

# Cooperation with Government Agencies Under Environmental Audit Privilege/Immunity Laws, Rules and Policies

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This article serves a dual purpose. It seeks first to examine what the term “cooperation” means in several major federal policies, 24 state audit privilege/immunity laws, and 13 state self-disclosure policies and rules in existence as of February 1998. This synopsis, provided in table format to allow for easy comparisons, should prove useful to legal practitioners concerned with the issue of what constitutes cooperation with government agencies under those statutes, rules and policies. Secondly, in examining how cooperation is treated in each of those laws, rules, and policies, this article seeks to pose—but does not answer or even discuss—questions about what role cooperation with government agencies should play when a regulated entity self-discloses violations of environmental laws to those agencies, and how precisely the term should be defined in order to fulfill effectively the goals underlying the statutes, policies and rules. This article does not comment on the desirability of a particular cooperation definition or on the desirability of the environmental audit privilege/immunity laws, rules, and policies themselves.

## TABLE I: Federal Policies

There are four federal policies which deal specifically with, or have strong implications for, environmental audits and disclosures.<sup>1</sup> All four of those policies make cooperation a necessary condition or factor to be considered before receiving some or all of the benefits they confer. The United States Environmental Protection Agency (EPA) Self-Disclosure and Criminal Implementation Policies explicitly define “cooperation,” while the United States Department of Justice (DOJ) Criminal Prosecution Policy elaborates on the term and the EPA Small Business Policy offers no elaboration or definition. The extent of cooperation required by the policies is addressed but left largely undefined, leaving room for broad discretion and flexibility in applying the requirements or factors.

The EPA Self-Disclosure and Criminal Implementation Policies do not require that attorney-work product or attorney-client privilege information be submitted to the government in order to meet the “cooperation” requirement. The other two U.S. government policies do not address this question. While none of the policies addresses explicitly whether audit information or related material beyond the initial disclosure must be disclosed, all but the Small Business Policy address that issue in at least a broad manner. Again, except for the EPA Small Business Policy, each of the federal policies either explicitly or broadly addresses the question of whether

“cooperation” must include access to one or more of the following: 1) all individuals who conducted the audit, 2) employees directly responsible for activities leading to the violations disclosed in the audit, 3) all employees of the disclosing facility, 4) all requested documents. The federal policies do not address whether a partial disclosure meets, at least in part, the requirements for “cooperation,” but the DOJ Criminal Prosecution Policy does seem to offer some flexibility.<sup>2</sup> If, and how, cooperation applies differently in criminal, civil, and administrative contexts is not expressly addressed in the federal policies, except, of course, that the DOJ and EPA criminal policies are written specifically to apply in a criminal enforcement context. Likewise, only the Small Business Policy expressly examines how cooperation applies to small businesses.

#### **TABLE II: State Audit Privilege/Immunity Laws**

A total of 24 states have passed laws providing a qualified privilege for audit reports and associated documents and/or penalty immunity for violations for regulated entities which voluntarily disclose their violations.<sup>3</sup> Of those 24 laws, nine make cooperation a requirement or condition for receiving some or all of the benefits they confer<sup>4</sup>, but what they define as “cooperation” remains largely unclear. With the exception of Rhode Island<sup>5</sup>, those laws neither specifically define “cooperation” nor provide much information about the requirements of “cooperation” or whether it must include access to audit-related information and/or individuals.

For example, six of the laws broadly indicate that cooperation is required in connection with or regarding the “issues identified in the disclosure.”<sup>6</sup> None of the laws addresses whether, as a requirement of cooperation, attorney-work product or attorney-client privileged material, or audit information or related material beyond the initial disclosure, must be disclosed. Similarly, most of the laws do not address whether cooperation includes access to the individuals who conducted the audit, the employees who may be directly responsible for the violations, all employees of the disclosing entity, and/or all requested documents.<sup>7</sup> None of the laws addresses the issue of to what extent a partial disclosure meets the requirements (if they are defined) for “cooperation.” The laws also leave unanswered the question of how “cooperation” may apply differently in criminal, civil, or administrative enforcement contexts, or to small businesses.

#### **TABLE III: State Audit Rules**

Only one state, Oklahoma, has adopted an audit rule. It formerly had a policy, which was superseded when the rule was promulgated. Though with less force than a law, Oklahoma’s rule binds the Oklahoma Department of Environmental Quality to the procedures outlined in the rule. Oklahoma’s rule does include “cooperation” as a necessary condition for receiving some or all of the benefits that it confers, but there is little information provided as to a definition or applicability of “cooperation.” In this regard, Oklahoma’s rule follows more closely the state laws than the state policies, the latter of which tend to be more explicit and specific about what they mean by “cooperation.”

#### TABLE IV: State Self-Disclosure Policies

While only 12 states have adopted self-disclosure policies<sup>8</sup>, compared to 24 states with enacted audit privilege/immunity bills, all but two of these state policies—North Carolina and Washington—make “cooperation” a necessary condition for receiving some or all of the benefits they confer. In addition, nearly half of the policies that require “cooperation” with a government agency specifically define the term (by using a definition which is the same as, or very close to, that set forth in U.S. EPA’s Self-Disclosure Policy). Though there is a myriad of requirements and applications of “cooperation” in these nine state policies, they generally address more categories in the following tables, and do so more extensively, than most of the state laws.

For example, though the extent of cooperation required by these policies ranges from an undefined “full” (Delaware, Maryland) to access to all requested documents and assistance in investigations (California, Florida, Massachusetts), all those policies that require cooperation address this issue, if only cursorily. As for what must be disclosed to meet the requirement of cooperation, only California explicitly excludes attorney-work product and attorney-client privileged material. None of the policies expressly addresses whether information beyond the initial disclosure must be submitted to meet the “cooperation” requirement.<sup>9</sup> Many of the policies do address, however, whether cooperation must include access to certain individuals and documents. In six of the policies it is presumably the case that cooperation includes access to all the employees of the disclosing entity, including those employees directly responsible for the violation(s).<sup>10</sup> Five policies state explicitly that cooperation includes access to all requested documents<sup>11</sup>, while in another five policies this item is not addressed. No policy addresses whether or not cooperation must include access to all individuals who conducted the audit (particularly non-employees), or whether a partial disclosure of violations meets some or all of the requirements for cooperation. Only Delaware’s policy addresses the differing applications of cooperation in criminal, civil, and administrative contexts.<sup>12</sup> None of the policies addresses the issue of what “cooperation” means for small businesses.

1. Department of Justice Criminal Prosecution Policy, U.S. EPA Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations, U.S. EPA Policy on Implementation of EPA Self-Disclosure Policy in Criminal Cases, and U.S. EPA Policy on Compliance Incentives for Small Businesses.

2. See Table I, *infra*.

3. As of February 1998, Alaska (Alaska Stat. §§ 09.25.450-490 (1997)), Arkansas (Ark. Stat. Ann. §§ 8-1-301 to -312 (1997)), Colorado (Colo. Rev. Stat. § 13-25-126.5 and § 25-1-114.5 (1997)), Idaho (Idaho Code §§ 9-801 to -811 (1997)), Illinois (Ill. Ann. Stat. ch. 415 para. 5/52.2 (1997)), Indiana (Ind. Code Ann. §§ 13-28-4-2 to -10 (1997)), Kansas (K.S.A. §§ 60-3332 -3339 (1996)), Kentucky (Ky. Rev. Stat. Ann. §§ 224.01-040 (1996)), Michigan (Mich. Stat. Ann. §§ 13A.14801 -14809 (1997)), Minnesota (Minn. Stat. §§ 114C.20 -31 (1997)), Mississippi (Miss. Code Ann. § 17-17-29, § 49-2-2, § 49-17-43, § 49-17-427 (1997)), Montana (Mont. Code Anno. §§ 75-1-1201 to -1206 (1997)), New Hampshire (N.H. Rev. Stat. Ann. §§ 147-E:1 - 9 (1997)), New Jersey (N.J. Stat. Ann. §§ 13:1D-125 to -130 (1997)), Nevada (Nev. Rev. Stat. Ann. §§ 445C.020 -120 (1997)), Ohio (Ohio Rev. Code Ann. §§ 3745.70 -73 (1997)), Oregon (Or. Rev. Stat. §§ 468.961 -963 (1996)), Rhode Island (R.I. Gen. Laws §§ 42-17.8.1 -8 (1997)), South Carolina (S.C. Code Ann. §§ 48-57-10 to -110 (1997)), South Dakota (S.D. Codified Laws Ann. §§ 1-40-33 to -37 (1997)), Texas

(Tex. Rev. Civ. Stat. Ann. art. 4447cc (1997)), Utah (Utah Code Ann. §§ 19-7-101 to -109 (1997)), Virginia (Va. Code Ann. §§ 10.1-1198 to -1199 (1997)), and Wyoming (Wyo. Stat. §§ 35-11-1105 to -1106 (1997)). Wyoming's law also provides for immunity from injunctive relief.

4. The nine states with such laws are: Alaska, Colorado, Kansas, Mississippi, Montana, Ohio, Rhode Island, South Carolina, and Texas. It should be noted, however, that Virginia's law includes a "bad faith" provision. See Table I, infra. "Cooperation" can either be a direct requirement (i.e., it is one of several conditions necessary for receiving privileges and/or immunity) or an indirect one (i.e., it is one condition needed to make a disclosure voluntary, and the voluntariness of a disclosure is one of the requirements for receiving the law's benefits).

5. The definition of "cooperation" used in the Rhode Island law is the same as that used in U.S. EPA's Self-Disclosure Policy. See note 14 in Table I, infra.

6. Rhode Island's law is distinct from these six (but equally as broad) in that it requires cooperation "as requested by the Department," especially with regard to relevant information and individuals. See Table I, infra.

7. Rhode Island's and Alaska's laws do address some of these issues. See Table I, infra.

8. As of February 1998, California (Policy on Incentives for Self-Evaluation), Connecticut (Policy on Incentives for Self-Policing), Delaware (Penalty Mitigation Policy), Florida (Incentives for Self-Evaluation by the Regulated Community), Maryland (Environmental Audit Guidance), Massachusetts (Interim Policy on Incentives for Self-Policing: Environmental Audit Policy), Minnesota (Policy on Environmental Auditing), North Carolina (Enforcement Penalty Policy for Self-Reported Violations), Pennsylvania (Policy to Encourage Voluntary Compliance by Means of Environmental Compliance Audits and Implementation of Compliance Management Systems), Tennessee (TDEC Policy Encouraging Self-Policing and Voluntary Correction), Vermont (Incentives for Self-Evaluation and Environmental Compliance), and Washington (Policy 1-26, Adjusting Civil Penalties in Response to Self-Disclosure).

9. Minnesota is the only exception, since under its policy it is presumably not the case that one must submit such information or material. See Table IV, infra.

10. California, Connecticut, Florida, Massachusetts, Tennessee, and Vermont.

11. California, Connecticut, Florida, Massachusetts, and Tennessee.

12. Delaware's policy states that its provisions do not "affect any criminal liability or penalties." See Table IV, infra.

**ENVIRONMENTAL AUDIT PRIVILEGE/IMMUNITY TABLES**

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**Guide to Terms Used:**

Yes/No	Item is addressed explicitly in the statute, rule, or policy.
Presumably	Item is not addressed explicitly, but can be inferred, to a high degree of certainty, from the language of the statute, rule, or policy.
Not addressed, but presumably	Item not addressed explicitly, but can be inferred from language of the statute, rule, or policy.
Not addressed	Item not addressed in the statute, rule, or policy.
N/A	Not applicable.

**States that have enacted audit privilege/immunity laws as of February 1998:**

Alaska	New Hampshire
Arkansas	New Jersey
Colorado	Nevada
Idaho	Ohio
Illinois	Oregon
Indiana	Rhode Island
Kansas	South Carolina
Kentucky	South Dakota
Michigan	Texas
Minnesota	Utah
Mississippi	Virginia
Montana	Wyoming

**States that have adopted audit privilege/immunity rules as of February 1998:**

Oklahoma

**States that have adopted self-disclosure policies as of February 1998:**

California  
Connecticut  
Delaware  
Florida  
Maryland  
Massachusetts  
Minnesota  
North Carolina  
Pennsylvania  
Tennessee  
Vermont  
Washington

**TABLE I: Federal Policies**

Policies (Federal)	U.S. DOJ Criminal Prosecution Policy	U.S. EPA Self-Disclosure Policy	U.S. EPA Policy on Implementation of EPA Self-Disclosure Policy in Criminal Cases	U.S. EPA Policy on Compliance Incentives for Small Businesses
Citation	Memorandum dated July 1, 1991	Federal Register, December 22, 1995, <i>Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations; Notice</i>	Memorandum dated October 1, 1997 from Earl E. Devaney, Director, Office of Criminal Enforcement, Forensics, and Training	Memorandum of Policy, issued May 20, 1996
Effective Date	July 1, 1991	December 22, 1995	October 1, 1997	June 10, 1996
Is “cooperation” a necessary prerequisite, condition, or factor for receiving some or all of the benefits conferred by the policy?	Yes - one of key mitigating factors to be considered in deciding “whether to bring a criminal prosecution for a violation of an environmental statute”	Yes - necessary condition in (1) determining whether gravity-based penalties (excludes penalties based on significant economic benefit <sup>1</sup> ) should be mitigated or eliminated, and (2) deciding not to recommend criminal prosecution	Yes - necessary condition in deciding not to recommend criminal prosecution	Yes - necessary element of “good faith”, which is required under policy to receive mitigation or elimination of civil penalties (including both gravity-based penalties and penalties based on insignificant economic benefit <sup>2</sup> )
Is the term “cooperation” specifically defined?	No, but term is elaborated on <sup>3</sup>	Yes <sup>4</sup>	Yes <sup>5</sup>	No <sup>6</sup>
What is the extent of “cooperation” required?	“Full and prompt”	Access to relevant information and individuals (see below); otherwise not specified	Access to relevant information and individuals (see below) and good faith dealings	Not specified, but must be part of “good faith effort to comply with applicable environmental requirements”
What of the following must be disclosed as a condition of “cooperation”?				
a) Attorney work product material?	Not specified	Presumably no	No, as long as privilege issues are raised in good faith	Not specified

<b>Policies (Federal)</b>	<b>U.S. DOJ Criminal Prosecution Policy</b>	<b>U.S. EPA Self-Disclosure Policy</b>	<b>U.S. EPA Policy on Implementation of EPA Self-Disclosure Policy in Criminal Cases</b>	<b>U.S. EPA Policy on Compliance Incentives for Small Businesses</b>
b) Attorney-client privilege material?	Not specified	Presumably no	No, as long as privilege issues are raised in good faith	Not specified
c) Audit material beyond initial disclosure?	Presumably yes	Not addressed	Not addressed	Not addressed
Does “cooperation” include access to:				
a) All individuals who conducted audit?	Presumably yes	Not addressed	Yes	Not addressed
b) Employees directly responsible for activities leading to violations?	Presumably yes	Yes	Not addressed	Not addressed
c) All employees of disclosing entity?	Not addressed	Presumably yes	Yes	Not addressed
d) All requested documents?	Presumably yes - “all relevant information”	Yes, except attorney-work product and attorney-client privilege material <sup>7</sup>	Yes	Not addressed
To what extent does partial disclosure meet requirements for “cooperation”?	Not addressed, but some flexibility exists since a number of factors, including (but not limited to) cooperation, are to be considered	Not addressed	Not addressed; bad faith claim of privilege as to material not disclosed is tantamount to no cooperation	Not addressed
Does “cooperation” mean something different in:				
a) Criminal context?	Yes	Not addressed	Yes	Not addressed
b) Civil context?	Not addressed	Not addressed	Not addressed	Not addressed
c) Administrative context?	Not addressed	Not addressed	Not addressed	Not addressed
Are requirements for “cooperation” different for small businesses? If so, how are they different?	Not addressed	Not addressed	Not addressed	N/A - policy addresses only small businesses

Notes:

1. “Economic benefit may be waived, however, where the [U.S. Environmental Protection] Agency determines that it is insignificant.” Self Disclosure Policy (§) D(1).
2. The policy states that “if a small business meets all of the criteria, except it has obtained a significant economic benefit from the violation(s) such that it may have obtained an economic advantage over its competitors, EPA will waive up to 100% of the gravity component of the penalty, but may seek the full amount of the significant economic benefit associated with the violations.” Compliance Incentives Policy § F(3).
3. “Cooperation”: “The attorney for the Department should consider the degree and timeliness of cooperation by the person. Full and prompt cooperation is essential, whether in the context of a voluntary disclosure or after the government has independently learned of a violation. Consideration should be given to the violator’s willingness to make all relevant information (including the complete results of any internal or external investigation and the names of all potential witnesses) available to government investigators and prosecutors. Consideration should also be given to the extent and quality of the violator’s assistance to the government’s investigation.” Criminal Prosecution Policy at 3-4.
4. “Cooperation”: “The regulated entity cooperates as requested by EPA and provides such information as is necessary and requested by EPA to determine applicability of this policy. Cooperation includes, at a minimum, providing all requested documents and access to employees and assistance in investigating the violation, any noncompliance problems related to the disclosure, and any environmental consequences related to the violations.” Self-Disclosure Policy § D(9). It should be noted that the final policy differs from the interim policy in that the former amended “cooperation” to include “assistance in determining the facts of any related violations suggested by the disclosure, as well as of the disclosed violation itself.” Introduction to Final Self-Disclosure Policy at 66709-10.
5. “Cooperation”: “Cooperation in a criminal investigation shall include, at a minimum, access by CID Special Agents to the specific information contained in the Audit or Due Diligence Program that revealed the violation(s), access to the individuals who conducted the audit or program, access to all employees of the disclosing entity, and access to all requested documents. Such cooperation may be effected directly by the company or through counsel. Full cooperation does not require that the entity waive legitimate legal privileges available to it, but does require that any privilege issues raised during the course of the criminal investigation be made in good-faith. The Board may include in its final recommendation consideration pertaining to bad-faith claims of privilege that impact the progress and result of criminal investigations.” Self-Disclosure Policy in Criminal Cases at 6.
6. Nowhere is “cooperation” explicitly defined. Rather, a “good faith effort to comply with applicable environmental requirements” requires “that a small business cooperate with EPA and provide such information as is necessary and requested to determine applicability of this Policy.” Compliance Incentives Policy at 2-3.
7. Confidential Business Information is not explicitly excluded from materials which may be requested under the Policy. However, the Policy does state that “any material claimed to be confidential business information will be treated in accordance with EPA regulations at 40 C.F.R. Part 2.” Self-Disclosure Policy § E(2).

**TABLE II: State Audit Privilege/Immunity Laws**

<b>Laws/Statutes (AK-IN)</b>	<b>Alaska</b>	<b>Arkansas</b>	<b>Colorado</b>	<b>Idaho</b>	<b>Illinois</b>	<b>Indiana</b>
Statute	Alaska Stat. §§ 09.25.450-490 (1997)	Ark. Stat. Ann. §§ 8-1-301 to -312 (1997)	Colo. Rev. Stat. § 13-25-126.5 and § 25-1-114.5 (1997)	Idaho Code §§ 9-801 to -811 (1997)	Ill. Ann. Stat. ch. 415 para. 5/52.2 (1997)	Ind. Code Ann. §§ 13-28-4-2 to -10 (1997)
Type of Statute - Immunity or Privilege?	Both	Privilege only	Both	Both	Privilege only	Privilege only
Effective Date	May 11, 1997, vetoed by Governor, veto overridden August 9, 1997	July 28, 1995	June 1, 1994	July 1, 1995 [sunset December 31, 1997]	January 24, 1995	July 1, 1994
Is “cooperation” a necessary prerequisite, condition, or factor for receiving some or all of the benefits conferred by the law?	Yes - to obtain immunity from/mitigation of civil and administrative penalties	Not addressed	Yes <sup>1</sup> - to obtain privileged status of audit material and immunity from civil, administrative, and criminal penalties	Not addressed	Not addressed	Not addressed
Is the term “cooperation” specifically defined?	No <sup>2</sup>	N/A	No <sup>3</sup>	N/A	N/A	N/A
What is the extent of “cooperation” required?	Required “in connection with an investigation of the issues identified in the disclosure”; otherwise not addressed	N/A	Required “regarding investigation of the issues identified in the disclosure”; otherwise not addressed	N/A	N/A	N/A
What of the following must be disclosed as a condition of “cooperation”?						

<b>Laws/Statutes (AK-IN)</b>	<b>Alaska</b>	<b>Arkansas</b>	<b>Colorado</b>	<b>Idaho</b>	<b>Illinois</b>	<b>Indiana</b>
a) Attorney work product material?	Not addressed	N/A	Not addressed	N/A	N/A	N/A
b) Attorney-client privilege material?	Not addressed	N/A	Not addressed	N/A	N/A	N/A
c) Audit material beyond initial disclosure?	Not addressed	N/A	Not addressed	N/A	N/A	N/A
Does “cooperation” include access to:						
a) All individuals who conducted audit?	Not addressed	N/A	Not addressed	N/A	N/A	N/A
b) Employees directly responsible for activities leading to violations?	Not addressed	N/A	Not addressed	N/A	N/A	N/A
c) All employees of disclosing entity?	Not addressed	N/A	Not addressed	N/A	N/A	N/A
d) All requested documents?	Not addressed, but presumably no <sup>4</sup>	N/A	Not addressed	N/A	N/A	N/A
To what extent does partial disclosure meet requirements for “cooperation”?	Not addressed	N/A	Not addressed	N/A	N/A	N/A
Does “cooperation” mean something different in:						
a) Criminal context?	Not addressed	N/A	Not addressed	N/A	N/A	N/A
b) Civil context?	Not addressed	N/A	Not addressed	N/A	N/A	N/A
c) Administrative context?	Not addressed	N/A	Not addressed	N/A	N/A	N/A
Are requirements for “cooperation” different for small businesses? If so, how are they different?	Not addressed	N/A	Not addressed	N/A	N/A	N/A

Laws/Statutes (KS-MT)	Kansas	Kentucky	Michigan	Minnesota	Mississippi	Montana
Statute	K.S.A. §§ 60-3332 -3339 (1996)	Ky. Rev. Stat. Ann. §§ 224.01-040 (1996)	Mich. Stat. Ann. §§ 13A.14801 -14809 (1997)	Minn. Stat. §§ 114C.20 -31 (1997)	Miss. Code Ann. § 17-17-29, § 49-2-2, § 49-17-43, § 49-17-427 (1997)	Mont. Code Anno. §§ 75-1-1201 to -1206 (1997)
Type of Statute - Immunity or Privilege?	Both	Both	Both	Both	Privilege only	Both
Effective Date	July 1, 1995	July 15, 1996	March 8, 1996, amended effective November 14, 1997	June 1, 1995	July 1, 1995	October 1, 1997 (terminates October 1, 2001)
Is “cooperation” a necessary prerequisite or condition for receiving some or all of the benefits conferred by the law?	Yes - to obtain immunity from civil, administrative, and criminal penalties	Not addressed	Not addressed	Not addressed <sup>5</sup>	Yes <sup>6</sup> - to qualify for mitigation of penalties to de minimus amount (excludes penalties based on economic benefit)	Yes - to obtain immunity from civil and administrative penalties
Is the term “cooperation” specifically defined?	No <sup>7</sup>	N/A	N/A	N/A	No <sup>8</sup>	No <sup>9</sup>
What is the extent of “cooperation” required?	Required “in connection with investigation of the issues identified in the disclosure”; otherwise not addressed	N/A	N/A	N/A	Required “regarding investigation of the issues identified in the disclosure”; otherwise not addressed	Not addressed
What of the following must be disclosed as a condition of “cooperation”?						
a) Attorney work product material?	Not addressed	N/A	N/A	N/A	Not addressed	Not addressed
b) Attorney-client privilege material?	Not addressed	N/A	N/A	N/A	Not addressed	Not addressed
c) Audit material beyond initial disclosure?	Not addressed	N/A	N/A	N/A	Not addressed	Not addressed

<b>Laws/Statutes (KS-MT)</b>	<b>Kansas</b>	<b>Kentucky</b>	<b>Michigan</b>	<b>Minnesota</b>	<b>Mississippi</b>	<b>Montana</b>
Does “cooperation” include access to:						
a) All individuals who conducted audit?	Not addressed	N/A	N/A	N/A	Not addressed	Not addressed
b) Employees directly responsible for activities leading to violations?	Not addressed	N/A	N/A	N/A	Not addressed	Not addressed
c) All employees of disclosing entity?	Not addressed	N/A	N/A	N/A	Not addressed	Not addressed
d) All requested documents?	Not addressed	N/A	N/A	N/A	Not addressed	Not addressed
To what extent does partial disclosure meet requirements for “cooperation”?	Not addressed	N/A	N/A	N/A	Not addressed	Not addressed
Does “cooperation” mean something different in:						
a) Criminal context?	Not addressed	N/A	N/A	N/A	Not addressed	Not addressed
b) Civil context?	Not addressed	N/A	N/A	N/A	Not addressed	Not addressed
c) Administrative context?	Not addressed	N/A	N/A	N/A	Not addressed	Not addressed
Are requirements for “cooperation” different for small businesses? If so, how are they different?	Not addressed	N/A	N/A	N/A	Not addressed	Not addressed

Laws/Statutes (NH-RI)	New Hampshire	New Jersey	Nevada	Ohio	Oregon	Rhode Island
Statute	N.H. Rev. Stat. Ann. §§ 147-E:1 - 9 (1997)	N.J. Stat. Ann. §§ 13:1D-125 to -130 (1997) <sup>10</sup>	Nev. Rev. Stat. Ann. §§ 445C.020 -120 (1997)	Ohio Rev. Code Ann. §§ 3745.70 -73 (1997)	Or. Rev. Stat. §§ 468.961 and -963 (1996)	R.I. Gen. Laws §§ 42-17.8.1 -8 (1997)
Type of statute - Immunity or Privilege?	Both	Immunity only	Both	Both	Privilege only	Immunity only
Effective Date	July 1, 1996	December 22, 1995	October 1, 1997	March 13, 1997	November 4, 1993, § 468.963 amended effective June 16, 1997 <sup>11</sup>	July 1, 1997
Is “cooperation” a necessary prerequisite or condition for receiving some or all of the benefits conferred by the law?	Not addressed <sup>12</sup>	Not addressed	Not addressed	Yes <sup>13</sup> - to obtain immunity from civil and administrative penalties	Not addressed	Yes - to obtain immunity from gravity-based penalties (excludes penalties based on significant economic benefits obtained through noncompliance), or from other penalties
Is the term “cooperation” specifically defined?	N/A	N/A	N/A	No <sup>14</sup>	N/A	Yes <sup>15</sup>
What is the extent of “cooperation” required?	N/A	N/A	N/A	Required in “investigating the cause, nature, extent, and effects of the noncompliance”; otherwise not addressed	N/A	As requested by Department <sup>16</sup> ; entity must provide access to relevant information and individuals (see below); otherwise not addressed
What of the following must be disclosed as a condition of “cooperation”?						
a) Attorney work product material?	N/A	N/A	N/A	Not addressed	N/A	Not addressed

<b>Laws/Statutes (NH-RI)</b>	<b>New Hampshire</b>	<b>New Jersey</b>	<b>Nevada</b>	<b>Ohio</b>	<b>Oregon</b>	<b>Rhode Island</b>
b) Attorney-client privilege material?	N/A	N/A	N/A	Not addressed	N/A	Not addressed
c) Audit material beyond initial disclosure?	N/A	N/A	N/A	Not addressed	N/A	Not addressed
Does “cooperation” include access to:						
a) All individuals who conducted audit?	N/A	N/A	N/A	Not addressed	N/A	To employees of entity; otherwise not addressed
b) Employees directly responsible for activities leading to violations?	N/A	N/A	N/A	Not addressed	N/A	Not addressed, but presumably yes (“access to employees and assistance in investigating the violation”)
c) All employees of disclosing entity?	N/A	N/A	N/A	Not addressed	N/A	Presumably yes
d) All requested documents?	N/A	N/A	N/A	Not addressed	N/A	Yes
To what extent does partial disclosure meet requirements for “cooperation”?	N/A	N/A	N/A	Not addressed	N/A	Not addressed
Does “cooperation” mean something different in:						
a) Criminal context?	N/A	N/A	N/A	Not addressed	N/A	Not addressed
b) Civil context?	N/A	N/A	N/A	Not addressed	N/A	Not addressed
c) Administrative context?	N/A	N/A	N/A	Not addressed	N/A	Not addressed
Are requirements for “cooperation” different for small businesses? If so, how are they different?	N/A	N/A	N/A	Not addressed	N/A	Not addressed

Laws/Statutes (SC-WY)	South Carolina	South Dakota	Texas	Utah	Virginia	Wyoming
Statute	S.C. Code Ann. §§ 48-57-10 to -110 (1997)	S.D. Codified Laws Ann. §§ 1-40-33 to -37 (1997)	Tex. Rev. Civ. Stat. Ann. art. 4447cc (1997)	Utah Code Ann. §§ 19-7-101 to -109 (1997)	Va. Code Ann. §§ 10.1-1198 to -1199 (1997)	Wyo. Stat. §§ 35-11-1105 to -1106 (1997)
Type of Statute - immunity or privilege?	Both	Immunity only	Both	Both	Both	Both
Effective Date	July 1, 1996	March 8, 1996	May 23, 1995, amended effective September 1, 1997	April 29, 1996, amended effective May 5, 1997	March 24, 1995	February 18, 1995
Is “cooperation” a necessary prerequisite or condition for receiving some or all of the benefits conferred by the law?	Yes <sup>17</sup> - to obtain immunity from civil and administrative penalties	Not addressed	Yes <sup>18</sup> - to obtain immunity from/mitigation of civil and administrative penalties	Not addressed	Not addressed <sup>19</sup>	Not addressed
Is the term “cooperation” specifically defined?	No <sup>20</sup>	N/A	No <sup>21</sup>	N/A	N/A	N/A
What is the extent of “cooperation” required?	Required “in connection with investigation of the issues defined in the disclosure”; otherwise not addressed	N/A	Not addressed	N/A	N/A	N/A
What of the following must be disclosed as a condition of “cooperation”?						
a) Attorney work product material?	Not addressed	N/A	Not addressed	N/A	N/A	N/A
b) Attorney-client privilege material?	Not addressed	N/A	Not addressed	N/A	N/A	N/A
c) Audit material beyond initial disclosure?	Not addressed	N/A	Not addressed	N/A	N/A	N/A
Does “cooperation” include access to:						

<b>Laws/Statutes (SC-WY)</b>	<b>South Carolina</b>	<b>South Dakota</b>	<b>Texas</b>	<b>Utah</b>	<b>Virginia</b>	<b>Wyoming</b>
a) All individuals who conducted audit?	Not addressed	N/A	Not addressed	N/A	N/A	N/A
b) Employees directly responsible for activities leading to violations?	Not addressed	N/A	Not addressed	N/A	N/A	N/A
c) All employees of disclosing entity?	Not addressed	N/A	Not addressed	N/A	N/A	N/A
d) All requested documents?	Not addressed	N/A	Not addressed	N/A	N/A	N/A
To what extent does partial disclosure meet requirements for “cooperation”?	Not addressed	N/A	Not addressed	N/A	N/A	N/A
Does “cooperation” mean something different in:						
a) Criminal context?	Not addressed	N/A	Not addressed	N/A	N/A	N/A
b) Civil context?	Not addressed	N/A	Not addressed	N/A	N/A	N/A
c) Administrative context?	Not addressed	N/A	Not addressed	N/A	N/A	N/A
Are requirements for “cooperation” different for small businesses? If so, how are they different?	Not addressed	N/A	Not addressed	N/A	N/A	N/A

Notes:

1. For presumption against the imposition of civil, administrative, or criminal penalties, a disclosure must be voluntary. A disclosure is voluntary only if certain conditions are met, one of which concerns cooperation. Section 25-1-114.5. See note 3, infra.
2. Cooperation, as a condition for immunity from civil and administrative penalties, is elaborated on as follows: a regulated entity must “cooperate with the department or municipality, as appropriate, in connection with an investigation of the issues identified in the disclosure; the department or municipality may request that the owner or operator allow the department or municipality to review, under a written claim of confidentiality as described in AS 09.25.455 (b) (3), the part of the audit report that describes the implementation plan or tracking system developed to correct past noncompliance, improve current compliance, or prevent future noncompliance.” Section 09.25.475 (d) (5). A regulated entity must be in “cooperation with government officials investigating the disclosed violation” to qualify for penalty mitigation. Section 09.25.480 (c) (4).
3. See note 1, supra. As one of the conditions required to make a disclosure voluntary, cooperation is discussed as follows: “The person or entity making the disclosure cooperates with the appropriate division or agency in the department of health regarding investigation of the issues identified in the disclosure.” Section 25-1-114.5 (D). “Cooperation” itself is not defined.
4. The act provides a specific and very limited definition of what documents may be requested under the auspices of cooperation. See note 2, supra.
5. Minnesota’s law is by far the most complicated of those considered here. The law grants immunity from administrative, civil, and criminal penalties to an entity which conducts an environmental audit or self-evaluation and submits a pollution prevention plan or similar action plan. The audit report itself is not required to be disclosed; in fact, Section 15, subd. 1 states that the state may not request this report. Subject to certain conditions, however, the law provides the state with the authority to bring an enforcement action against an entity. If this is the case, then “good faith” becomes a factor in deciding whether to bring an enforcement action and/or seek a penalty against the entity. “Cooperation” is not expressly a component of “good faith.” Additionally and separately, if a regulated entity submits an action plan as required by the law, the audit report and related documents become privileged and may not be accessed by third parties. The previous reference to “good faith” is not, however, applicable to this privilege provision. The Minnesota Pollution Control Agency’s (MPCA) “Policy on Environmental Auditing” does not relate to the law in any manner except for its inclusion in Section 15, subd. 1. That section expands the circumstances, which are specified in the policy, under which MPCA can request environmental audit material. Because the immunity/privilege law and the audit policy are largely unrelated documents, this article treats them as such, including both the law in this table and the policy under the “State Self-Disclosure Policies” table (Table IV). See note 7, infra, in Table IV. As a final note, the part of the law governing environmental audits and self-evaluations is more generally called the “Environmental Improvement Pilot Program.” This is separate and distinct from the “Voluntary Investigation and Cleanup Program,” which concerns the cleanup of state Superfund sites, and does contain an element of “cooperation.” While amendments to these two programs were contained in the same enacted bill (1995 Minn. ALS 168), their provisions are not related.
6. Cooperation is discussed only in the context of reducing penalties for violations of environmental law. For those who voluntarily conduct an environmental audit, discover their violations, and voluntarily disclose those violations, the penalty for noncompliance may be reduced to a de minimis amount (excluding any economic benefit resulting from noncompliance) if all of a certain set of conditions are satisfied. One of those conditions is: “The person making the disclosure cooperates with the Commission and the Department regarding investigation of the issues identified in the disclosure.” Sections 5, 6, and 9. The types of penalties (civil, administrative, criminal) mitigated are not specified.
7. Immunity from penalties requires that the entity making the disclosure “cooperate...with the appropriate agency in connection with investigation of the issues identified in the disclosure,” among other requirements. Section 7. “Cooperation” itself is not defined.

8. A gravity-based penalty will be reduced “to the greatest extent possible” for an entity that discloses voluntarily and meets a number of conditions, one of which concerns cooperation: “The person making the disclosure cooperates with the Mississippi Commission on Environmental Quality and the Mississippi Department of Environmental Quality regarding investigation of the issues identified in the disclosure.” Sections 5 (7) (G) (III), 6 (g) (vii) (3), 9 (3) (G) (III). No definition of “cooperates” is provided. It is worth noting that the law does make mention of “good faith” when defining “environmental self-evaluation report.” The law states that such a report “means any document, including any audit, report, finding, communication, or opinion or any draft of an audit, report, finding, communication or opinion, prepared solely as a part of or in connection with a voluntary self-assessment that is done in good faith, which report is kept and maintained solely within the confines of the evaluated party.” Section 3 (E).

9. Nowhere is cooperation defined. The law grants immunity from administrative and civil penalties if “the regulated entity cooperates with the department and provides information that is necessary for the implementation of (sections 1 through 6).” Section 3 (5). “Department” refers to the Department of Justice, the Department of Agriculture, or the Department of Environmental Quality, depending on the statute.

10. New Jersey’s law is generally an amnesty law, distinct from the more comprehensive audit privilege/immunity laws of the other states in this table. The New Jersey law does, however, contain some immunity provisions that apply to “minor violations.” Included as part of a general environmental reform act, the law states quite simply that an entity which discloses voluntarily any “minor” violations of environmental law will be immune from civil and administrative penalties, given certain conditions (of which “cooperation” is not one).

11. The June 1997 amendments (contained within 1997 House Bill 3571) affected the 1993 law in only minor ways, none of which concerned “cooperation.”

12. While there is no mention of “cooperation” in the law, the law does state that a “regulated entity shall not qualify for a penalty waiver pursuant to RSA 147-E:9, I” if one or more conditions applies/apply, one of which is “absent good cause shown.” “Good cause” is not defined, however. Section 147-E:9 (II) (g).

13. Cooperation is a condition required to make a disclosure voluntary, and voluntary disclosures qualify for immunity from all civil and administrative penalties arising from alleged violations. Sections 3745.71 (C) (2) and 3745.72 (B) (4).

14. Cooperation is not defined, but merely set out as a condition for making a disclosure voluntary (only voluntary disclosures qualify for immunity): “The owner or operator cooperates with the director of the state agency that has jurisdiction over the alleged violation in investigating the cause, nature, extent, and effects of the noncompliance.” Section 3745.72 (B) (4). The law also states that privilege does not apply to information that “is collected, developed, made, or maintained in bad faith or for a fraudulent purpose,” but “bad faith” is not defined. Section 3745.71 (C) (6).

15. “Cooperation”: “The regulated entity cooperates as requested by the department and provides such information as is necessary and requested by the department to determine applicability of this policy. Cooperation includes, at a minimum, providing all requested documents and access to employees and assistance in investigating the violation, any noncompliance problems related to the disclosure, and any environmental consequences related to the violations.” Section 10-20.1-3 (9).

16. The “Department” referred to here and elsewhere is not specified anywhere in the law.

17. Cooperation is a condition required to make a disclosure voluntary, and voluntary disclosures qualify for immunity from all civil and administrative penalties “associated with the issues disclosed.” Sections 48-57-20 and 48-57-100 (B) (4).

18. Cooperation is discussed in the context of immunity. To be immune to a civil or administrative penalty, the disclosure must be voluntary, and cooperation is one of the conditions required to make the disclosure voluntary. Cooperation is also a factor in penalty mitigation.

19. While “cooperation” is not mentioned, the act does state the following: “Immunity shall not be accorded if it is found that the person making the voluntary disclosure has acted in bad faith,” but “bad faith” is not defined. Section 10.1-1194.

20. Cooperation is not defined, but merely set out as a condition for making a disclosure voluntary: “The person or entity making the disclosure cooperates with the appropriate agency in connection with investigation of the issues identified in the disclosure.” Section 48-57-100 (B) (4).

21. Cooperation is mentioned in two instances: 1) Section 10 (b) (6) indicates that a disclosure is voluntary if “the person making the disclosure cooperates with the appropriate agency in connection with an investigation of the issues identified in the disclosure”; 2) Section 10 (e) (4) indicates that a penalty imposed “should, to the extent appropriate, be mitigated” by several factors, one of which is “cooperation with government officials investigating the disclosed violation.”

**TABLE III: State Audit Rules**

<b>Rules (OK)</b>	<b>Oklahoma</b>
Name of Rule	Audit Rule <sup>1</sup>
Effective Date	June 1, 1997
Is “cooperation” a necessary prerequisite or condition for receiving some or all of the benefits conferred by the policy or law?	Yes <sup>2</sup> - to obtain waiver/reduction of civil and administrative penalties (excludes penalties based on economic benefits gained through noncompliance)
Is the term “cooperation” specifically defined?	No <sup>3</sup>
What is the extent of “cooperation” required?	Not addressed
What of the following must be disclosed as a condition of “cooperation”?	
a) Attorney work product material?	Not addressed
b) Attorney-client privilege material?	Not addressed
c) Audit material beyond initial disclosure?	Not addressed
Does “cooperation” include access to:	
a) All individuals who conducted audit?	Not addressed
b) Employees directly responsible for activities leading to violations?	Not addressed
c) All employees of disclosing entity?	Not addressed
d) All requested documents?	Not addressed

<b>Rules (OK)</b>	<b>Oklahoma</b>
To what extent does partial disclosure meet requirements for “cooperation”?	Not addressed
Does “cooperation” mean something different in:	
a) Criminal context?	Not addressed
b) Civil context?	Not addressed
c) Administrative context?	Not addressed
Are requirements for “cooperation” different for small businesses? If so, how are they different?	Not addressed

Notes:

1. Oklahoma replaced its audit policy, effective January 1, 1995, with a new audit rule. It allows for the waiving and mitigation of civil and administrative penalties. It is the only state with such a rule.
2. If all but one of the conditions are satisfied (the condition that the entity “has not realized and will not realize a demonstrable and significant economic or competitive advantage as a result of non-compliance”), the Oklahoma Department of Environmental Quality (DEQ) will seek an administrative or civil penalty “only to extent of the economic or competitive advantage gained.” Section 252:2-11-7 (a) - (c).
3. Penalty mitigation/elimination will occur only if, among other conditions, “the regulated entity cooperates with the DEQ as the DEQ performs its duties and provides such information as the DEQ reasonably requests to confirm the entity’s compliance with these conditions.” Section 252:2-11-7 (b) (8). The rule also indicates that, if a regulated entity fails to comply with DEQ rules, penalty mitigation will depend on, among other conditions, whether or not the failure indicates “a lack or reasonable question of the basic good faith attempt to understand and comply with applicable state environmental statutes or rules....” Section 252:2-11-7 (b) (3). “Good faith attempt” is not defined.

**TABLE IV: State Self-Disclosure Policies**

<b>Policies (CA-MA)</b>	<b>California</b>	<b>Connecticut</b>	<b>Delaware</b>	<b>Florida</b>	<b>Maryland</b>	<b>Massachusetts</b>
Name of Policy	Policy on Incentives for Self-Evaluation	Policy on Incentives for Self-Policing	Penalty Mitigation Policy	Incentives for Self-Evaluation by the Regulated Community	Environmental Audit Guidance	Interim Policy on Incentives for Self-Policing: Environmental Audit Policy
Effective Date	July 8, 1996	October 23, 1996	April 11, 1997	April 1, 1996	June 24, 1997	April 26, 1997
Is “cooperation” a necessary prerequisite, condition, or factor for receiving some or all of the benefits conferred by the policy or law?	Yes <sup>1</sup> - to qualify for waiver/reduction of gravity-based penalties (excludes penalties based on significant economic benefit <sup>2</sup> ) and no criminal referral	Yes <sup>3</sup> - to qualify for waiver/reduction of gravity-based penalties (excludes penalties based on significant economic benefit <sup>4</sup> ) and no civil or criminal referral	Yes - to qualify for waiver of civil and administrative penalties <sup>5</sup>	Yes - to qualify for waiver of gravity-based penalties	Yes - to qualify for waiver of civil penalties <sup>6</sup>	Yes - to qualify for waiver/reduction of “punitive” penalties <sup>7</sup> (excludes penalties based on significant economic benefit <sup>8</sup> ) and no criminal referral
Is the term “cooperation” specifically defined?	Yes <sup>9</sup>	Yes <sup>10</sup>	No <sup>11</sup>	Yes <sup>12</sup>	No <sup>13</sup>	Yes <sup>14</sup>

<b>Policies (CA-MA)</b>	<b>California</b>	<b>Connecticut</b>	<b>Delaware</b>	<b>Florida</b>	<b>Maryland</b>	<b>Massachusetts</b>
What is the extent of “cooperation” required?	Access to all requested documents (except attorney-client privilege or attorney work product) and employees, and additional assistance in investigations into violation or other compliance problems; otherwise not addressed	Access to relevant information and individuals (see below); otherwise not addressed	“Full” (no definition of “full” is provided)	Access to all requested documents and employees, and additional assistance in investigations into violation or other compliance problems; otherwise not addressed	“Fully” (regarding “investigation of the disclosed condition”); otherwise not addressed	Access to all requested documents and employees, and additional assistance in investigations into violation or other compliance problems; otherwise not addressed
What of the following must be disclosed as a condition of “cooperation”?						
a) Attorney work product material?	No	Not addressed	Not addressed	Not addressed	Not addressed	Not addressed
b) Attorney-client privilege material?	No	Not addressed	Not addressed	Not addressed	Not addressed	Not addressed
c) Audit material beyond initial disclosure?	Not addressed	Not addressed	Not addressed	Not addressed	Not addressed	Not addressed
Does “cooperation” include access to:						
a) All individuals who conducted audit?	Not addressed	Not addressed	Not addressed	Not addressed	Not addressed	Not addressed
b) Employees directly responsible for activities leading to violations?	Presumably yes	Presumably yes	Not addressed	Presumably yes	Not addressed	Presumably yes
c) All employees of disclosing entity?	Presumably yes	Presumably yes	Not addressed	Presumably yes	Not addressed	Presumably yes
d) All requested documents?	Yes, except attorney-client privileged and attorney work product documents	Yes	Not addressed	Yes	Not addressed	Yes

<b>Policies (CA-MA)</b>	<b>California</b>	<b>Connecticut</b>	<b>Delaware</b>	<b>Florida</b>	<b>Maryland</b>	<b>Massachusetts</b>
To what extent does partial disclosure meet requirements for “cooperation”?	Not addressed	Not addressed	Not addressed	Not addressed	Not addressed	Not addressed
Does “cooperation” mean something different in:						
a) Criminal context?	Not addressed	Not addressed	Not addressed <sup>15</sup>	Not addressed	Not addressed	Not addressed
b) Civil context?	Not addressed	Not addressed	Not addressed	Not addressed	Not addressed	Not addressed
c) Administrative context?	Not addressed	Not addressed	Not addressed	Not addressed	Not addressed	Not addressed
Are requirements for “cooperation” different for small businesses? If so, how are they different?	Not addressed	Not addressed	Not addressed	Not addressed	Not addressed	Not addressed

<b>Policies (MN-WA)</b>	<b>Minnesota</b>	<b>North Carolina</b>	<b>Pennsylvania</b>	<b>Tennessee</b>	<b>Vermont</b>	<b>Washington</b>
Name of Policy	Policy on Environmental Auditing	Enforcement Penalty Policy for Self-Reported Violations	Policy to Encourage Voluntary Compliance by Means of Environmental Compliance Audits and Implementation of Compliance Management Systems	TDEC Policy Encouraging Self-Policing and Voluntary Correction	Incentives for Self-Evaluation and Environmental Compliance	Policy 1-26, Adjusting Civil Penalties in Response to Self-Disclosure
Effective Date	January 24, 1995	September 1, 1995	September 25, 1996	November 27, 1996	December 14, 1996	December 20, 1994
Is “cooperation” a necessary prerequisite, condition, or factor for receiving some or all of the benefits conferred by the policy or law?	Yes <sup>16</sup> - to qualify for a lesser frequency of requests for or inspections of facility audit reports by MPCA	Not addressed <sup>17</sup>	Yes - to qualify for waiver of civil penalties <sup>18</sup> ; no initiations of summary criminal actions or referrals to Attorney General for investigation <sup>19</sup> ; or no suspension or revocation of a license, permit, “or other Department authorization”	Yes <sup>20</sup> - to qualify for waiver/reduction of gravity-based penalties, or no criminal referral	Yes <sup>21</sup> - to qualify for waiver/reduction of both gravity-based penalties and penalties based on economic benefits obtained through noncompliance, no civil or criminal referrals	Not addressed <sup>22</sup>
Is the term “cooperation” specifically defined?	No <sup>23</sup>	N/A	No <sup>24</sup>	Yes <sup>25</sup>	No <sup>26</sup>	N/A
What is the extent of “cooperation” required?	“Fully and promptly with regulatory authorities in addressing issues of noncompliance”	N/A	Required regarding “investigation of the disclosed condition”; otherwise not addressed	Access to relevant information and individuals (see below); otherwise not addressed	“As requested by” Vermont Agency of Natural Resources; otherwise not addressed	N/A
What of the following must be disclosed as a condition of “cooperation”?						
a) Attorney work product material?	Not addressed	N/A	Not addressed	Not addressed	Not addressed	N/A

<b>Policies (MN-WA)</b>	<b>Minnesota</b>	<b>North Carolina</b>	<b>Pennsylvania</b>	<b>Tennessee</b>	<b>Vermont</b>	<b>Washington</b>
b) Attorney-client privilege material?	Not addressed	N/A	Not addressed	Not addressed	Not addressed	N/A
c) Audit material beyond initial disclosure?	Not addressed, but presumably no, unless a violation of criminal law is involved	N/A	Not addressed	Not addressed	Not addressed	N/A
Does “cooperation” include access to:						
a) All individuals who conducted audit?	Not addressed	N/A	Not addressed	Not addressed	Not addressed	N/A
b) Employees directly responsible for activities leading to violations?	Not addressed	N/A	Not addressed	Presumably yes	Presumably yes	N/A
c) All employees of disclosing entity?	Not addressed	N/A	Not addressed	Presumably yes	Presumably yes	N/A
d) All requested documents?	Not addressed	N/A	Not addressed	Yes	Not addressed	N/A
To what extent does partial disclosure meet requirements for “cooperation”?	Not addressed	N/A	Not addressed	Not addressed	Not addressed	N/A
Does “cooperation” mean something different in:						
a) Criminal context?	Not addressed	N/A	Not addressed	Not addressed	Not addressed	N/A
b) Civil context?	Not addressed	N/A	Not addressed	Not addressed	Not addressed	N/A
c) Administrative context?	Not addressed	N/A	Not addressed	Not addressed	Not addressed	N/A
Are requirements for “cooperation” different for small businesses? If so, how are they different?	Not addressed	N/A	Not addressed	Not addressed	Not addressed	N/A

Notes:

1. In cases in which a disclosing entity meets all but one of the requirements (the one being the method by which the violation was discovered), the California Environmental Protection Agency (Cal/EPA) will reduce gravity-based penalties by 75%. Section C (1) - (3).

2. “Economic benefit may be waived, however, where Cal/EPA determines that it is insignificant.” Section C (1).
  
3. Connecticut’s policy is essentially an adoption of U.S. EPA’s self-policing policy; as such, the terms and definitions of the policy are the same as those found in the EPA policy. In cases in which a disclosing entity meets all but one of the requirements (the one being the method by which the violation was discovered), the Connecticut Department of Environmental Protection (DEP) will reduce gravity-based penalties by 75%. Section B (1) - (3).
  
4. “The Department may forgive the entire penalty for violations which meet conditions 1 through 9 in section C and, in the Department’s opinion, do not merit any penalty due to the insignificant amount of any economic benefit.” Section D.
  
5. While most other policies exclude from mitigation penalties based on economic benefit obtained through noncompliance, this policy makes economic benefit a condition for possibly making void the terms of the policy: “...the terms of this policy are specifically not applicable if ... significant economic benefit accrued to the person as a result of the non-compliance. In such cases the Department reserves the right to seek penalties commensurate with economic benefit.” Section V ( C ) (1) (f).
  
6. The policy’s Introduction adds that “entities which disclose environmental hazards to the Department, under specified requirements, may receive immunity from administrative penalties, pursuant to the Department’s enforcement discretion.” This is a different form of “immunity” from that granted by most state environmental audit immunity statutes, since, the policy states, this form of immunity may be granted as an exercise of the Maryland Department of the Environment’s enforcement discretion. [The authors state no opinion whether under Maryland law the Maryland Attorney General would have to be a party to the exercise of such enforcement discretion.]
  
7. The Massachusetts Department of Environmental Protection (DEP) will waive completely “punitive” penalties for disclosing entities which meet all the requirements of its policy, one of which concerns cooperation. DEP will reduce punitive penalties by 50% for entities which meet all but one the criteria (the one being the method by which the violation was discovered). Section III (A).
  
8. “Recovery of economic benefit may be waived, however, where DEP determines that it is insignificant.” Section III (A) (2).
  
9. “Cooperation”: “The regulated entity cooperated as requested by Cal/EPA and provided such information as was necessary and requested by Cal/EPA to determine applicability of this policy. Cooperation includes, at a minimum, providing all requested documents, except documents subject to a recognized privilege, such as the attorney-client or attorney work-product privileges, and access to employees and assistance in any further investigations into the violation and other related compliance problems of the regulated entity.” Section D (9).
  
10. “Cooperation”: “The regulated entity cooperates as requested by the Department [of Environmental Protection] and provides such information as is necessary and requested by the Department to determine applicability of this policy. Cooperation includes, at a minimum, providing all requested documents and access to employees and assistance in investigating the violation, any noncompliance problems related to the disclosure, and any environmental consequences related to the violations.” Section C (9).
  
11. Immunity from penalties is provided as long as (in addition to other conditions) the “disclosing person” “fully cooperates with the Department regarding its investigation of the disclosed condition.” Section V (A) (1) (c) (2). “Cooperates” is not defined.

12. “Cooperation”: “The regulated entity cooperates as requested by DEP and provides such information as is necessary and requested by DEP to determine applicability of this policy. Cooperation includes, at a minimum, providing all requested documents and access to employees and assistance in any further investigations into the violation and other related compliance problems of the regulated entity.” Section 4 (i).

13. A civil penalty will not be assessed if, among other requirements, “the regulated entity fully cooperates with the Department [of Natural Resources and Environmental Control] regarding investigation of the disclosed condition.” Section A (4). No definition for “cooperates” is given.

14. “Cooperation”: “The regulated entity cooperates as requested by DEP, and provides such information as is necessary and requested by DEP to determine applicability of this policy. Cooperation includes, at a minimum, providing reasonable site access, all requested documents and access to employees and assistance in investigating the violation, any noncompliance related to the disclosure, and any environmental consequences related to the violations.” Section III (B) (9).

15. The self-disclosure policy does not “affect any criminal liability or penalties.” Section XI.

16. See note 5, supra, in the “Audit Privilege/Immunity Laws” table (Table II). The Minnesota Pollution Control Agency’s (MPCA) policy grants neither immunity from penalties nor privileged status for audit material. It does, however, grant limitations on the frequency of access by the MPCA to audit material; specifically: “The MPCA will not, as a matter of routine procedure, request, inspect or seize environmental audit reports from regulated entities which have conducted environmental audits in good faith.” The policy goes on to list a number of conditions which must be met if an entity is “deemed to have acted in good faith,” one of which reads: “It has cooperated fully and promptly with regulatory authorities in addressing issues of noncompliance.” Section II (A) (2) (c). This “good faith” requirement seems to bear no relation to the requirements outlined in Minnesota’s immunity law (Minn. Stat. §§ 114C.20 - 31 (1997)), and the policy in general applies only to that law insofar as the state’s access to audit material is expanded under the policy.

17. While there is no mention of “cooperation,” the policy does state that to receive a penalty waiver, a disclosing entity must meet the condition (among others) that “the deficiency was not due to a lack of good faith efforts to understand or comply with applicable environmental, health or safety laws, or a lack of good faith efforts to correct past deficiencies.” Section A (1). “Good faith efforts” is not defined.

18. The Department retains the authority, however, “to assess a civil penalty to collect any economic benefit that may have been realized as a result of noncompliance with environmental requirements.” Section A (5).

19. The policy qualifies the ability of the Pennsylvania Department of Environmental Protection to grant these benefits by stating: “As a general rule the Department does not have the ultimate authority to decide whether to pursue criminal actions. The Office of Attorney General has this authority. In some situations the Department has received delegation from the Office of Attorney General to initiate summary criminal actions. The Department also has the authority to refer matters to the Office of Attorney General for investigation.” The policy goes on to state that the Department will not exercise its “limited authority” to “initiate summary criminal matters, or to refer matters to the Attorney General for investigation” if a disclosing entity meets the terms of the policy.

20. The Tennessee Department of Environment and Conservation will waive gravity-based penalties, and/or make no criminal recommendations, if a regulated entity meets a number of conditions, one of which concerns cooperation. In cases in which a disclosing entity meets only some of the conditions, the Department will “consider all of the actions of the entity in assessing any civil penalty.” Section C (1) (a), (1) (b), and (2) (a), and Section D (9). The policy includes both civil and administrative penalties. Section E (3). It should be noted, however, that “significant economic gain” due to noncompliance makes void the terms of the policy.

21. With some relatively minor exceptions, Vermont’s policy is essentially an adoption of U.S. EPA’s self-policing policy; as such, the terms and definitions of the policy are generally the same as those found in the EPA policy. In cases in which a disclosing entity meets all ten requirements, the Vermont Agency of Natural Resources (ANR) will not seek gravity-based penalties, nor will it seek civil or criminal referrals. Vermont’s policy differs from U.S. EPA’s, however, in that not only will ANR not seek gravity-based penalties, it also will not seek penalties based on the economic benefits of noncompliance. In cases in which a disclosing entity meets all but one of the requirements (the one being the method by which the violation was discovered), ANR will seek penalties based on the economic benefits of noncompliance in the amount attributable to 10 V.S.A. Section 8010(b)(5). Section C (1) (a), (1) (b), and (2).

22. While there is no mention of “cooperation,” the policy does state that, as a condition of non-assessment of civil penalties, an entity’s violation must not be due to a “lack of good faith efforts to comply with applicable environmental laws, and correct past deficiencies.” Section 2 (A). “A good faith effort,” the policy states, “exists when the actions taken demonstrate an honest intention to comply with the law. Good faith will not be found when negligence exists or there has been some attempt to gain an economic benefit through non-compliance.” Section 1.

23. See note 7, supra, for the exact language.

24. The entity “making the disclosure” will qualify for the benefits conferred by the policy if the entity “provides a full written description of the condition including a compliance schedule to address the violation and cooperates with the Department regarding its investigation of the disclosed condition.” Sections A (3) and B (3).

25. “Cooperation”: “The regulated entity cooperates as requested by the Department and provides such information as is necessary and requested by the Department to determine applicability of this policy. Cooperation includes, at a minimum, providing all requested documents and access to employees and assistance in investigating the violation, any noncompliance problems related to the disclosure, and any environmental consequences related to the violations.” Section D (9).

26. “Cooperation”: “The person cooperates as requested by ANR and provides such information as is necessary and requested by ANR to determine applicability of this policy.” Section D (10). “Cooperates” is not defined.