BACKGROUND PAPER 97-3

ENVIRONMENTAL SELF-AUDIT

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# TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Introduction and Background Information</td>
<td>1</td>
</tr>
<tr>
<td>Immunity</td>
<td>1</td>
</tr>
<tr>
<td>Privilege</td>
<td>1</td>
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<tr>
<td>Support and Opposition</td>
<td>1</td>
</tr>
<tr>
<td>State and Federal Activity</td>
<td>2</td>
</tr>
<tr>
<td>State Legislative Actions</td>
<td>2</td>
</tr>
<tr>
<td>Federal Activity</td>
<td>2</td>
</tr>
<tr>
<td>Alternatives and Examples</td>
<td>4</td>
</tr>
<tr>
<td>Appendices</td>
<td>4</td>
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<td>Appendix A</td>
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**ENVIRONMENTAL SELF-AUDIT**

**INTRODUCTION AND BACKGROUND INFORMATION**

In the broadest sense, environmental self-audit refers to an industrial or business entity’s efforts to voluntarily discover, disclose, and correct violations of state or federal environmental laws. Several states, and the Federal Government, have developed incentives to encourage the use of environmental self-audits. Although these incentives vary considerably, they may be categorized generally under the headings of "immunity" and "privilege."

**Immunity**

The topic of immunity addresses the degree to which an entity, which employs self-audit to identify, disclose, and correct a violation, is subject to penalties associated with the violation. This type of immunity may apply to administrative penalties, civil proceedings, or criminal prosecution. Also part of this consideration may be the applicability of penalties designed to recover any economic benefit (competitive advantage) gained as a result of noncompliance.

**Privilege**

Privilege typically refers to protection of information associated with a self-audit from disclosure. Topics most often considered under this heading include the degree to which a regulatory agency may require filing of self-audits, whether information associated with a self-audit is confidential or open to the public, and the degree to which information related to a self-audit may be sought in an evidentiary proceeding or is admissible in an administrative, civil, or criminal action. Likewise, penalties against people (including employees of the industrial entity or the regulatory agency) who divulge or disseminate information contained in a self-audit may be included under the heading of privilege.

**Support and Opposition**

The business and industrial communities have traditionally supported environmental self-audit as an incentive for attaining the ultimate goal of achieving environmental standards in an efficient, cooperative manner. They contend that removing the threat of punitive actions allows them to move to compliance without the fear of unreasonable losses. Representatives argue that the principles of self-audit provide incentives for the company to identify environmental problems and work cooperatively with the regulatory agency to handle the situations, rather than being put in a position of not aggressively seeking to identify possible environmental hazards because of the fear of unreasonable financial punishment or public reaction to the findings. Supporters also propose that in many instances environmental self-audit laws are simply a codification of existing
regulatory practices; and therefore, placing the provisions in statute only provides the regulated community assurance of the rules under which they will function.

Conversely, the environmental community contends that environmental self-audit provides a shield for “bad actors” and hinders legitimate protection of the environment and public safety. Labor has expressed opposition to the concept of privilege because they feel the secrecy can mask dangers to workers. The press has also opposed this aspect of self-audit on grounds that it contradicts the public’s right to know about potential hazards to their health and safety. Similarly, the National District Attorneys Association in 1994 adopted a resolution opposing environmental self-audit on the grounds that it constitutes an obstacle to prosecuting environmental violations.

STATE AND FEDERAL ACTIVITY

Legislative activity related to environmental self-audit has been experienced at the state and federal levels. The United States Environmental Protection Agency (EPA) has also been active in the administrative arena.

State Legislative Actions

Eighteen states have enacted legislation addressing environmental self-audit. Included are Arkansas, Colorado, Idaho, Illinois, Indiana, Kansas, Kentucky, Michigan, Minnesota, Mississippi, New Hampshire, Oregon, South Carolina, South Dakota, Texas, Utah, Virginia, and Wyoming. Thirteen of these states provide privilege and immunity; four states allow privilege only; and one state permits only immunity. Of the 17 states that provide privilege, five require that the audit be reported to the regulatory agency. Four states extend their privilege provisions to the underlying facts of the audit. While 12 of the 13 states having immunity provisions provide immunity for civil actions, five also grant immunity in criminal court proceedings.

Several additional states, including Nevada, have considered various forms of self-audit legislation. During Nevada’s 1995 Legislative Session, the Senate Committee on Natural Resources heard testimony on Senate Bill 533 and the Assembly Committee on Natural Resources, Agriculture and Mining worked on Assembly Bill 591. Neither measure was voted out of committee.

Federal Activity

Although two measures (Senate Bill 582 and House Bill 1047) were introduced in Congress during 1996, neither bill was processed.
The most significant activity at the federal level has been conducted administratively by the EPA. Based upon a 1½-year review of the topic, the Agency issued its final policy for federal actions related to self-audits in December of 1995, and the policy became effective on January 22, 1996. Major aspects of the policy include:

- Elimination of "gravity-based" civil penalties (those based on the seriousness of the violator's behavior) for violations that (1) are found through self-audit or a compliance management program which meets criteria for due diligence, and (2) are promptly disclosed and corrected. The Agency, however, retains the ability to collect any significant economic benefit that may have been realized as a result of noncompliance in order to eliminate an unfair competitive advantage for the violator.

- Reduction by 75 percent of "gravity-based" civil penalties for violations that are voluntarily discovered, promptly disclosed, and expeditiously corrected even though the violations are not found through self-audit and the violator cannot document due diligence.

- Not recommending criminal prosecution for violations that are discovered through self-audit or due diligence, promptly disclosed, expeditiously corrected, and meet other specified conditions.

- Refraining from routinely requesting self-audits. If the Agency has independent evidence of a violation, however, it may seek information needed to establish the extent and nature of the problem and the degree of culpability.

- A statement that reductions of penalties are not available for violations that resulted in serious actual harm or which may have presented an imminent and substantial endangerment to public health or the environment, nor are reductions applicable for violations of specific terms of any order, consent agreement, or plea agreement.

- A specific expression of opposition to the establishment of a statutory evidentiary privilege for self-audits.

Because primary enforcement of federal environmental laws is generally delegated to the states, the federal policy may provide guidance concerning the types of factors the Agency will consider in evaluating this delegation. Although several state laws are inconsistent with the federal policy and the EPA has indicated that it may increase its independent regulatory activity in these states, the basic delegation has not been revoked in any of the states.
ALTERNATIVES AND EXAMPLES

The extensive variety in available materials provides a range of alternatives for persons desiring to consider legislation relating to environmental self-audit. Examples and concepts may be drawn from existing and proposed state legislation, a model prepared by the American Legislative Exchange Council (ALEC), and the federal policy.

Following is a spectrum of approaches which provide a variety of concepts for consideration (copies available through the Legislative Counsel Bureau’s Research Library):

- ALEC “Uniform State Environmental Audit Privilege Act” - Considered to be the most forceful approach incorporating strong incentives in the areas of immunity and privilege.
- Nevada’s S.B. 533 and A.B. 591 from the 1995 Legislative Session - Modeled generally after the Utah and Colorado laws, respectively, and including strong incentives relative to immunity and privilege.
- Minnesota’s “Environmental Improvement Act” - A pilot program considered by some to be “middle ground” in providing immunity, but requiring reports of self-audits and providing that information associated with an audit is privileged as to all persons other than the state regulatory officials.
- California’s Assembly Bill 3023 (from 1996) sponsored by now-Senator Byron Sher - An approach providing for elimination or reduction of penalties for “minor” violations and specifically stating that audits are not exempt from disclosure, but restricting an agency from requesting or subpoenaing an audit unless it has independent reason to believe a violation has occurred.
- The EPA’s policy statement - as outlined previously in this paper.

APPENDICES

The following two appendices provide additional background information, as well as excerpts from interviews with officials from states having environmental self-audit laws and the U.S. Environmental Protection Agency.

Appendix A

Appendix B

APPENDIX A

The weakest part of environmental law is enforcement. State legislatures may pass comprehensive bills only to see enforcement languish due to a lack of resources in the administering agency. A new kind of legislation seeks to provide companies with incentives to conduct internal audits of their own operations, discover noncompliance problems and fix those problems at an early date. The incentives grant the information developed through an audit a privilege against disclosure to a regulatory agency or the public, and grant a company that voluntarily discloses the audit results and cleans up the violation limited immunity against fines or penalties.

Proponents of “voluntary audit privilege and immunity legislation” contend that it will increase the number of businesses conducting self-audits and correcting violations that otherwise would not have been discovered. They also say it will allow state agencies to concentrate enforcement on companies that choose not to audit their compliance with environmental standards. Opponents argue that such legislation limits access to information on environmental violations by affected third parties and allows violations that a company audit discovers to go unreported.

Federal Policy
The U.S. Environmental Protection Agency, which delegates administrative responsibility for many environmental programs to the states, adopted an audit policy in December 1995 that opposes privileged status for information developed through a voluntary environmental audit, but supports limited immunity for violations that are reported and promptly corrected. The agency is concerned that some laws will restrict access to company data necessary to determine whether a violation of an environmental standard has occurred. It also believes the laws will limit the ability of a state to assess penalties for certain violations. EPA is reviewing environmental audit laws on a case-by-case basis to determine whether a state can adequately enforce a federally delegated environmental program before EPA turns it over to the state.

State Action
Eighteen states have enacted some form of environmental audit privilege and immunity legislation since 1993. Thirteen states provide for privilege and immunity; four states allow privilege only; and one state permits immunity only. Differences among laws in the same category may affect the incentive offered and the level of enforcement authority retained by a state agency. Of the 17 states that provide privilege, five require that the audit be reported to a regulatory agency; 12 do not. Four states extend privilege to the underlying facts of an audit; 13 do not. All but one of the 13 states with immunity provisions provide immunity in civil court proceedings; only seven grant immunity in criminal court proceedings.

OREGON's 1993 statute offers privilege only to the audit document itself (not to the facts in a particular case) and only if any violations are corrected promptly. Utah's 1996 law essentially codifies EPA's audit policy. NEW HAMPSHIRE's 1996 legislation provides both privilege and
immunity, but the state's attorney general has certified to EPA that the law would not diminish New Hampshire's ability to enforce federally delegated environmental programs. These examples suggest that there is room for states to draft legislation that may provide incentives for companies to self-audit compliance with environmental regulations without sacrificing enforcement authority.

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(1) Privilege enacted in 1994; immunity enacted in 1996.
(2) Privilege enacted in 1995; immunity enacted in 1996.

Selected References

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APPENDIX B

Daily Environmental Report, September 18, 1996
Environmental Audits

State Immunity, Privilege Laws Examined For Conflicts Affecting Delegated Programs

Three states — Idaho, Michigan, and Texas — are embroiled in a battle with the Environmental Protection Agency over whether provisions of their environmental audit laws compromise state authority to implement federal environmental statutes. But most of the 18 states with audit laws are facing no threats to their federally delegated environmental programs, BNA has found in recent interviews with officials from these states and EPA.

Some states report that EPA has no program delegation concerns stemming from their audit laws. In some cases, EPA was involved with these states as they drafted their statutes. In other states, a letter of interpretation by a state attorney general or other declaration of policy has put to rest any issues the federal agency has raised about audit laws. States began adopting audit statutes in 1993, when Oregon enacted the first law designed to encourage companies and other regulated entities to scrutinize their compliance with environmental standards.

Some states — notably Texas — say many companies have used the protections available under the new audit laws. However, some states — including Illinois and Mississippi — report no instances of regulated entities seeking the protections their audit laws offer.

Under all but one of these 18 state laws, environmental audit reports are granted a legal protection called privilege, meaning that they may not be introduced as evidence in court. The exception is in South Dakota, where the results of audits are subject to discovery according to the rules of both civil and criminal procedure, but the state may not request companies to submit voluntary audit reports (33 DEN B-4, 3/19/96).

Many of the laws also grant reduced penalties or immunity for violations found through environmental audits.

EPA generally has opposed the creation of privilege to protect environmental audits. But it is immunity provisions that some of these states have enacted that are raising red flags in the delegation of federal programs.

In some cases, EPA is concerned that statutory language on immunity may deprive a state of the adequate authority to enforce federal requirements. EPA also wants states to retain the right to collect, through penalties, the economic benefit a company garnered because of non-compliance uncovered through audits.

Generally, three conditions must be met to invoke privilege or qualify for reduced penalties or immunity under the state laws: the regulated entity must conduct an audit, voluntarily report the self-discovered violation to authorities within a certain time frame, and correct the violation in a timely manner.

The state laws differ from EPA's new policy on audits, which was issued in December 1995. Although EPA offers penalty reduction for violations found through audits or compliance management systems, it does not consider audit reports to be privileged (243 DEN AA-1, 12/19/95).

In addition to the 18 states with audit privilege or privilege-and-immunity statutes, New Jersey has a "grace period" law. The New Jersey act gives companies 90 days to correct minor environmental violations — but the statute does not affect audits directly.

This Daily Environment Report update on federal and state environmental audit policy was compiled by DEN Staff Editors Cheryl Hogue and James Kennedy in Washington. Reports on individual states also were provided by BNA correspondents: Tom Alkire in Portland, Ore.; Tripp Baitz in Denver; Michael J. Bologna in Chicago; Maybelle Cage in Jackson, Miss.; Mary Chapman in Detroit; Kurt Fernandez in Austin, Texas; Bebe Raupe in Cincinnati; Barney Tumey in Atlanta; Rick Valliere in Boston; George Wells in Little Rock, Ark.; and Mark Wolski in St. Paul, Minn.

EPA Concerns

Eric Schaeffer, director of planning and policy analysis in EPA's Office of Enforcement and Compliance Assurance, told BNA the agency's interest in state environmental audit statutes revolves around their effect on federal programs delegated to states, "not in crusading against these laws."

EPA warned some states they would run into problems with delegated programs if pending audit legislation was enacted as written, Schaeffer told BNA. "We were very clear" in letters and phone calls, the EPA official said.

One of those states was Michigan, which adopted its privilege-and-immunity law this year, he said. Another was Ohio, whose pending audit bill did not get legislative approval in 1996.

EPA has proposed granting Michigan only interim approval of its Clean Air Act operating permits program. The agency cited concerns about the state's enforcement ability due to the new audit law.

Two other states facing challenges to Clean Air Act Title V delegation because of their environmental audit laws are Idaho and Texas.

Meanwhile, many states responded to EPA's concerns about possible delegation problems when they crafted their audit laws, Schaeffer said. State legislators are understanding better than they did two years ago that federal environmental laws require certain enforcement authority of states as a condition of delegation, he added.

South Dakota worked closely with EPA when it hammer­ed out its audit privilege law this year, he said. Utah, meanwhile, in 1995 enacted a privilege-and-immunity statute that is "basically the same" as EPA's.
December 1985 penalty reduction policy for violations discovered through audits and compliance management systems, Schaeffer said.

"We don't declare [state] laws null and void," Schaeffer said. Instead, EPA raises concerns about how state laws and administrative policies on environmental audits affect the minimum enforcement standards set in federal statutes, he said.

Ambiguities, AG Letters

In some cases, audit laws contain ambiguous or unclear provisions relating to a state's enforcement authority, Schaeffer said. For instance, EPA has asked states whether their statutes would prevent state enforcement officials from obtaining injunctive relief if a company finds through an audit a violation that poses an imminent and substantial endangerment to health or the environment.

Some attorneys general, in response to such inquiries, have issued interpretations of audit laws that lay EPA's concerns to rest, Schaeffer said.

New Hampshire's attorney general, for example, issued an opinion letter saying the state's 1996 privilege-and-immunity statute does not apply to requirements of Title V of the Clean Air Act, Schaeffer said. This is because holders of operating permits must provide annual compliance certification. Since these compliance checks are required under federal law, violations found through them do not qualify for special treatment under the New Hampshire audit law.

"It worked quite well," Schaeffer said of the New Hampshire attorney general's letter. "In a case like this, there is no issue."

"Other states are approaching us with interpretations that suggest their audit laws don't apply to federally delegated programs," he added.

If a state's response to EPA concerns about an audit law is that the statute does not apply to violations of federally delegated programs, "our inquiry is over," Schaeffer said.

Idaho

EPA is expected to issue soon a final ruling on whether changes are needed in Idaho's audit law, an EPA Region X official in Seattle told BNA.

EPA has told the Idaho Division of Environment that the state's environmental privilege law conflicts with the administration of Title V under the Clean Air Act. In a proposed action June 17, the agency recommended granting interim approval only to Idaho's Title V stationary source air permit program based partly on its objections to the audit law (61 FR 30570).

As is the case with some other states, Idaho's audit law, adopted in 1986, provides immunity from administrative, civil, and criminal violations when a company voluntarily discloses the results of an internal audit and takes steps to correct the problems (122 DEN A-2, 6/25/96).

In its proposed action, EPA said Idaho needs to make changes in the privilege and immunity law or otherwise demonstrate that the law does not impair enforcement authorities of Title V of the air act.

EPA conducted hearings on its proposed action this past summer and now is reviewing the information from the hearings, said David Bray, a program manager in the Title V air section at Region X. It is unclear now if the public comments will alter EPA's original objections to the audit law, he told BNA.

Bray said EPA is expected soon to issue a final ruling on whether changes are needed in Idaho's audit-privilege law.

In its proposed action EPA said that Section 502(b) of the CAA requires states to have certain enforcement authorities to be delegated administration of the act. Both the immunity and audit privilege provisions of the audit law deprive the state of "adequate authority to enforce the requirements of Title V of the Clean Air Act," EPA said in its proposed action.

Specifically, the audit law bars the prosecution of "knowing" violations of Title V requirements unless the source has previously and repeatedly violated the same requirements within the past three years. The statute precludes the assessment of civil penalties for violations voluntarily disclosed in an audit even if the violations resulted in serious harm or risk to the public or the environment, EPA said. And the law unduly interferes with the state's authority to issue emergency orders and seek injunctive relief, EPA added.

State officials, during the public comments period this past summer, tried to persuade EPA that its interpretation of its law was incorrect, said Tim Teater, permit support supervisor at the Idaho Department of Environmental Quality.

The state now is awaiting EPA's response to its testimony, Teater said. If the state is not successful in its attempt to move EPA from its current position, the department may have to ask the 1997 Legislature for statutory changes in the audit law to gain final permit approval, Teater said.

Texas

Federal regulators have not given Texas a clear direction on what specific changes might be needed to make the law pass muster with EPA, an official with the Texas Natural Resource Conservation Commission told BNA.

"We really don't have any specifics," John Riley, director of the commission's litigation support division, said. "Right now we have not received a communication from EPA that tells us in what context we're going to discuss this, and what the specifics are for that discussion."

The federal agency has repeatedly raised concerns about the state's audit privilege law in connection with programs delegating authority for a number of federal programs to the state. These include stationary source permitting under Title V of the Clean Air Act, underground injection control, and the national pollutant discharge elimination system under the Clean Water Act.

Riley said the state's hand is tied until EPA comes forward with a list of specific concerns.

"For now, we're stymied in our effort to make any progress with the Legislature until we know exactly what it is they (EPA) want us to change," Riley said.
Existing State Audit Law Summary

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Note: New Jersey has a "grace period" law allowing companies 90 days to correct minor violations of environmental law. However, there is no law affecting audits per se. See the "New Jersey" section in this story.

Source: Information compiled by the Arizona Department of Environmental Quality and The Bureau of National Affairs, Inc. (August and September 1996).

Although the state does not have specifics, it has been given a general idea of the principal problem areas, according to Riley. "They (EPA) don't like privilege, and they don't like criminal immunity," Riley stated.

"Privilege in any form seems to be the biggest hang-up for EPA," he said. Extension of immunity to any criminal conduct appears to be the other, he added.

Riley suggested, however, that there may be negotiating room on immunity issues. "They are concerned about the immunity side, but their biggest gripe is with..."
privilege," he said. "They could live with any immunity statute that didn't go to intentional criminal conduct if the privilege didn't exist in the same statute."

Riley said that the audit privilege law continues to "co-exist" with traditional enforcement and has not detracted from the agency's aggressive enforcement posture.

So far under the state's audit program, 289 audits have been performed, according to Riley. In no instance has privilege been requested, he said, although the state did tell one company that indicated informally that it would make such a request that it would be denied. Immunity was sought a total of 44 times, he said, and denied once.

Yet even with the audit program in full swing, soon-to-be released enforcement statistics reveal that 1996 was a record year for penalties and supplemental environmental projects, totaling some $11.3 million, Riley said.

The year also boasts the second-highest number of enforcement orders issued, Riley said. From December 1994 through July 1996, the commission has reduced the number of pending cases from 1,169 to 1,001. It has also reduced its backlog from 528 cases to 104.

Riley said officials from other states with audit privilege laws are beginning to talk to each other to establish a dialogue. He said they are likely to form a unified group for future discussions with EPA.

**Michigan**

Because of concerns it has about Michigan's environmental audit law, EPA has proposed granting the state only interim approval of its Clean Air Act operating permits program.

As of Sept. 16, EPA had not taken final action on the proposal made in June, said Paul Zugger of the Michigan Department of Environmental Quality's environmental assistance division. Department officials said they have had formal communication with EPA regarding when a ruling might be made on the intent to issue two-year interim approval.

Zugger said no action has been taken to modify the state's audit law — enacted in March as Public Act 132 — pending an EPA decision on the state's permit program.

According to EPA's proposal, Section 14602 of Michigan's audit privilege is so broad that it may be interpreted as restricting access to data and preventing testimony necessary to determine whether a civil or criminal violation either has occurred or is imminent.

Similarly, the EPA proposal said, the sweeping language of Section 14609 may be interpreted as prohibiting the state from assessing civil penalties for violations:

- Of regulations, permits, consent orders, or agreements;
- Which reflect a parent company's pattern of violations at various facilities; and
- Which result in serious harm or imminent and substantial endangerment.

In addition, that section appears to allow sources to retain economic benefit from a violation, the EPA notice said, regardless of amount or whether it was deliberately obtained.

In addition to revising its privilege and immunity law, EPA is proposing that Michigan submit a revised Title V attorney general's opinions that addresses the agency's concerns.

EPA said because Michigan officials may have a different interpretation of the provisions of its law, the state need only submit a revised attorney general's opinion certifying that the state Title V program meets the agency's enforcement requirements. The opinion must also address why EPA's interim approval provision requiring revisions to the currently enacted law is not valid.

Also required is a supplemental attorney general's opinion that certifies that any other Title V requirements that may be affected by the privilege and immunity law are met, including Michigan's authority to:

- Bring suit to restrain individuals from engaging in any activity in violation of a permit;
- Seek injunctive relief to enjoin any violation of any program requirement, including permit conditions;
- Recover criminal fines; and the requirement that the burden of proof for establishing civil and criminal violations is no greater than the burden of proof required under the Clean Air Act.

**Minnesota**

EPA's main objection to Minnesota's audit law concerns the lack of economic benefit penalties, according to Gordon Wegwart, a spokesman for the Minnesota Pollution Control Agency (MPCA).

Under this law, participating businesses are not required to reimburse the state for any significant economic benefits their environmental violations may have gained them.

Wegwart said EPA correspondence with the state indicates that the federal agency believes Minnesota should be able to recover the amounts companies saved or earned due to their environmental violations.

The issue was discussed by the Minnesota Legislature in 1995, he said, and rejected. He said the Legislature wanted to see companies participate in the program, and there was concern that economic benefit could be seen in just about every company environmental violation. It was believed that allowing for state recovery of these costs would limit or reduce business participation, he said.

Wegwart said EPA and the MPCA likely will discuss the issue soon.

EPA has identified other aspects of the program it would like to discuss, he said, but they appear to be matters of definition and interpretation. He said the two agencies need to meet so they can clearly understand their differences, and resolve them as best they can.

When the Minnesota Legislature adopted the state's environmental auditing law in 1995, EPA had not yet issued its final policy on environmental audits. Since then, EPA has contacted the state about concerns it has regarding the Minnesota program, Wegwart said.

However, the contacts have only been informal and further clarification is needed if the two sides are going to come to an agreement regarding environmental auditing in the state, he added.
Under Minnesota's environmental auditing program, businesses and local units of government that conduct compliance audits can receive protection from enforcement, fines, and other penalties from the MPCA for minor environmental violations. These protections apply only if participants have not committed the same violations within the past year or if the violations are not criminal or pose serious harm to the environment or endanger public health.

Wegwart noted that the Minnesota audits program is a pilot project. Its provisions will expire June 30, 1999, unless the Legislature chooses to renew them. As a pilot project, it is being carefully studied, and a report on its successes and failures must be presented to the Legislature. The report, which can include recommendations for both enhanced participation and enhanced environmental protections, is due before Jan. 1, 1999, he said.

**Colorado**

Colorado's 1994 immunity-and-privilege audit law sunsets in 1999. Patti Shwayder, executive director of the Colorado Department of Public Health and Environment, told BNA the interim period is "a test" that should be allowed to go forward.

"Let's give it a chance to work," Shwayder said, acknowledging the state and EPA have a difference of opinion over the statute.

"They don't like our law at all," she said. "They made no bones about that. They don't like privilege, period."

Shwayder and Fred Hansen, deputy administrator of EPA, debated the merits of Colorado's audit law at a regional White House Conference on Environmental Technology, held Sept. 11 in Golden, Colo.

According to Shwayder, Hansen said EPA wants to "discourage other states from doing this and that they are looking at ours and possible delegations of programs." She said, "We're in pretty intense discussions about how to deal with this."

Shwayder said she asked Hansen "to show me what [EPA's] specific problems are with our law." EPA has yet to do that, she added.

Tom Looby, director of environment for the state health department, told BNA that EPA's recent discussions with Colorado have centered on the federal agency "trying to understand how our law works."

Mike Risner, director of legal enforcement for EPA's Region VIII in Denver, told BNA the federal agency is concerned about the cases where companies have sought immunity or asserted privilege under the Colorado law.

"We are taking a look at what happened in those cases and we will ultimately make a decision as to whether EPA needs to take an enforcement action against the entities concerned or not," he said.

Since the law took effect in July 1994, some 21 entities have disclosed audit information under the law. Jackie Berardinii, coordinator of the Environmental Multi-Media Advisory Committee for the state health department, told BNA.

The reports include disclosures of violations "we were not likely to have ever discovered on our own because they came from organizations that were outside the permitting system," Berardinii said.

Four of those 21 companies are undergoing evaluation to determine "whether immunity is appropriate," she said. No reporting entity that has sought immunity has been denied, she said.

State health department officials have told EPA they "don't think it would be wise" for them to suggest lawmakers tinker with Colorado's audit law, Risner said.

Until 1999, Shwayder said, "I cannot guarantee EPA won't come in" and file an enforcement action against an entity that has disclosed audit information under the state statute.

**Kentucky**

Kentucky adopted a self-disclosure privilege law in 1994 but did not institute an immunity feature until 1996, according to Peter Raack, an attorney with EPA's regional counsel office in the agency's Region IV in Atlanta.

In July 1996, EPA sent Kentucky a letter explaining how the state's compliance with the Clean Air Act would be evaluated in light of this immunity provision, said Raack. However, EPA did not ask for any specific changes in the law.

In this letter to the Kentucky Natural Resources and Environmental Protection Cabinet, Region IV Administrator John H. Hankinson Jr. said total immunity from penalties may be appropriate in some circumstances. However, Hankinson said, "It is important for regulators to retain full discretion to recover any substantial economic benefit gained as a result of noncompliance."

The letter said one aspect of Kentucky's privilege statute raises a question of whether state law prevents the Cabinet from reviewing audit evidence of noncompliance to determine whether a violation would be corrected. Another confusing aspect of the law, Hankinson said, concerns criminal cases where a prosecutor needs information obtained through an audit.

In light of the statute, EPA asked Kentucky to clarify its authority to determine whether Clean Air Act Title V violations exist at a permitted facility. EPA also asked Kentucky to submit a supplemental attorney general's opinion certifying that any other Title V requirements that may be affected by the privilege and immunity law will continue to be satisfied.

Raack said EPA has not asked Kentucky to make any adjustments to its audit privilege law.

**New Hampshire**

EPA's concern about New Hampshire's environmental audit law was lifted earlier this year by an opinion from Attorney General Jeffrey R. Howard declaring that the statute will not affect the state's ability to enforce Title V of the Clean Air Act.

EPA wondered whether the state retained "adequate enforcement" to administer the act in light of the audit privilege and waiver statute enacted into law last March, said Joel Blumstein, an attorney with EPA Region I in Boston.

"Our concern was that a company that violated terms of a Title V permit might have been shielded" by the new law, Blumstein said. Howard "made it clear that
none of the sources that would be subject to the operating permit program would get relief" through the statute, he said.

Signed into law by Gov. Stephen Merrill (R) on March 18 (58 DEN A-5, 32696), the measure provides that environmental audits undertaken to identify areas of non-compliance and to improve compliance are privileged and not admissible as evidence in civil, criminal, or administrative proceedings. It also waives penalties for companies that discover violations through self-audits, inform state officials, and take corrective action.

In a July 11 letter to EPA Acting Regional Counsel Pamela Hill, Howard said that sources in violation of a Title V permit term or condition could not take advantage of the audit privilege because the law defines an "environmental audit" as a "voluntary" evaluation, thereby excluding the stringent requirements of the Title V program from its scope.

The privilege law also contains a separate exception for information that is required to be collected for the state's Title V program, he added.

Sources that conduct compliance evaluations producing information in a form different from that required under a Title V permit would not be protected, Howard continued. This is because Title V requires prompt reporting of any deviations from terms and conditions of a permit.

Penalty waiver provisions of the law would not affect the state's authority to recover civil penalties for violations of Title V permits or conditions because such waivers are valid only when a source "elects" to undertake reporting and remedial steps, Howard stated. Title V sources "have an independent obligation to report and remedy any violations and would not have the opportunity to "elect" to report" such violations, he said.

A penalty waiver would not be available to a source failing to apply for a Title V permit for two reasons, according to Howard. First, the submission of data to the state in permit applications is mandatory, not voluntary. Second, the violation would be determined independently by the state through emissions monitoring.

Nothing in the statute prevents the state from enforcing judicial or administrative consent orders. Howard told EPA, because the law grants penalty waivers only for violation of "environmental law," not consent orders or decrees.

In writing the bill, the New Hampshire Legislature "was aware that there are some program areas where existing requirements of law are so encompassing that [the audit privilege and penalty waiver] may be inapplicable; the federal Clean Air Act makes the Title V program one such area," Howard concluded.

Ensuring that environmental audit laws conform to EPA requirements has been "more of a problem in some other states where the agency is looking for specific changes," Blumstein said. Although EPA is focusing on the relation between audit laws and Title V of the Clean Air Act, the agency also will be examining the impact of the laws on hazardous waste and water pollution statutes, he said.

South Dakota

By the time South Dakota enacted its environmental self-audit legislation earlier this year, it had already received recommendations on it from EPA.

Unfortunately, the recommendations came late in the legislative process, said Joe Nadenicek of the South Dakota Department of Environment and Natural Resources. The bill was amended somewhat, he said, but not all of EPA's suggestions were included in the bill signed by Republican Gov. William Jankowi.

The bottom line, Nadenicek said, was that EPA indicated the draft legislation it had reviewed was workable. It asked for language clarifying federal primacy, and such text was included in the measure signed into law.

He said EPA's letter noted its concerns about the bill, but did not state that any legislation enacted had to address the concerns to be a valid environmental audit law. The Legislature attempted to address the issues raised by EPA, he said, but did not address all of them.

Under South Dakota's environmental self-audit law, businesses performing voluntary environmental audits receive a presumption against the imposition of civil or criminal penalties for violations found and disclosed. While the Department of Environment and Natural Resources generally may not pursue penalties or prosecution for violations disclosed to it within 30 days of their being found through audits, it may if the violations caused damage to human health or the environment.

The department also may pursue penalties or prosecution if it is required by the federal government to do so for a violation so the state can maintain its primacy over a federally-delegated program.

The EPA letter, written by Michael T. Risner of the Denver-based Region VIII's Legal Enforcement Program, warned the state that it generally disapproved of immunity for violators of environmental laws because violations involving significant economic benefits could also be shielded. It advised South Dakota to reserve its right to collect a penalty at least equal to the economic benefit of the violation.

It also questioned whether the law's provision that audits cannot be used as a defense if the business "willfully and with knowledge" violated state and federal laws increased the criminal intent required for criminal violations. The letter stated that EPA opposed increasing the criminal intent necessary for proving criminal violations, especially when the possible increase was in an exception to the criminal immunity provided by the bill.

EPA also was concerned that the criminal exception could be applied to individual employees. Such a loophole should be closed, it stated.

Risner said while EPA's concerns were not addressed fully by the South Dakota Legislature, it is not the agency's role to dictate legislation to the states. He said he was sure EPA would have preferred a law that more closely followed its own policy on environmental audits, but the state did not have to abide by its recommendations.

The agency works continually with the state on environmental matters, he said. However, it has not brought
up the issue of voluntary environmental audits since the legislation was passed, he said.

Risner said the EPA will be following the South Dakota law to examine usage, its success, and any problems that may result.

**Kansas**

EPA is reviewing Kansas' environmental audit law, but has not yet determined whether to make comments on it, said Rebecca Dolph, an attorney with Kansas City, Kan.-based Region VII. The agency "is taking a close look at the Kansas state law to see whether . . . it is necessary to look again at Kansas' ability to implement and enforce the 'Title V program,'" under the Clean Air Act, Dolph told BNA.

The Kansas law provides criminal immunity, along with civil immunity and mitigation of some penalties. "Neither any person who conducted the audit nor anyone to whom the audit results are disclosed . . . can be compelled to testify regarding any matter which was the subject of the audit," the law says.

This could be a sticking point with EPA, according to Theresa Hodges, acting director of the Kansas environment department's science and educational support section. Hodges told BNA that a Sept. 12 meeting with state attorneys revealed that criminal immunity was likely to be the area of greatest concern to EPA.

EPA lawyers also indicated that the state's "imminent threat" provision may be troublesome to the federal government, she added. Under this provision, immunity does not apply when there is imminent threat to the environment, Hodges explained.

She said that while "we are well aware that the laws will be looked at very closely, to date EPA has not contacted us."

**New Jersey**

The current New Jersey statute easing penalties for violators of environmental laws "is not an audit privilege law," according to Gary Nurkin, an attorney with EPA's Region II office in Philadelphia. The 1996 law gives industry a grace period of up to 90 days to correct "minor violations" without being fined (19 DEN B-1, 1/30/96).

The so-called "grace period" law is probably not part of EPA's review of state audit privilege laws, John Spinello of the New Jersey environmental protection department told BNA. However, "EPA does want to be closely involved in the rulemaking process," Spinello said.

"They have an interest" in the difference between "minor" and "major" violations, which will be worked out in the regulatory process, he said.

Potential New Jersey audit privilege laws are pending in the state Legislature. Any new law will likely be "interrelated" with the current grace period law, Nurkin said.

Spinello said EPA is following the legislation closely. "Sometimes they call me up to see what's going on," Spinello said. "A lot of the time they even know something I don't know yet," he added. "They're paying close attention."

**Illinois**

The Illinois law establishing a qualified legislative privilege protecting the confidentiality of communications involving voluntary, internal environmental audits has attracted little response from the regulated community or EPA, state officials told BNA.

Todd Rettig, associate counsel for the Illinois Environmental Protection Agency, said he is unaware of any instances in which the state has questioned a regulated entity's right to keep various information confidential under the law. He noted that the state has not initiated any action through the Illinois Attorney General's Office challenging a regulated entity's right to deem a particular document privileged.

Rettig added that the U.S. EPA has not voiced concerns over the law's impact on Illinois' operation of federal programs.

"So far it hasn't had any impact on any of our delegated programs," Rettig said.

Beth Steinhour, project director for the Chamber's Illinois Environmental Regulation Group, said she was uncertain how the regulated community has responded since the law was recently two years ago. Steinhour suggested greater interest may emerge as more corporations gain experience with the law.

"We're really not sure who is taking advantage of this or how they are using it," she said. There was a great deal of interest when the law was being passed and not much since then," Steinhour said.

Illinois' audit privilege legislation was signed into law on Jan. 24, 1995, by Gov. James Edgar (R-III.). At the time, Illinois was the seventh state to enact such legislation.

The Illinois law creates specific labeling and content requirements, which must be followed closely for the privilege to be extended. For instance, regulated entities could potentially forfeit privilege if such documents are not labeled Environmental Audit Report, Privileged Document.

Rettig said there are two circumstances under which the law would come into use. He noted that a regulated entity may assert audit privilege when the government or a third party seeks disclosure of an internal audit report during proceedings before a court or the Illinois Pollution Control Board. The law also may come into play if the government makes a written request for such documents prior to a formal court or board proceeding.

Rettig said privilege is not automatic and pointed to various circumstances under which the government or a third party could mount a challenge. Specifically, privilege cannot be asserted for a fraudulent purpose, nor can it be asserted to cover materials not subject to the privilege. Finally, privilege does not apply relative to audits that identify significant non-compliance with a particular law and the regulated entity fails to take appropriate corrective actions within a reasonable amount of time.

Illinois' law differs from some other states in that it does not establish an exception recognizing a compelling interest on the part of the government for audit information in criminal prosecutions.

Rettig noted that Illinois' audit privilege does not bar U.S. EPA or certain third parties from obtaining
When Indiana adopted its environmental audit privilege law the statute remains untested in court. Industry likes the law, but it is unclear if more such audits are being done now than before, said Chris Rich, an environmental law specialist in enforcement with the Oregon Department of Environmental Quality.

Rich told BNA that Indiana has not asked Oregon to make any changes in its audit law. EPA has not asked Oregon to change its statute either. Oregon's law grants only evidentiary privilege, not immunity, Rich said. In other words, only the environmental audit document itself is privileged information; such a document could not be used as evidence to prove that a violation had occurred, he said.

However, this limited privilege applies only if the problems that were identified in the audit are corrected promptly with "reasonable diligence," the statute says.

The privilege applies fully to administrative and civil cases, but is limited in criminal cases. If a district attorney can demonstrate to a judge that the information in the report is otherwise unavailable, then a judge could order the report to be turned over for a criminal case, Rich said. The privilege also does not apply to the facts of the case, only to the audit document, he said.

### Oregon

Three years after Oregon adopted the nation's first environmental audit privilege law the statute remains untested in court. Industry likes the law, but it is unclear if more such audits are being done now than before, said Chris Rich, an environmental law specialist in enforcement with the Oregon Department of Environmental Quality.

Rich told BNA that Oregon has not been asked by EPA to change its statute. "EPA has not contacted Oregon to say whether it has a problem with the statute or not. Oregon's law has not been contacted by EPA," he said.

Oregon's law grants only evidentiary privilege, not immunity, Rich said. In other words, only the environmental audit document itself is privileged information; such a document could not be used as evidence to prove that a violation had occurred, he said.

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### Indiana

EPA has not asked Indiana to make any changes in its audit privilege provisions, according to Department of Environmental Management spokeswoman Leslie Krampf. The only recent request EPA has made regarding this law concerns "minor numerical information," Krampf told BNA.

When Indiana adopted its environmental audit privilege statute in 1994, the structure of this law was "blessed by EPA," said Krampf. Since then several other states have contacted Indiana and used the construct of its law as a guideline for devising their own statutes, she said.

Burt Frey, an attorney in EPA's Region V office in Chicago, said Indiana's law is not foremost on the agency's list of concerns because it does not contain immunity provisions. Indiana's law, which was patterned after the law in Oregon, would "probably be 19th out of a universe of 18 states" that EPA is examining, said Frey, because it lacks immunity provisions.

Frey disagreed, however, with Krampf's assertion that its law carried EPA's blessing. The federal agency generally is opposed to audit privilege laws, he said, even though it has not asked Indiana to make any formal adjustments.

### Arkansas

Arkansas has not been asked by EPA to change its 1995 environmental auditing law, according to Steve Weaver of the Legal Division of the Arkansas Pollution Control and Ecology Department.

Weaver said this is probably because the Arkansas law does not grant immunity to industries that do a self-audit of their environmental compliance. The statute only grants privilege.

It is difficult to say how many companies are using the Arkansas law. Weaver said, because firms do not have to report unless they claim privilege. He said he was aware of only one audit that has been brought to the APC&E and we had to release that under a Freedom of Information Act request.

The Arkansas law does not create an exception to FOIA for audits, he said.

### Wyoming

EPA has not contacted Wyoming to say whether it has a problem with the state's environmental audit statute, state officials told BNA.

"Ours is pretty much up to standards," said Dennis Hemmer, director of the Wyoming Department of Environmental Quality. "We have not had any problems with delegation, nor have we been made aware that EPA has problems with it."

No company has asserted privilege or sought immunity from civil action under the law, Hemmer said. "We have had a [few companies] come in and talk to us, but not formally," he said.

The law does not provide for immunity from criminal prosecution, nor does it allow for mitigation of criminal penalties. "It doesn't really say anything about criminal penalties," said Mary Throne, Wyoming assistant attorney general with the state department of environmental quality.

Generally the immunity provision of audit laws "gives EPA heartburn," she said, but Wyoming companies "have not taken advantage of it."

Wyoming's law is newer and "less generous" than Colorado's, noted Mike Risner, director of legal enforcement for EPA's Region VIII in Denver.

### Utah

Utah's environmental audits law was passed in 1995 and amended in 1996. EPA has not had a problem with the law, Fred Nelson, assistant Utah attorney general and counsel for the state's Department of Environmental Quality, told BNA.

Some three months or four months ago, while approving Utah for delegation in the sludge management program, EPA reviewed the state's audit law and said "it appeared not to be in conflict with the program," Nelson said.

No company has asserted privilege or sought immunity from civil action under the law, he said. Audit reports and the information in them are privileged under the law and auditing entities need not report the audit to get privilege, he said.

Utah's law contains a provision for civil immunity but does not provide for immunity from criminal prosecution or for mitigation from criminal penalties.

### Virginia

Virginia's audit privilege statute does not conflict with Title V requirements, so EPA has no plans to contact the state. "There have been no changes to the law since we last looked at it," Stephanie Branche, EPA's
congressional liaison for Virginia, told BNA. Therefore, “we’re not looking at it; we have not planned further action,” Branche said.

The July 1995 law protects companies by stating that “no person involved in the preparation of or in possession of a document shall be compelled to disclose such document or information about its contents or the details of its preparation” (50 DEN B-1, 3/15/95).

The privilege, however, does not extend to criminal proceedings, or to cases in which such violations demonstrate a “clear, imminent and substantial danger to the public health or environment,” or to self-assessments conducted in bad faith.

Harry Kelso, director of enforcement for the Virginia Department of Environmental Quality, was not surprised to hear that EPA was satisfied with the law. “The civil immunity part of the law is already conditional upon it being consistent with federal law,” and there is no criminal immunity component, Kelso said. Therefore, there is little room for conflict, he added.

Mississippi

Mississippi’s environmental audit law enacted in 1995 has been “a very quiet bill,” an official with the state Department of Environmental Quality told BNA.

Chuck Barlow, chief of the DEQ’s Legal Division, said to his knowledge there have been no audits performed and privilege or immunity never has been requested by regulated entities in the state.

“Probably, some people have done audits. Hopefully, they’re finding their environmental control laws [for their respective companies] are working,” said Barlow.

According to Barlow, the Mississippi law is “similar to EPA policy” and is “fairly typical” of such legislation in other states.

Barlow said he knows of no request from EPA for Mississippi to make changes to the law.

Charlis Thomas, a Region IV EPA spokeswoman in Atlanta, told BNA Sept. 12 she agreed with Barlow. She said EPA’s only known communication on the issue came in a letter Feb. 22, 1995, to Tim Ford, speaker of the Mississippi House of Representatives. The letter was from EPA Region IV Administrator Hankinson.

In the letter, Hankinson noted his concerns over the then-pending legislation, SB 3079.

“As you may know, EPA is currently reassessing its environmental auditing policy. My comments are based on the current policy and its application to EPA’s regulatory programs. Nevertheless, if Mississippi constraints its enforcement efforts through this legislation, we can foresee the emerging need for increased federal enforcement in your state, particularly in those circumstances where the bill in question would shield egregious acts of non-compliance and those requiring corrective action,” Hankinson wrote.

Barlow said apparently Hankinson saw a draft of the pending legislation and that EPA’s concerns were met when the legislation was approved in both houses.

South Carolina

South Carolina’s environmental regulatory agency, the Department of Health and Environmental Control, has received no requests from EPA to alter its four-month-old environmental audit law, a DHEC official told BNA.

In addition, to date no companies have contacted DHEC seeking to do an audit or reporting one under way, Mike Rowe, DHEC’s director of research and planning, said.

When a South Carolina Senate subcommittee was considering the law earlier this year, Region IV Administrator Hankinson sent a letter to its chairman expressing concern over some of its provisions, Rowe said. Lawmakers amended the final version significantly based on some of Hankinson’s comments, he said.

“That was the limit of the correspondence we’ve had from EPA,” Rowe said. “We are not, to my knowledge, considering any amendments to that bill,” he added.

Rowe speculated that no company has sought to take advantage of the immunity provisions of the audit law because it is new and not much of a departure from the way state environmental regulators have always done business.

“I probably figured no one would use it to begin with,” Rowe said. “It’s new and duplicative of pretty much what the status quo was as far as operational protocol.”

“We don’t really try to kill somebody if they come in and say, ‘Look, we’ve just discovered we’ve got this problem and we need to fix it.’ Our biggest concern is fixing the problem rather than being punitive,” he said.

“Now, if it happens again, then we pretty much deal with them, which the bill negates if it’s a repeat violation. I would be willing to bet that’s pretty much the case in a lot of other states,” he added.