Ben Lieberman

EXECUTIVE SUMMARY

Environmental regulation has experienced tremendous growth in the last quarter century, resulting in a heavily centralized, command-and-control bureaucracy overseeing all aspects of environmental protection, including enforcement. While not without its successes, this approach is widely acknowledged to have numerous deficiencies. It is inflexible, inefficient, costly, unduly adversarial, and does not maximize environmental protection. Nonetheless, the federal government has proven resistant to new ideas for improving environmental compliance.

Promising innovations in environmental protection are coming from the states, however. One example is environmental audits. Without any encouragement from Washington, almost every state has either passed or considered an environmental audit bill since 1993. These laws facilitate self-enforcement by removing disincentives for regulated entities to investigate their own operations and proactively correct any discovered violations. The state laws differ from federal policy largely in that they provide privilege and immunity for the audit report so long as any discovered violations are disclosed and corrected. The EPA and DOJ, on the other hand, insist on retaining the right to use audit reports in subsequent legal actions, a factor that discourages many firms from undertaking audits in the first place.

The Clinton Administration continues to oppose state audit laws and Congressional efforts to enact a federal counterpart. The EPA has engaged in an intimidation campaign against several states with audit laws as well as those considering audit bills. The agency has threatened several states with revocation of federally-delegated authority under the Clean Air Act and Clean Water Act. Both the EPA and DOJ have also stated that they will step up federal enforcement in states with audit laws not to their liking.

The EPA argues that the laws, in particular the privilege they extend to audit reports, fail to deter violations and protect the environment, interfere with its own enforcement efforts, and are unnecessary to encourage audits. The DOJ echoes these views. But none of these arguments stand up to scrutiny:

- the legal protections only apply for violations that are disclosed to the appropriate authorities and promptly and permanently remedied, ensuring that all environmental benefits are attained;
- there are exceptions for serious, life-threatening, or deliberate violations;
- federal and state enforcement is unhindered by state audit laws, the only exception being that the audit report cannot be used against firms;

- the privilege extends only to voluntarily undertaken audit reports, and not to any other information required by law;
- the lack of legal protections has indeed had a chilling effect on both the number and scope of audits, according to many regulated entities .

In addition, the federal environmental bureaucracy may oppose audits for self-interested reasons. Environmental audits shift the focus away from Washington, D.C., and replace red tape and confrontation with a streamlined and cooperative approach. In contrast, the EPA and DOJ measure success (and attempt to justify budget increases) by the number of convictions and penalties assessed. Those who see environmental enforcement as an end in itself view audits as something of a threat, regardless of their potential for improving compliance with environmental regulations.

ENVIRONMENTAL AUDITS

STATE CARROTS VERSUS FEDERAL STICKS IN ENVIRONMENTAL ENFORCEMENT

Ben Lieberman

INTRODUCTION

Environmental regulation has experienced tremendous growth in the last quarter century. Much of this growth has occurred at the federal level, resulting in a heavily centralized, command-and-control bureaucracy overseeing virtually all aspects of environmental protection, including enforcement. State and local governments are a significant part of the enforcement scheme, but under strict federal oversight.¹ While not without its successes, this approach to environmental protection has several limitations, and is beginning to show signs of obsolescence. The current system is inflexible, inefficient, costly, unduly adversarial, and does not maximize environmental protection.

These failings are widely acknowledged. In the 1995 report *Reinventing Environmental Regulation*, the Clinton Administration concedes the “limitations of ‘command-and-control’ regulation.”² According to the report, “the adversarial approach that has often characterized our environmental system precludes opportunities for creative solutions that a more collaborative system might encourage.”³ It acknowledges that “Washington, D.C. is not the source of all the answers” and endorses “shifting more authority – and responsibility – from the Federal government to states, tribes and local communities.”⁴ Similarly, in an April 1995 report to Congress, the National Academy of Public Administration said that “[t]o continue to make environmental progress, the nation will have to develop a more rational, less costly strategy for protecting the environment, one that achieves its goals more efficiently, using more creativity and less bureaucracy.”⁵

"The adversarial approach that has often characterized our environmental system precludes opportunities for creative solutions. . ."

¹ See “States Jarred by EPA Criticisms, Ask Browner To Reaffirm Partnership,” *Bureau of National Affairs Daily Environment Report*, December 27, 1996, pp. AA-1.

² President Bill Clinton and Vice President Al Gore, “Reinventing Environmental Regulation,” *Inside EPA Weekly Report: Special Report*, March 16, 1995.

³ *Id.*, pp S-2.

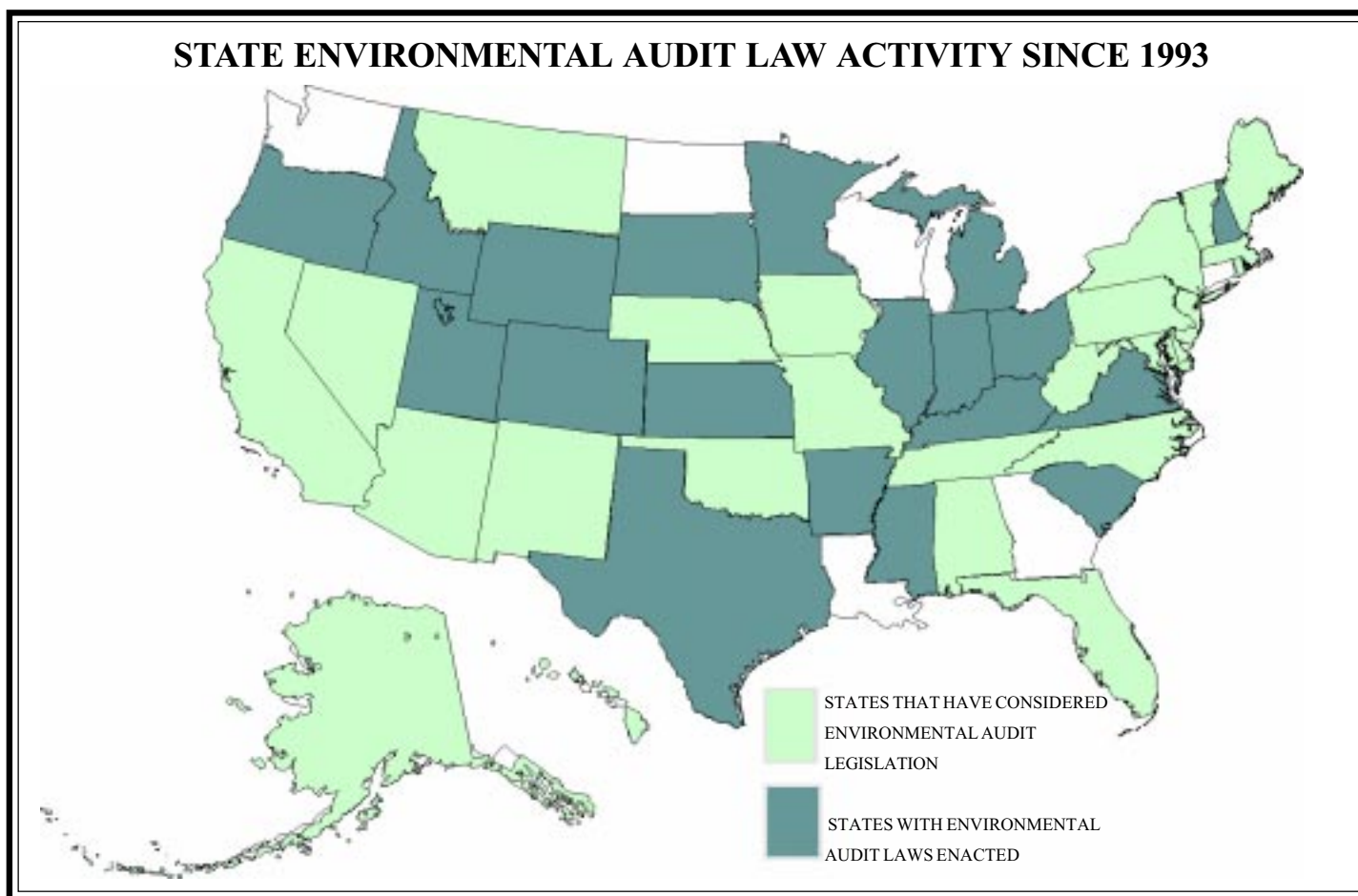
⁴ *Id.*, pp. S-2.

⁵ National Academy of Public Administration, *Setting Priorities, Getting Results: A New Direction For EPA*, booklet, April 1995, pp. 1.

While there is little real initiative at the federal level, creative improvements have come from the states.

Despite this consensus, the federal government has proven resistant to new ideas for improving environmental compliance. Current reform efforts, including the EPA's Common Sense Initiative and Project XL, have been extremely limited, due in part to the EPA's unwillingness to change its treatment of the regulated community or its relationship with state and local governments. The largely inconsequential nature of these reforms exemplifies how ossified the environmental enforcement bureaucracy has become.

While there is little real initiative at the federal level, creative improvements have come from the states. One example is environmental audits. Without any encouragement from Washington, almost every state legislature has either passed or considered an audit bill since 1993 (see chart below). These laws facilitate self-enforcement by removing disincentives for regulated entities to investigate their own operations and proactively correct any discovered violations. According to their proponents, environmental audits could harken a shift away from punitive command-and-control regimes toward outcome-based policies. However, audit laws have been actively opposed by the federal environmental bureaucracy, to the detriment of policy innovation and environmental protection.



ENVIRONMENTAL LAWS AND TRADITIONAL ENFORCEMENT

Compliance with federal environmental laws and regulations is arguably the most difficult legal challenge facing businesses today. The Clean Air Act (CAA) alone is several hundred pages long, has spawned thousands of pages of implementing regulations and guidance documents, and has been interpreted in numerous court decisions.⁶ The Act is applicable to several hundred thousand regulated entities throughout the nation. Yet the CAA is but one of more than 20 federal environmental laws on the books today.⁷

Each of these complicated statutes has an equally complicated enforcement scheme. Enforcement is carried out by state and local environmental authorities, the EPA's Office of Enforcement and Compliance Assurance, and the Department of Justice's (DOJ) Environment and Natural Resources Division. Many environmental statutes also have citizen suit provisions to complement traditional enforcement.⁸ These provisions allow environmental groups to act as private attorneys general and enforce compliance with environmental regulations in court.

Not surprisingly, dealing with these regulations and the authorities that enforce them can be extremely difficult. A recent survey reported that 70 percent of corporate lawyers consider total compliance with every applicable requirement to be impossible.⁹

Enforcement takes the form of administrative, civil, and criminal actions against regulated entities for violations of the myriad requirements. In recent years, the number of federal actions has ballooned, as has the cost of compliance.¹⁰ These traditional, adversarial enforcement strategies have played a part in achieving compliance with environmental statutes. However, given the complexities of the regulations and the limitations on enforcement resources, there are constraints on the extent of compliance, and, ultimately, the environmental benefits that government officials alone can attain. Incentives for regulated entities to find and correct violations are also very important. Many believe that environmental audits could play a crucial role in the self-enforcement process.

There are constraints on the extent of compliance and the environmental benefits government officials alone can attain.

⁶ 42 U.S.C. §§ 7401-7671q (1995).

⁷ See, e.g., Clean Water Act, 33 U.S.C. §§1251-1387 (1995), Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§9601-9675 (1995), Solid Waste Disposal Act, 42 U.S.C. §§ 6901-6992k (1995), Toxic Substances Control Act, 15 U.S.C. §§ 2601-2671 (1995), Surface Mining Control and Reclamation Act, §§ 1201-1328 (1995).

⁸ See 42 U.S.C. § 7604 (1995)(The citizen suit provisions under the Clean Air Act).

⁹ See Marianne Lavelle, "Environmental Vise: Law, Compliance," *National Law Journal*, August 30, 1993, pp. S8.

¹⁰ See, EPA Press Release, "EPA Announces Enforcement Accomplishments," July 23, 1996; Alexander Volokh and Roger Marzulla, "Environmental Enforcement: In Search of Both Effectiveness and Fairness," *Reason Foundation Policy Study No. 210*, August 1996, pp. 2.

ENVIRONMENTAL AUDITS

The EPA defines an environmental audit as a “systematic, documented, periodic, and objective review by regulated entities of facility operations and practices related to meeting environmental requirements.”¹¹ In other words, environmental audits refer to the process by which companies evaluate themselves for compliance with environmental regulations. Any violations discovered through an audit can then be corrected. In addition, environmental audits may provide information useful for preventing future pollution problems.

For most companies, environmental audits are a relatively new phenomenon, and one with a significant potential for future growth. According to a recent survey, approximately 75 percent of industrial companies have some form of environmental audit program.¹² On average, these firms have had such a program in place for seven years. Twenty-five percent do not audit, and, perhaps more importantly, most of the 75 percent who do have refrained from expanding their programs. Many firms say they would increase the size and scope of their audit programs if the government removed certain disincentives. (For more survey results, see page 13.)

Conflicting Positions on Environmental Audits

Environmental audits are discouraged by existing environmental statutes. These statutes have their own enforcement schemes, which have been aggressively pursued by the federal government. These laws do not grant protected status to information uncovered through private environmental audits. Any information revealed by an audit can expose a firm to administrative, civil, or criminal liability. Nor are environmental audits well protected by existing evidential privileges, such as the attorney-client, work product, or self-evaluative privilege.¹³

As a result, plant managers have good reasons not to voluntarily undertake audits (or to undertake them in a defensive and limited manner), as the information they disclose may result in the assessment of penalties and/or the commencement of further civil or criminal actions by the government or third parties. Fear of penalties from disclosed violations and concerns about the subsequent use of audit information have been cited as important factors for companies that are hesitant to expand their audit programs. Without additional legal protections, the promise of cost-effective pollution reductions through environmental audits will never be fully realized.

Approximately 75 percent of industrial companies have some form of environmental audit program.

¹¹ 51 *Federal Register* 25,004, 25,006 (1986).

¹² Price Waterhouse LLP, “The Voluntary Environmental Audit Survey of U.S. Business” (Price Waterhouse Survey), March 1995.

¹³ See, Barry M. Hartman and Linda L. Raclin, “A Primer on Environmental Auditing,” National Legal Center for the Public Interest, July 1994.

Generally speaking, the federal government has opposed substantive efforts to encourage auditing. But a growing number of states have recently passed laws granting stronger protections. These conflicting positions will be detailed below.

The Environmental Protection Agency

In 1986, the EPA first set out a policy providing limited incentives for regulated industries to conduct audits and disclose violations.¹⁴ In this policy, the EPA announced that it may take into consideration the fact that an environmental audit was conducted (and the discovered violations promptly corrected) as a mitigating factor in assessing penalties against firms that violate environmental laws. The EPA also stated that it will not routinely request an audit report for use in subsequent enforcement actions. These limited protections were discretionary, and applied only to the EPA. Under this scheme, the number and scope of environmental audits remained limited.

Largely in response to state audit laws enacted since 1993, and the introduction of federal audit bills, the EPA recently revisited the issue of environmental audits. The agency issued a new Final Policy Statement that took effect on January 22, 1996.¹⁵ According to the EPA, “because government resources are limited, maximum compliance cannot be achieved without active efforts by the regulated community to police themselves.”¹⁶ The new policy offers what it calls “major incentives that EPA will provide to encourage self-policing, self-disclosure, and prompt self-correction.”¹⁷ These include a waiver or 75 percent reduction of “gravity-based” (punitive) civil penalties, and a policy of not recommending criminal prosecution of violations discovered through an audit. The EPA also stated that it will not routinely request audit reports. The EPA set out nine criteria for which the penalty waivers apply:

- the violation must be discovered through an environmental audit, as defined in the 1986 policy, or through the company’s due diligence;
- the violation must have been identified voluntarily, as opposed to being detected through required procedures such as mandatory monitoring;
- the violation must be promptly disclosed to the EPA;
- the disclosure cannot have been prompted by an impending inspection, investigation, citizen’s suit, or other action;

Environmental audits are discouraged by existing environmental statutes.

¹⁴ 51 *Federal Register* 25,004 (1986).

¹⁵ 60 *Federal Register* 66,706 (1995).

¹⁶ *Id.*

¹⁷ *Id.*, pp. 66,707.

According to the EPA, "because government resources are limited, maximum compliance cannot be achieved without active efforts by the regulated community to police themselves."

- the violation must be corrected and any harm remediated;
- the entity must take steps to prevent recurrence of the violation;
- the specific violation must not be part of a pattern of such violations;
- the violation must not be one which resulted in serious actual harm, or presented an imminent and substantial endangerment to human health or the environment, or violated any legally binding agreement;
- the entity must fully cooperate with the EPA.¹⁸

If all nine conditions are met to the EPA's satisfaction, the agency may grant immunity for the gravity-based portion of the penalty. If condition one is not met (i.e., the violation was not detected through an environmental audit or due diligence), but conditions two through nine are met, then 75 percent of the gravity-based penalty may be waived.¹⁹ In neither case will the portion of the penalty attributed to the economic benefit accrued to the violator be waived, unless it is trivial.²⁰ The economic benefit is calculated by the EPA.

In addition to penalty immunity, the policy offers qualified assurances that audit reports and contributing materials will not be requested for use in subsequent actions. But the EPA expressly reserves the right to request an audit report if the agency has what it deems "independent evidence of a violation."²¹ The EPA specifically opposes state laws which make such materials privileged and offer penalty reductions without conditions and qualifications similar to those in the policy.²²

The EPA also offers assurances that it will not recommend self-reported violations to the Department of Justice or other authorities for criminal prosecution. This protection does not apply to violations that the EPA determines to involve a prevalent management philosophy or practice that concealed or condoned violations. Also excluded are instances of high-level officials' or managers' conscious involvement in or willful blindness to the violations. The EPA also reserves the right to recommend criminal prosecutions for the acts of individual managers or employees.²³

It is important to note that the EPA's policy is not a regulation, and thus is not legally binding on the agency. The EPA expressly states that the policy "does not create any rights, duties, obligations, or defenses, implied or

¹⁸ Id., pp. 67,711-2.

¹⁹ Id., pp. 66,711.

²⁰ Id., pp 66,712.

²¹ Id., pp. 66,708.

²² Id., pp. 66,710.

²³ Id., pp. 66,711.

otherwise, in any third parties.”²⁴ It also does not apply to the Department of Justice, or to environmental organizations and other third party litigants. Therefore, it provides only limited assurances to firms that wish to conduct environmental audits without fear of prosecution.

The Department of Justice

Since 1991, the DOJ has had a policy of providing limited and inducements for companies that conduct audits.²⁵ More recently, the DOJ has expressed support for the new EPA policy, though it is not bound by it.²⁶ The DOJ has stated it will “consider in the exercise of prosecutorial discretion self-auditing, self-policing, and voluntary disclosure as important mitigating factors,” both in deciding to undertake a criminal investigation, and in the sentencing phase of criminal cases.²⁷ The DOJ states that it “generally will not seek an environmental audit from a regulated entity,” but adds that “once an investigation is begun on the basis of independent information of violations, the Department seeks all relevant information, including audit reports.”²⁸

As with the EPA, the DOJ’s policy is totally discretionary. There are no assurances in any particular case that the DOJ will not request an audit report and/or fully prosecute and penalize self-disclosed violations. The DOJ also joins the EPA in opposing privilege for audit reports, and in warning of conflicts with state laws that establish privilege.²⁹ In other words, companies undertake audits at their own risk.

The States

In the last few years, many state governments came to realize that existing policies were discouraging environmental audits, and that potential environmental benefits were being lost. This impression was buttressed by a few publicized incidents of audit reports being used against companies that voluntarily disclosed their violations. For example, the Coors Brewing Company conducted an environmental audit in 1993, and discovered a Clean Air Act violation unlikely to have otherwise been detected. Despite disclosing

It provides only limited assurances to firms that wish to conduct environmental audits without fear of prosecution.

²⁴ Id., pp. 66,712

²⁵ U.S. Department 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.

²⁶ Letter from Lois J. Schiffer, Assistant Attorney General, Environment and Natural Resources Division, Department of Justice, to Steven Herman, Assistant Administrator, Office of Enforcement and Compliance Assurance, U.S. Environmental Protection Agency, January 31, 1996 (DOJ Letter).

²⁷ Id.

²⁸ Id.

²⁹ Id.

the problem and initiating steps to control it, the company was hit with a large penalty by the state of Colorado.³⁰

Consequently, the states have taken the lead in encouraging environmental audits, providing broader protections and greater certainty for entities conducting audits than the federal government. The first environmental audit law was passed in the state of Oregon in 1993.³¹ And, despite opposition at the federal level, 18 other states have passed similar laws, and many additional states are considering such legislation.³² (These states are identified in the chart on page 2.) These laws have been supported by state legislators and governors of both parties.

The DOJ states, "once an investigation is begun on the basis on independent information of violations, the Department seeks all relevant information, including environmental audits."

Generally, these laws allow regulated entities to conduct environmental audits and report any violations discovered to the state environmental authorities. Then, in exchange for promptly remedying the problems, the audit report becomes privileged, and thus cannot be used as evidence against the auditee in a subsequent action. Many also offer partial or total immunity from additional penalties for self-disclosed and corrected violations. Most contain exceptions if the privilege is asserted for fraudulent purposes, or if the disclosed violation is sufficiently serious or intentional.

The state laws differ from the EPA's new policy in two important areas. First, most provide privilege for the audit report and supporting materials.³³ The audit data can be compiled without fear that it will be used by the government or private parties in administrative, civil, or criminal actions. And second, most of the state laws provide more reliable immunity provisions for the underlying violations.³⁴ Unlike the penalty immunity under the EPA's policy, the state laws subject auditees seeking immunity to fewer conditions, qualifications, and exclusions. This gives firms considering undertaking environmental audits greater certainty that audit reports will not later be used against them.

Some state audit laws have sunset provisions. Colorado's law, for example, is subject to review in 1999.³⁵ It will become permanent only if the

³⁰ Letter from Scott B. Smith, Director, Environmental, Health and Safety Policy, Coors Brewing Company, to Brian PPPP, Reidel and Ira R. Feldman, Office of Compliance, U.S. EPA, July 26, 1994; "Coors Settles With State Over Violations Discovered In Company's Self-Audit," *Bureau of National Affairs Daily Environment Report*, February 22, 1996, pp. A-3.

³¹ Oregon Revised Statutes §468.963 (1995).

³² See, R. Goleman and L. Wolf, "The New Paradigm in Environmental Enforcement: Environmental Audit Privilege and Immunity Legislation," American Legislative Exchange Council, May 1996; "Environmental Audits: Ohio Industries Conducting Voluntary Audits Will Not Have To Disclose Findings," *Bureau of National Affairs Daily Environment Report*, December 23, 1996, pp. A-2.

³³ "Environmental Audits: State Immunity, Privilege Laws Examined For Conflicts Affecting Delegated Programs," *Bureau of National Affairs, Daily Environment Report*, September 18, 1996, pp. AA-3 (South Dakota does not provide privilege for audit reports).

³⁴ Id.

³⁵ Colorado Revised Statutes, §§13-25-126.5 (1995).

state legislature deems the experiment in encouraging self-enforcement a success.

The state laws are still too new to draw any firm conclusions as to their success or failure. Thus far, only a small number of regulated entities have taken advantage of state privilege and immunity to conduct audits and report violations, in part due to the lack of comparable federal protections. But the early indications are positive. In Texas, for example, several audits have uncovered violations many believe would not have otherwise been discovered and corrected.³⁶

The Congress and the White House

In the 104th Congress, Congressman Joel Hefley (R-Colorado), and Senators Mark Hatfield (R-Oregon) and Hank Brown (R-Colorado) introduced federal audit bills.³⁷ The House and Senate versions provide privilege and penalty immunity, like the state laws. But unlike state laws, a federal law would bind the EPA and DOJ. On May 16, 1996, seventeen House Democrats wrote a letter to Vice President Gore strongly supporting the state audit laws and the federal environmental audit bills, indicating that the issue enjoys at least some bipartisan support.³⁸ In addition, Congress unsuccessfully attempted to encourage environmental audits through the appropriations process, by prohibiting the EPA from allocating enforcement resources for actions against companies disclosing and correcting violations under state audit laws.³⁹

Thus far, the Clinton administration has opposed any protections for environmental audits beyond those in the EPA's policy. Vice President Gore criticized state audits laws as both dangerous to the environment and unfair because they allow "those who caused the pollution to get off the hook."⁴⁰ President Clinton has proposed a "get tough" bill to improve compliance by increasing criminal enforcement, implying that privilege and immunity for environmental audits is a move in the wrong direction.⁴¹

These laws allow regulated entities to conduct environmental audits and report any violations discovered to the state environmental authorities.

³⁶ State of Texas, Senate Natural Resources Committee Interim Report to the 75th Legislature, Effectiveness of the Environmental Audit Legislation, September 1996; "Environmental Audits: Violations Disclosed Under Immunity Law Would Have Eluded Texas, Observers Agree," *Bureau of National Affairs Daily Environment Report*, April 24, 1996, pp. AA-1.

³⁷ Voluntary Environmental Self-Evaluation Act, H.R. 1047, 104th Cong., 1st Sess. (1995); *Voluntary Environmental Audit Protection Act*, S 582, 104th Cong., 1st Sess. (1995).

³⁸ "Audits: Letter From House Democrats Urges Gore To Support Privilege, Immunity," *Bureau of National Affairs National Environment Daily*, May 24, 1996, pp. A-1.

³⁹ *141 Congressional Record* 14,171 (1995).

⁴⁰ "Enviro Auditing: Gore Rails Against Enviro Crimes," *Greenwire*, June 24, 1996; "Administration Elevates Level of Opposition to Privilege, Immunity Bills," *Bureau of National Affairs Daily Environment Reporter*, June 26, 1996, pp. A-2, A-3.

THE FEDS VERSUS THE STATES

The Clinton EPA remains vigorously opposed to most state environmental audit laws. In the past two years, the EPA has engaged in strong-arm tactics, interfering with the states' implementation of existing laws and discouraging states currently considering audit bills. And the EPA has many weapons in its arsenal.

The Clinton administration has opposed any protections from environmental audits beyond those in the EPA's policy.

Many statutes, like the Clean Water Act and Clean Air Act delegate enforcement authority to the states, conditioned on these states meeting the EPA's approval. For example, under Title V of the Clean Air Act, each state runs its own air operating permits program.⁴² But if the EPA deems state enforcement inadequate, it has the discretion to take back this authority and operate the program at the federal level, a highly undesirable option for most states. Specifically, in response to its dissatisfaction with the audit laws of Texas, Idaho, and Michigan, the EPA has told these states that their Title V programs may receive only temporary approval, on the grounds that their audit laws render them unable to run their own programs as the EPA desires.⁴³ Permanent approval may require a repeal or revision of their audit laws. In addition, several environmental groups have petitioned the EPA to do the same in other states.⁴⁴

In an attempt to discourage additional states from passing audit bills, the EPA has made similar threats to states with bills pending in the legislature.⁴⁵ This has provoked a strong response from several state legislators and environmental officials. "It's arrogant, it's bullying, and it's legally and factually wrong," commented State Representative William Schuck, Chairman of the Ohio House Energy and Environment Committee.⁴⁶ Despite the EPA's intimidation campaign, the Ohio legislature recently passed its audit bill, and many other states are actively considering similar bills.⁴⁷

⁴¹ Id.

⁴² 42 U.S.C.A. §§ 7661a to 7671; See Ben Lieberman, *Title V Of The Clean Air Act: Will America's Industrial Future Be Permitted?* (Washington, D.C.: Competitive Enterprise Institute, July 1995).

⁴³ "EPA Says State's Audit Law Conflicts With Clean Air Act Delegation," *Bureau of National Affairs Daily Environment Report*, May, 22, 1996, pp. A-2; "State Authority to Implement Federal Statutes May Be Compromised, EPA Tells Some States," *Bureau of National Affairs Daily Environment Report*, September 18, 1996, pp. AA-1.

⁴⁴ Environmental Audits Ohio: Groups Seek Revocation by EPA of State Enforcement Power Due to Law;" Environmental Audits: Colorado Groups Petition EPA Over State's Audit Privilege Law." *Bureau of National Affairs National Environment Daily*, January 30, 1997, pp. AA-1-3.

⁴⁵ Id.

⁴⁶ Letter from Donald R. Schregardus, Director, State of Ohio Environmental Protection Agency to Valdas V. Adamkus, Regional Administrator, U.S. Environmental Protection Agency, April 30, 1996.

⁴⁷ "Environmental Audits: Ohio Industries Conducting Voluntary Audits Will Not Have To Disclose Findings," *Bureau of National Affairs Daily Environment Report*, December 23, 1996, pp. A-2.

The EPA has also suggested that it will step up enforcement efforts in those states whose audit laws are not to its liking, and may commence federal actions against companies that disclose violations under state audit laws, a tactic commonly called overfiling. The agency declared that it “will scrutinize enforcement more closely in states with audit privilege and/or immunity laws and may find it necessary to increase federal enforcement” where state audit programs do not meet with the EPA’s approval.⁴⁸ The Department of Justice has made similar threats.

This tactic is legal, since Congress’ attempt to restrict it through the appropriations process failed. However, some have suggested that such an approach is environmentally counterproductive, because shifting scarce enforcement resources towards firms that self-audit means relatively less oversight of those that do not, although the latter are more likely to have undetected violations.⁴⁹

FEDERAL OPPOSITION TO AUDITS: THE STATED REASONS

The EPA has several justifications for its opposition to state environmental audit laws. Generally, the EPA argues that these laws, particularly the privilege they extend to audit reports, provide too much protection for violators, and thus will endanger public health and the environment by failing to deter serious acts of non-compliance. The agency also claims that audits will interfere with its own enforcement efforts. Finally, the EPA asserts that privilege and other protections beyond those provided in its policy are unnecessary to encourage audits. The Department of Justice echoes these views.

The EPA’s characterization of state audit laws as providing amnesty for polluters who threaten human health and the environment is widespread.⁵⁰ However, it does not stand up to scrutiny. Most state audit laws deny privilege or immunity for audits that uncover environmentally serious, life-threatening, or deliberate violations, thus preserving deterrence where needed. In fact, audits may actually assist in the detection and deterrence of environmentally significant problems, as government regulators can focus their resources on finding major violations, while relying more heavily on industry to self-police minor and unintentional violations. The latter are far more numerous, given the extreme complexity of environmental statutes and regulations. As it is, both the EPA and DOJ squander a substantial and increasing amount of enforcement resources on trivial problems, such as paperwork violations.

The EPA argues that the laws will endanger public health and the environment.

⁴⁸ 60 *Federal Register* 16,875, 16878 (1995).

⁴⁹ See Goleman and Wolf, pp. 3.

⁵⁰ See Cushman, “Many States Give Polluting Firms New Protections,” *New York Times*, April 7, 1996, pp. 1.

Unfortunately, neither is willing to encourage self-detection and self-correction by extending privilege, no matter how environmentally insignificant the violation.

Most importantly, the protections for auditees are granted only if the violations are reported to the authorities, and promptly and permanently remedied. If not, then privilege and immunity is forfeited. This ensures that all environmental benefits are attained before any protections are bestowed. This undermines the argument that audits will harm the environment by preventing subsequent enforcement by the EPA or DOJ. Quite the opposite, there are no environmental gains from pursuing federal enforcement actions for violations that have already been fixed, or are about to be.

Nor do these laws interfere with independent enforcement efforts. Despite claims to the contrary, the EPA, DOJ, state enforcement officials, and private parties can undertake enforcement actions if necessary, and state audit laws do nothing to get in the way. Legally required information and any violations revealed is unprotected by audit laws. Most environmental statutes have extensive paperwork requirements, under which federal and state authorities receive voluminous amounts of information, none of which is subject to privilege. Publicly available data, such as the toxic Release Inventory, is also unaffected. The audit privilege only protects voluntarily undertaken audit reports. Nor are government-mandated inspections of facilities limited in any manner, except that audit reports cannot be seized. In sum, government and third party enforcement continues unabated under state audit laws, the only limitation being that the audit report cannot be used as a roadmap for an easy enforcement score.

The EPA has suggested it will step up enforcement efforts in those states whose audit laws are not to its liking.

Although the laws are still new, the early experience suggests that the kind of violations reported and remedied are those that would have escaped detection from state and federal inspectors.⁵¹ This is not surprising, as a regulated entity knows much more about its own operations than any outsider. Audit laws provide the necessary incentives to harness this superior knowledge for the benefit of environmental protection. For example, an extensive audit of a facility in Texas owned by Sterling Chemicals uncovered a manufacturing unit out of compliance with the applicable regulations. The non-compliance had not been discovered by five previous state inspections. As a result of the audit, Sterling Chemicals shut down the unit.⁵²

The EPA has suggested that its policy is sufficient to encourage companies to audit and that the additional incentives provided by the states are not necessary.⁵³ But a large number of regulated companies believe otherwise. Of

⁵¹ See note 35.

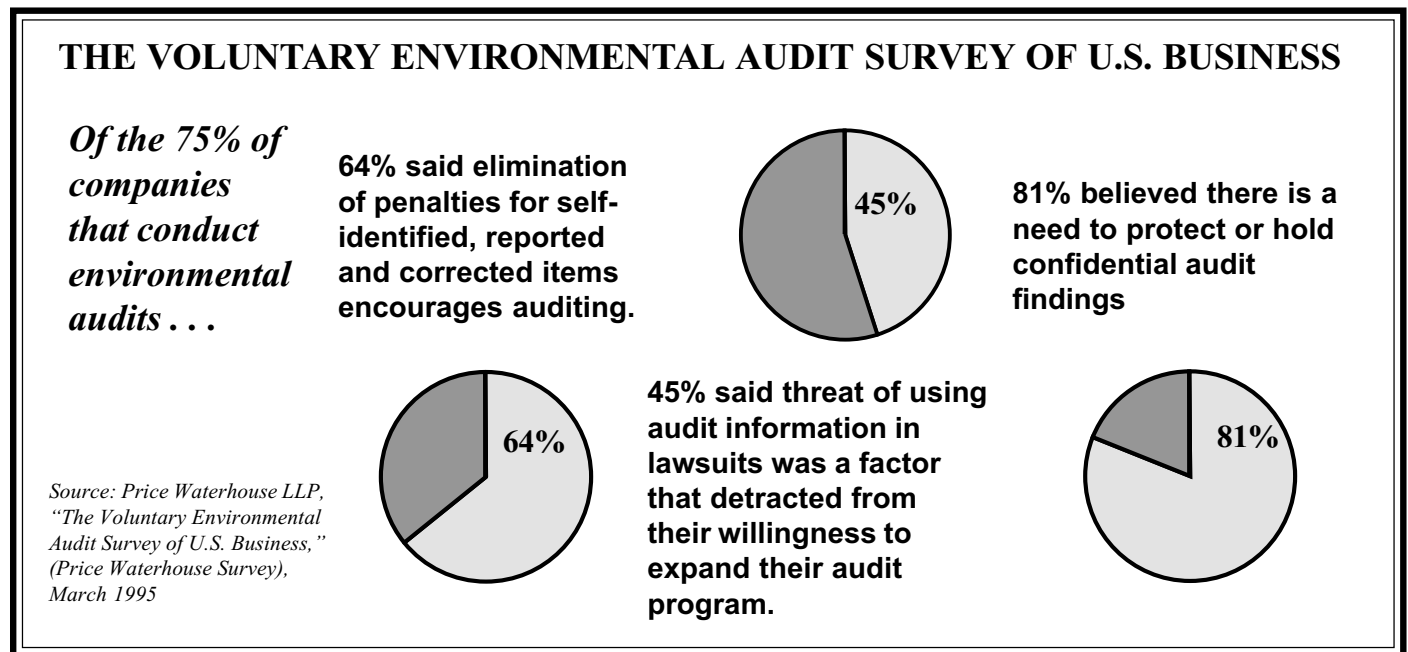
⁵² Testimony of Samuel Z. Chamberlain, Director of Corporate Environmental, Legislative, and Regulatory Affairs, Sterling Chemicals, Inc., before the State of Texas, Senate Natural Resources Committee, June 4, 1996.

⁵³ 60 *Federal Register* 66,706, 66,710 (1995).

the surveyed companies that conduct audits, 45 percent said that their willingness to expand their program was affected by the fact that information could be used in a citizen's suit, toxic tort suit, civil or criminal enforcement action. Sixty-eight percent of surveyed firms also said that audit reports are drafted to minimize concerns about disclosure outside the company. Such defensive measures may reduce an audit report's usefulness. Eighty-one percent believed that audit findings need to be kept confidential. And, of the companies that do not audit, 20 percent cited fears of the information being used against them as a reason for their policy (see below).

Although the number of instances of environmental audit reports being overtly used to secure a criminal conviction or a substantial civil penalty is small, the federal government has done so often enough to pose a real threat.⁵⁴ In addition, the EPA and DOJ have taken advantage of audit information in other ways. For example, the DOJ has frequently used audit materials (or the threat of using them) as "bargaining chips" during criminal investigations and settlement negotiations.⁵⁵ Nearly 10 percent of companies that audit said that an audit report has been used against them by the government. Twenty-five percent report attempts by outside parties to obtain audit information.

Most state audit laws deny privilege or immunity for audits that uncover environmentally serious, life-threatening, or deliberate violations, thus preserving deterrence where needed.



⁵⁴ See Terrell E. Hunt and Timothy A. Wilkins, "Environmental Audits and Enforcement Policy," 16 *Harvard Environmental Law Review* (1992), 365, 373-4; *United States v. Dexter Corpppp.*, 132 F.R.D. 8 (D. Conn. 1990); *United States v. Chevron U.S.A. Inc.*, No. 88-6681, 1989 Dist. LEXIS 12,267 (E.D. Pa. Oct. 16, 1989).

⁵⁵ See Joseph G. Block and Gregory S. Braker, "Environmental Auditing: Safe Investment or High Risk Venture?," *Bureau of National Affairs Prevention of Corporate Liability*, October 17, 1994, pp. 10.

Given industry's concerns and past experiences, the federal government's new audit policy, though a step in the right direction, falls far short of providing protections adequate to encourage audits. It is totally discretionary, provides limited benefits, and does not affect other agencies or third party litigants. It also contains carefully chosen language that has raised concerns among those who have dealt with the federal government on environmental matters. For example, the policy exempts violations that "may have presented an imminent and substantial endangerment to human health or the environment . . ." (emphasis added). While seemingly justifiable to exclude imminent and substantial threats, the regulated community is well aware that the EPA's language has been interpreted very broadly, and that it can be applied to a great many violations, even relatively trivial ones.⁵⁶

Of the 75 percent of companies that conduct environmental audits . . .

- 81% believed there is a need to protect or hold confidential audit findings
- 68% indicated their audits are done to minimize concern about disclosure outside the company
- 45% said the potential use of audit information in enforcement actions or litigation detracted from their willingness to expand their environmental audit program
- 64% said that elimination of penalties for self-identified, reported and corrected items would encourage more auditing.
- 9% said their audit findings have been involuntarily discovered or disclosed
- 25% reported attempts by outside parties to obtain audit information

Of the 25 percent of companies that do not audit, 20 percent were concerned audit information could be used against them.

Source: Price Waterhouse LLP, "The Voluntary Environmental Audit Survey of U.S. Business," (Price Waterhouse Survey), March 1995

That the current policy does not preclude subsequent use of audit reports is of particular concern given the fact that the criminal knowledge standard is very easily met in the context of environmental law.⁵⁷ An audit report can provide the DOJ with sufficient evidence to turn even minor and unintentional violations into criminal cases, an increasingly common occurrence.⁵⁸

The EPA and DOJ insist that they will not take advantage of companies that audit, although they have done so in the past and stubbornly defend a policy that gives them every opportunity to do so. One could argue that neither agency has earned sufficient trust among the regulated community for such a discretionary policy to work. Quite the contrary, in many circles the EPA and DOJ have a reputation for unfairness, enforcement zeal, and anti-industry bias. Many companies will not settle for

⁵⁶ See *U.S. v. Conservation Chemical Co.*, 619 F. Sup. 162 (WD Mo. 1985); Christopher C. Horner, "You Can Fool Some of The People Some of The Time: Why EPA's Audit Policy Gamble Should Backfire," *State Bar of Texas Law Journal*, Fall 1996, pp. 94.

⁵⁷ Ruth Weidel et al., "The Erosion of Mens Rea in Environmental Criminal Prosecutions," 21 *Seton Hall Law Review* 1100 (1991).

⁵⁸ See Frank Friedman, "Is This Job Worth It?" *The Environmental Forum*, May/June, 1991.

anything less than legally binding assurances before fully expanding their audit programs.

There is little question that the federal government's policy has a chilling effect on environmental audits, and that, absent state laws or a federal statute providing sufficient protections, audits will never fulfill their potential for improving environmental compliance.

FEDERAL OPPOSITION TO AUDITS: THE UNSTATED REASONS

The federal government's vehement opposition to state audit laws may well go beyond the reasons stated. In truth, the war on audits can also be explained in terms of bureaucratic self-interest. The modern environmental movement has spawned a large and powerful centralized bureaucracy, as formidable as any in Washington, D.C. Many policy decisions are made for the benefit of this bureaucracy, and not the benefit of the environment.

This is particularly true for environmental enforcement, where the command-and-control model, however flawed, still predominates. Prescriptive, inflexible rules are enforced in a confrontational and adversarial manner by a bureaucracy strongly resistant to change. Against this leviathan, environmental audits must fight for acceptance.

Despite their potential for achieving cost-effective compliance, audits do nothing to advance the interests of the enforcement bureaucracy. Quite the contrary, they pose something of a threat to agencies that view enforcement as an end in itself, and not a means toward the end of improved compliance and a cleaner environment.

Audits, particularly those sanctioned at the state level, shift the focus away from Washington, and de-emphasize red tape and process in favor of a streamlined, results-oriented approach. Audits also foster cooperation with the regulated community, rather than confrontation and litigation. In contrast, the EPA and DOJ measure success (and attempt to justify budget increases) by the number years of prison sentences meted out and the dollar totals of penalties imposed, irrespective of whether they result in a cleaner environment.⁵⁹ Federal opposition to audits is understandable, given this bean counting mindset. Violations proactively detected and eliminated through audits will not result in a notch in a DOJ lawyers's gun or show up as so many dollars in the EPA's annual penalty totals. That they improve compliance and do so at minimal cost matters little in Washington.

The EPA has acknowledged deficiencies in the existing enforcement scheme, and has made some attempts to incorporate innovative approaches.⁶⁰

Many companies will not settle for anything less than legally binding assurances before fully expanding their audit programs.

Without sufficient protections, audits will never fulfill their potential for improving environmental compliance.

⁵⁹ See Volokh and Marzulla, pp. 7-8.

Although the Clinton administration has embraced the rhetoric of "building partnerships," the treatment of states with environmental audit laws suggests that the partnership is decidedly unequal.

But well-hyped programs like the Common Sense Initiative and Project XL do not go far enough and fail to overcome the problems they were created to eliminate.⁶¹ The same is true for the EPA's improved, but still inadequate, audit policy. Like other "reforms," the audit policy is still shackled by EPA micromanagement and red tape, and fails to curb the agency's self-interested control over the process of environmental enforcement.

Perhaps more troubling than the EPA's unwillingness to change is its refusal to allow states the autonomy to do so. Environmental audit laws and other state-level alternative approaches to environmental protection are being frustrated by federal inflexibility and opposition to any diminution of control.⁶² Although the Clinton Administration has embraced the rhetoric of "building partnerships" with state governments in the area of environmental protection, the treatment of states with environmental audit laws strongly suggests that the partnership is decidedly unequal.⁶³

CONCLUSION

The federal government opposes substantive measures to encourage environmental audits. Current EPA and DOJ policies do not provide adequate protections for regulated entities conducting audits. State audit laws face considerable federal opposition. Federal legislation that is binding to the EPA and DOJ and similar to the state laws in providing sufficient privilege and immunity to facilitate the conduct of environmental audits is crucial to their success. With this change, audits will realize their considerable potential for producing cost-effective improvements in the level of compliance with environmental laws, and, more importantly, a cleaner environment.

⁶⁰ See *Reinventing Environmental Regulation*, Appendix C.

⁶¹ See "Frustrated By Pace Of Project XL, States Drafting Federal Legislation," *Bureau of National Affairs Daily Environment Reporter*, September 9, 1996, pp. AA-1, AA-2.

⁶² See Daniel M. Steinway and Steven L. Humphreys, "States Assume Greater Role In Policy Implementation," *New York Law Journal*, June 3, 1996, at S5 and S8; "States Jarred by EPA Criticisms, Ask Browner To Reaffirm Partnership," *Bureau of National Affairs Daily Environment Report*, December 27, 1996, pp. AA-1.

⁶³ *Reinventing Environmental Regulation*, pp. S-6.

ABOUT THE AUTHOR

Ben Lieberman, J.D., CPA, is an environmental research associate at the Competitive Enterprise Institute. He is the author of the CEI studies *Title V of the Clean Air Act: Will America's Industrial Future Be Permitted?* (July 1995) and *The High Cost of Cool: The Economic Impact of the CFC Phaseout in the United States* (June 1994). Mr. Lieberman hold a J.D. from George Washington University National Law Center and a B.S. in Accounting from the University of Maryland.