Voluntary Measures to Ensure Environmental Compliance

A Review and Analysis of North American Initiatives

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Profile

In North America, we share vital natural resources, including air, oceans and rivers, mountains and forests. Together, these natural resources are the basis of a rich network of ecosystems, which sustain our livelihoods and well-being. If they are to continue being a source of future life and prosperity, these resources must be protected. This stewardship of the North American environment is a responsibility shared by Canada, Mexico and the United States.

The Commission for Environmental Cooperation (CEC) is an international organization whose members are Canada, Mexico and the United States. The CEC was created under the North American Agreement on Environmental Cooperation (NAAEC) to address regional environmental concerns, help prevent potential trade and environmental conflicts and promote the effective enforcement of environmental law. The Agreement complements the environmental provisions established in the North American Free Trade Agreement (NAFTA).

The CEC accomplishes its work through the combined efforts of its three principal components: the Council, the Secretariat and the Joint Public Advisory Committee (JPAC). The Council is the governing body of the CEC and is composed of the highest-level environmental authorities from each of the three countries. The Secretariat implements the annual work program and provides administrative, technical and operational support to the Council. The Joint Public Advisory Committee is composed of fifteen citizens, five from each of the three countries, and advises the Council on any matter within the scope of the Agreement.

Mission

The CEC facilitates cooperation and public participation to foster conservation, protection and enhancement of the North American environment for the benefit of present and future generations, in the context of increasing economic, trade and social links among Canada, Mexico and the United States.

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- for the Canada Country Report: Dr. Dianne Saxe and John Moffet of Resource Futures International. Darlene Pearson assisted with revisions to the section on ISO 14000.
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We are also grateful to the many government officials who assisted the Secretariat in the selection of the voluntary mechanisms for review, in participating in interviews and in reviewing report drafts. The North American Working Group on Environmental Enforcement and Compliance Cooperation gave generous assistance and cooperation in ensuring that the three studies accurately reflected current law, policy and practice. We are similarly appreciative of the many government officials and others who shared information and insights about their innovative programs. It will be understood that the information and opinions contained herein are those of the authors and do not necessarily reflect the views of the governments of Canada, Mexico or the United States or of the CEC.

We hope the studies will provide a useful contribution to the continuing North American dialogue about voluntary approaches to compliance and lead to the implementation of effective environmental enforcement and compliance programs. Since the date of the initiation of the voluntary compliance project, a number of related initiatives have been sponsored by the CEC, including the 1996 North American Dialogue on Environmental Law and the regional public consultation led by the CEC Joint Public Advisory Committee (JPAC). Proceedings of both dialogues can be reviewed on the CEC homepage: <http://www.cec.org>.

Linda F. Duncan
Head, Law and Enforcement Cooperation Program
Commission for Environmental Cooperation

Preface

Background to the CEC Voluntary Compliance Project

These studies were commissioned by the CEC Secretariat in 1995 in response to considerable interest expressed by the North American public, regulated industry and government agencies about the proliferation of a broad spectrum of "voluntary" approaches to environmental compliance. Our research indicated that voluntary mechanisms encompassed a broad spectrum of private and public initiatives. Those mechanisms initiated by the private sector were usually directed at improving environmental performance, reducing pollution control costs or ensuring competitiveness. Government-initiated programs were generally authorized by law or policy as a complement to more traditional enforcement responses. In some instances, the programs provided incentives to industries that exceed regulatory standards, while others would replace regulatory controls.

Focus and Objectives of the Project

In determining the focus of the studies in this project, the CEC Secretariat decided it would be appropriate to concentrate on the commitments and obligations under the North American Agreement on Environmental Cooperation (NAAEC). The NAAEC obligates the Parties to effective enforcement of their respective environment laws, with the aim of achieving high levels of environmental protection and compliance through appropriate government action. Further, it prescribes a framework for effective enforcement which, in addition to more traditional enforcement activities, includes "seeking assurances of voluntary compliance and compliance agreements" and "promoting environmental audits." The review therefore focuses on a survey of experiences of North American environmental enforcement agencies in using voluntary initiatives as a component of their environmental enforcement and compliance strategies. Consistent with the NAAEC objective, these studies aim to:

- increase public knowledge about the use of voluntary approaches to environmental compliance, and
- support the Parties in their pursuit of improved mechanisms for enforcing environmental laws and enhancing the record of compliance.

Methodology

To undertake the studies, the Secretariat brought together a team of North American lawyers and other experts with extensive knowledge and expertise in environmental enforcement. The first challenge faced by the team was defining the term "voluntary compliance." It became evident that "voluntary compliance" encompasses a broad spectrum of initiatives or measures, from industry-formulated and implemented codes of practice external to the regulatory system, to a broad array of government-initiated alternative routes for achieving compliance. The team then set about attempting to categorize the array of initiatives.

One category included privatization of enforcement responsibilities (e.g., monitoring, inspection), through a delegation of compliance roles from government to industry, the community or a third party. A second category included environmental trade-offs or mechanisms for opting out of binding provisions. Under these mechanisms a facility is exempted from legal requirements in return for agreeing to a binding undertaking to achieve the same environmental objective through an alternative route. A third category of "voluntary" mechanisms included activities initiated solely at the volition of a regulated party, which may improve the potential for compliance with legal obligations, for example, environmental audits or ISO 14001. A fourth category of "voluntary" initiatives was

agreed to include actions initiated by private parties to improve environmental performance, but not necessarily first and foremost to ensure compliance with legally prescribed environmental standards or procedures.

As the focus of the study was evaluation of experiences in utilizing "voluntary approaches" for enhancing compliance with environmental laws, the review focused on only those categories of voluntary mechanisms. Consequently, the selected mechanisms were either directed at effecting compliance, exceeding compliance or in some cases providing alternative means for measuring compliance. The information about the selected mechanisms, which is contained in these studies, is for the most part based on interviews with the government officials responsible for their implementation, or drawn from documents or reports related to those mechanisms. Every attempt was made to describe accurately the purpose and intent of the voluntary mechanisms and to convey the perspectives of the agencies who were interviewed.

Study Criteria

For the purpose of evaluating a particular voluntary mechanism, the team of consultants established the following criteria reflective of the NAAEC enforcement framework and principles:

1. Legal Authority—Is there statutory authority for use of the mechanism and, if so, were policies and procedure legally prescribed for its use and application?

2. Efficacy as a measure for improving compliance—What has been the effect of the mechanism on regulatory compliance levels?

3. Relationship and effect on other enforcement and compliance programs, polices and responses—Who has authority or responsibility for developing and applying the mechanism? Is it under the direction of the enforcement agency? Have real or potential conflicts with other enforcement and compliance mechanisms been considered and addressed? Is the issue of officially induced error addressed? Is there potential for agency capture? Does the mechanism affect the probability of regulatory negligence?

4. Impact on standard of care—What is the impact on the standard of care for the regulated industry (the issue of due diligence), or on the ability of government to meet its obligations to enforce the law or generally to protect the environment or human health? What, if any, is the effect on mistake of fact or law?

5. Third-party impacts—Is there transparency in the process of applying the mechanism? Are there provisions for rights of appeals or for ensuring accountability in use of the mechanism? Is there any process for evaluating and reporting on compliance impacts? Are common law remedies affected?

6. Accountability—Does the introduction of the mechanism result in any shift in accountability for enforcement and compliance?

7. Fairness—Does the nature or application of the mechanism introduce any unfairness or inequity amongst sectors, individual regulatees or jurisdictions? If so, have those issues been

addressed? Does it impact on the “level playing field”? Does it address the potential for “free-riders”?

The consultants endeavored take into account the relevance of these criteria to the unique legal and policy context within which each mechanism evolved. Except where otherwise specifically stated, the evaluation of the mechanisms represents the opinions of the consultant team. Variations in style and approach to the application of the criteria are reflective of the unique analytical approaches of the members of the study team. Lastly, while every effort was made to provide timely and accurate information, due to the length of time taken in preparing the study, some material may be dated.

Canada

Canada

1 Introduction

> The appropriate measure of the success of environmental law is not the number of convictions obtained in a year, or the dollar value of the fines[....]Environmental law should aim at least to preserve, and perhaps to improve, the existing environmental quality[....]Compliance by the violator in a timely manner, without further intervention or violations, is the desired result.[1]

Today, as governments face a compelling need to do more with less, they are searching for ways to motivate more "compliance" with less publicly funded enforcement. This report analyses and critiques how Canadian jurisdictions use voluntary compliance as a component of environmental enforcement.

Section 2 of this report briefly summarizes the Canadian environmental legislative framework. Section 3 introduces the concept of "voluntary compliance" in the context of Canadian environmental law. The next six sections examine particular initiatives now being used or considered by Canadian regulators. This review is not intended to be exhaustive, but focuses on six representative approaches from across Canada:

- compliance policies that permit compliance plans and agreements (Section 4);
- statutory authority for regulatory exemptions (Section 5);
- lender liability exemption agreements (Section 6);
- audit privilege policies (Section 7);
- ISO 14000 certification (Section 8); and
- pollution prevention memoranda of understanding (Section 9).

These approaches share key themes and raise related problems. While Sections 4 and 5 review practices and provisions specifically designed to encourage individual parties subject to environmental regulation to develop plans ensuring compliance, Section 6 reviews a recent effort by the federal government to develop broad authorization for parties subject to a wide range of regulatory obligations to negotiate alternative compliance obligations.

Sections 7 and 8 also review closely related subjects. The discussion of government policies vis-à-vis environmental self audits in Section 7 highlights the relationships between these policies and the previously described policies on compliance plans and agreements. Section 8 then emphasizes the relationship between self auditing and broader initiatives to promote environmental management systems, such as ISO 14000.

Finally, Section 9 reviews some of the recent federal and provincial initiatives to promote environmental memoranda of understanding (MOUs) supporting pollution prevention. While conceptually distinct from each of the above measures, MOUs raise many similar issues—for example, the relationship of voluntary measures to existing compliance obligations, and the need for transparency and accountability in government-supported non-regulatory initiatives.

[1] Government of New Brunswick 1994.

The current interest in voluntary compliance in all three NAFTA countries stems from a combination of powerful forces that no regulator can ignore. One of the major forces is economic, in these days of cutbacks and restraint. Voluntary compliance measures are widely believed to offer savings by:

- reducing resource costs for the regulatory authority;[2]
- reducing costs for the regulated community, by enhancing flexibility for compliance and avoiding unproductive expenditures;
- redirecting resources from lawyers and other defense costs into measures that protect the environment; and
- reducing demands on the judicial system (including courts and administrative tribunals).

Other major forces behind the development and promotion of voluntary measures in Canada include:

- Environmental problems have evolved from those that are primarily local and caused by major polluters, to those that are more diffuse and have numerous sources. This has led to a corresponding expansion in the number and scope of environmental regulations, and in those to whom they apply. A primary focus on punishment and prosecution was manageable, when environmental "offenders" were a relatively small group with bad intentions. However, the amount of punishing to be done soars, and the perceived social benefit plunges, when "offenders" are ubiquitous.[3]
- In sharp contrast to twenty years ago, environmental standards are now accepted as normative by most regulated communities. Many "offenders" already believe that environmental protection is important; most will comply if they know what is required of them. Therefore, prosecution and punishment may not be required to induce appropriate attitudes or behavior. In contrast, much can be lost by punishing the well-intentioned.
- The growing recognition of the limits of "command-control" in producing desired results. Governments have limited resources, limited control over other economic factors, and imperfect knowledge about their behavior. Instead of being a powerful and omniscient "father," government is merely one (limited) set of forces among many.[4]
- The earlier emphasis on end-of-pipe control has shifted to an emphasis on pollution prevention. Pollution prevention is flexible, proactive, and closely integrated with ongoing business management. An essential part of pollution prevention is the internalization of responsibility for environmental outcomes. An emphasis on voluntary measures can enhance this internalization of responsibility; emphasis on compliance with specific government-prescribed methods of pollution control can undermine it.

[2] In individual cases, voluntary measures may cost much less than a prosecution or administrative hearing. However, it is not clear that regulators will have overall reductions in cost as a result. This will require further study.

[3] This is obviously related to the issue of resources.

[4] See Teubner 1983, and Bregman and Jacobson 1994.

- Initiatives to promote voluntary activities may be able to harness powerful economic forces favoring improved environmental performance. These forces include the trade, market and public relations advantages of a good environmental reputation, particularly environmental leadership, and the financial benefits of effective pollution prevention.[5]

In responding to these forces, many governments are struggling to integrate voluntary compliance mechanisms into their overall strategy for effective enforcement. This means that, at least in some sectors and for some potential offenders, governments want to help create a context in which businesses, in their own self interest, will choose to comply. In ecological terms, this re-imagines government more as a gardener than as a policeman.[6]

These advantages cannot be realized unless governments take active steps to change how they regulate, and how they manage regulation. There are also substantial risks, however—including potentially reduced effectiveness, transparency and accountability. This study describes some of these changes, and some of these risks.

[5] Private sector action may be stimulated by potential savings in reduced input and waste disposal costs, concerns about public image, individual leadership, employee action, and pressure from consumers, investors, insurers and lenders (Grabosky 1994; Schmidheiny 1992; Roy 1992). A number of economists are now questioning the extent to which companies will continue to be able to experience "win-win" opportunities, arguing that many of the most obvious environmental inefficiencies have now been eliminated (Whalley and Whitehead 1994). Governments can also play a variety of roles in promoting environmentally sound behavior. Regulations can ensure compliance with basic environmental objectives. Indeed, a recent survey of large Canadian businesses confirmed that regulatory compliance remains the most important factor influencing corporate environmental behavior (KPMG 1994). As one would expect, however, the relative influence of different factors appears to vary in practice from sector to sector. The experience with the Accelerated Reduction of Toxics program (ARET) suggests that some sectors can be influenced significantly by public challenges and reporting requirements. In some cases economic instruments can create incentives for ongoing improvements. Subsidies and research and development efforts can foster the development and dissemination of beneficial technologies. Information and education programs can promote values and knowledge about opportunities. Certification programs can ensure the integrity of information to consumers about green products. Standards and requirements for more open reporting can enhance accountability. And scientific monitoring can track environmental conditions and inform policy decision making.

[6] Its primary goal would be to transform the business community from primitive ecosystem of "weeds" requiring constant external control, to a diverse, stable, and self-sustaining "forest" (Hawkens 1994).

2 Jurisdiction and Mandate for the Environment

In Canada, both federal and provincial governments have legislative and regulatory authority over the environment, as well as an important leadership role in integrating the environment and the economy. In the Canadian Constitution, the "environment" as such is not specifically mentioned. However, in practice, each level of government has jurisdictional powers which are important for effective environmental management.

Responsibilities are based on the allocation of powers related to the environment. Federal environmental responsibility has been derived from a number of powers especially related to fisheries, interprovincial and international trade and commerce, criminal law and peace, order and good government. Key provincial environmental responsibilities derive from, among other things, jurisdiction over the management of resources, property and civil rights, and local works and undertakings. Agriculture in Canada is defined as a shared federal-provincial responsibility.

2.1 Federal Environmental Legislation

The federal government administers a wide range of laws: some designed expressly to protect the environment and others intended to regulate specific activities or businesses and containing environmental protection provisions.[7] Some statutes, such as the Canadian Environmental Protection Act (CEPA), are designed to prevent pollution of all media, including air, water and land, during all phases of the life cycles of products, from their importation and/or manufacture to their ultimate disposal. Some—like the Arctic Waters Pollution Prevention Act, the National Parks Act, the Canada Wildlife Act, the Migratory Birds Convention Act, the Fisheries Act, and the Oil and Gas Production and Conservation Act—protect specific natural resources. Some, like the Canada Water Act, are ecosystem planning tools. Others regulate specific hazardous products and activities, such as the manufacture of pesticides and radiation-emitting devices, the modification of weather, the installation of air pollution equipment on motor vehicles, the production of atomic energy, and the transportation of dangerous goods. Others regulate transportation in general or specific modes of transportation, such as railways, shipping or aeronautics.

2.2 Provincial Environmental Legislation

Due to their constitutional jurisdiction over "property and civil rights," the provinces have the principal jurisdiction for most domestic environmental matters. Therefore, most of the enterprises that would be candidates for voluntary compliance measures deal principally with provincial environmental laws.

Each of the provinces has adopted one or more environmental statutes. These statutes contain a range of measures, usually including the following:

[7] Note that the CEC has compiled a comprehensive list of Canadian environmental laws. These can be accessed on the Internet at <http://www.cec.org>.

[8] These prohibitions are normally enforced by prosecution.

- generally worded prohibitions against pollution, such as: "no person shall discharge or cause or permit the discharge into the natural environment of a contaminant that causes an adverse effect;"[8]
- licensing provisions, requiring permits in order to carry on activities that may have adverse effects on the environment;
- provisions for administrative orders, by which regulators can order people and organizations to protect or remediate the environment; and
- requirements for the conduct of environmental assessments prior to construction of major projects.

In 1985, Ontario was the first of the provinces to develop an aggressive enforcement program. Since that time, most of the other provinces have become more active and successful in their environmental enforcement programs. There are now hundreds of environmental prosecutions each year across Canada. Taken together with other factors, including the exposure of banks to the environmental liabilities of their debtors, these programs have been very effective in increasing the attention given to environmental matters by businesses. However, environmental regulators are now facing severe resource constraints, some responding by sharply reducing their enforcement programs and exploring alternative approaches to compliance.

3 What Is Voluntary Compliance?

3.1 What is "Voluntary"?

The team conducting the study, and almost everyone interviewed for it, had great difficulty with the term "voluntary compliance." "Voluntary compliance," to some, is an oxymoron. It is also a term with many potential meanings. "Compliance" intrinsically refers to obedience to a legal norm, and is therefore always "required by law." In that sense, how can "compliance" ever be "voluntary"?

"Voluntary compliance" makes sense if we focus on the degree to which government enforcement resources must be expended in the battle for regulatory compliance.[9] Compliance is not "voluntary" when it is obtained through directing the coercive power of the state at a particular polluter, e.g., through a control order or prosecution. Compliance may be referred to as "voluntary" when it is achieved without the individualized application of such force. This is how the term is generally used in Canada. For example, the compliance guidelines of several Canadian ministries of the environment permit regulators to use "voluntary compliance measures" to resolve problems of non-compliance. By this they mean any act or acts that will rectify the problem and improve the company's compliance, short of individualized compulsion.

Another way of looking at "voluntary compliance" is to focus on what governments must do so that companies will "voluntarily" choose to stay in compliance. In other words, it is what must governments do so that companies will chose compliance because it is in their own self interest.[10]

3.2 What is "Compliance"?

Discussions of "voluntary compliance" may also be hindered by the absence of a common understanding of the word "compliance." The general public, and some regulators, understand "compliance" in the sense of obeying a speed limit or the Criminal Code. That is, they make two assumptions:

- everyone knows whether or not they are "in compliance," and
- anyone who wants to be "in compliance," can be.

Unfortunately, neither of these common sense assumptions is reliably correct for environmental law as it has developed in Canada. They are true for non-compliance with some relatively simple requirements, such as obtaining a permit before installing certain equipment, or respecting quantitative limits on pollutant emissions where there is effective and reliable technology to do so.

However, this simplicity is more the exception than the rule. Almost all environmental offenses are public welfare offenses of strict liability. This means that *mens rea* (intention) is not an element of the offense.[11] Canadian prosecutors can show that a person has breached the law merely by evidence that some contaminant (including noise or odors) has escaped and had an adverse effect.

[9] This is now a critical focus for most Canadian jurisdictions struggling under huge government debts and forced to reduce their expenditures substantially.

[10] Such considerations differ from measures that are strictly "voluntary," i.e., independent of issues of compliance. The latter are not the subject of this study since, by definition, they are not part of the duty of NAFTA governments to enforce their own laws effectively.

[11] Some scholars argue that the Charter does not permit imprisonment for any offense unless *mens rea* is an element of guilt. They suggest, therefore, that all strict liability offenses punishable by imprisonment are unconstitutional (see Brudner 1990). If this argument is correct, all Ontario offenses of actual pollution, and many federal offenses as well, are unconstitutional. Not surprisingly, the courts have not been receptive to this argument.

A review of Canadian prosecution summaries shows that a high proportion of "non-compliance" is unintended, and was often unforeseen until it occurred. That is, the offender fell into non-compliance because of an unintended and unexpected spill, leak, overflow, pump breakdown or similar failure. If asked the moment before the incident occurred, many such companies would have considered themselves to be "in compliance." There may be no business or government in Canada that can be absolutely confident it is in "full compliance," if by that one means that it will have no emissions due to accidents, employee errors or equipment failures.

The principal defense available to a defendant is to show "due diligence"—i.e., that it had taken reasonable precautions to prevent the offense.[12] A company that has exercised due diligence will have fewer accidents, cause less environmental degradation, and perhaps be more efficient and competitive. Even when it does cause pollution, a duly diligent company will not have committed any "offense," and therefore must be considered "in compliance" with what the law requires. As a result, there is a substantial, although not complete, equivalence between the concepts of "compliance" and of "due diligence."[13]

3.3 What is "Due Diligence"?

It is surprisingly difficult to define "due diligence"; in some ways, it gets more difficult as time goes on. Can anyone reliably tell when they have it? How much is enough?

In the early days of environmental regulation in Canada, due diligence seemed no more than common sense: it was not good common sense to store waste acids in steel tanks that are prone to acidic corrosion, to pour untreated sewage into a river, or to process flammable materials while smoking. For less complicated businesses, it continues to be this simple. However, it is more difficult to define due diligence for larger, more complex businesses. In such organizations, defining and maintaining due diligence to comply with environmental, health and safety, product safety, tax, securities and other requirements is a matter of constant juggling, where there are an infinite number of things that can go wrong and only finite resources to manage them. the most definite thing that can be said is that the individual circumstances play a large role. The care warranted in each case is principally governed by the likelihood of harm, the gravity of it, the available alternatives, the skill required, and the extent [to which] the accused could control the causal elements of the offense.[14]

Thus, for the large number of well-intentioned businesses desiring to be in compliance but needing to be prudent with their expenditures, a commitment to due diligence merely amounts to asking the question, "how much is enough?"[15] Part of the task of promoting voluntary compliance is therefore the necessity of defining due diligence as a concept.

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[12] *R.* v. *Sault Ste. Marie* (1978), 40 C.C.C. (2d) 353 (S.C.C.).

[13] In environmental audits and other internal measures of environmental "compliance," "due diligence" is often all that can be measured. However, the concepts are not co-extensive: non-compliance can and does occur even to companies that are duly diligent, particularly those saddled with old facilities. Due diligence may also be insufficient to achieve compliance where the technology to avoid exceednaces does not exist or is not infallible. For example, INCO is required by its control order to avoid creating specified levels of sulfur dioxide at ground level. Under normal operating conditions and normal weather conditions, this is no problem. However, under certain weather condition, stack emissions drop directly on the town and exceed air quality standards. When this happens, INCO's only recourse is to cut back on production or shut down completely. Therefore, one of INCO's principal pollution control technologies is its weather forecasting office. Despite the best-trained staff and the most up-to-date equipment, weather forecasting is an inexact science, and the weather does sometimes change unexpectedly.

[14] *R.* v. *Placer Developments, Ltd.* (1983), 13 C.E.L.R. 42 (Yuk. Terr. Ct.)*; R.*v. *Gonder* (1981), 62 C.C.C. (2d) 326.

[15] The question is made more difficult since due diligence is evaluated in hindsight by regulators and judges, few of whom have ever run a comparable business.

4 Compliance Plans and Agreements

"Compliance plan" refers to a proposal, made by a regulated business to a regulator, describing its plan for resolving a problem of non-compliance. "Compliance agreements" are plans which have been accepted by regulators and crystallized into a legally binding contract.[16] They are the mechanisms most often intended when Canadian regulators talk of "voluntary compliance measures." This section examines the role given to compliance plans or agreements in Canadian environmental enforcement laws and policies.

4.1 Federal Government Proposals

The Canadian Environmental Protection Act (CEPA) does not specifically refer to "voluntary compliance" in its Enforcement and Compliance Policy. It allows enforcement officials limited discretion to respond to non-compliance with measures other than prosecution. Instead of inviting an offender to submit a proposal for returning to compliance, federal inspectors are limited to giving written warnings.[17] Warnings may be used when the degree of harm or potential harm to the environment, human life or health appears to be "minimal." The regulator must consider the nature of the violation and the effectiveness of a warning in enjoining the violator to achieve compliance. Factors to be considered include the violator's history of compliance and willingness to cooperate, any corrective or enforcement action already taken, and the importance of consistency.

In December 1995, the federal government announced its intention to amend CEPA to include negotiated settlements as part of its new, integrated approach to compliance and enforcement:[18]

> The term "negotiated settlement" refers to an agreement reached between a regulatee and a regulator. The goal of negotiated settlements is to increase compliance and decrease the need to prosecute or seek an injunction. The settlement is made after the regulatee has been found to have broken the law, in this case, CEPA and/or its accompanying regulations. Instead of prosecuting or taking another enforcement action, the regulator negotiates with the regulatee to identify the steps that the regulatee will take to ensure that another violation will not occur. The agreement takes as a starting point that the regulatee will correct the violation. It is important to note that compliance with the law is not negotiable—the regulatee must comply. The only thing being negotiated is the steps that the regulatee will take to return to a state of compliance with the law and to ensure that the violation does not recur.
>
> Negotiated settlements offer the regulatee and the regulator an opportunity to agree on such things, as, for example, the regulatee's commitment to set up better monitoring mechanisms, improve pollution prevention or pollution control measures, or changes to the production process to reduce the possibility of future offenses. Negotiated settlements can also specify the type of corrective measures that the regulatee will take to clean up environmental damage resulting from the offense or the restitution that the regulatee will offer. Settlements can include a time frame for the regulatee's actions, a requirement to file status reports with the regulator, and a list of specific consequences if the regulatee fails to live up to the terms of the settlement. Negotiated settlements do not stand alone. Under a renewed CEPA, they would be one enforcement mechanism among a spectrum of

[16] The binding, contractual nature of these agreements does generater some dispute about whether they are truly "voluntary." This is part of the oxymoron problem discussed above.

[17] There is also some controversy about whether warnings are properly considered part of "enforcement" or part of "voluntary compliance." It was a major step in the development of "taking enforcement seriously" when "warnings" of non-compliance became a formalized, written step in the enforcement response to non-compliance, and incorporated a real threat of further government action if the non-compliance were not corrected. Thus, responses to warnings are not wholly "voluntary" in that they are motivated by a threat of individualized coercion by the state. On the other hand, they are included here because they represent government action that can induce compliance without coercion actually having to occur.

[18] Government of Canada 1995b, excerpt from Ch. 5.

> options and would be used in conjunction with an administrative penalty scheme either to supplement the monetary penalty or to replace it.
>
> As is the case with administrative monetary penalties, negotiated settlements in various forms, including assurances of voluntary compliance, compliance plans, consent orders and consent agreements, are not new to North American law. For example, such assurances are used in Canada in provinces such as British Columbia, Newfoundland and Quebec in relation to business and trade practices. Compliance plans exist under the Ontario Occupational Health and Safety Act. Consent agreements are found in the federal Canadian Human Rights Act and Competition Act, and both the Ontario Business Practices Act and Discriminatory Business Practices Act. The Alberta Agricultural Service Board Act provides for "negotiations." The US Environmental Protection Agency uses consent orders and consent agreements.

Negotiated settlements under CEPA could include terms such as:

> [...]the regulatee's admission that a violation occurred; a plan setting out how the regulatee would try to ensure that another violation does not occur; the understanding that a regulatee's failure to respect the terms of a negotiated settlement is itself a violation; the understanding that, if the regulatee fails to follow the terms of the settlement, the regulator will take immediate, formal action; an agreement that the negotiated settlements will be part of the public record; an agreement that the regulatee will file periodic status reports with the regulator, which will be part of the public record, to show how the regulatee is fulfilling the terms of the negotiated settlement; and an agreement that the parties can re-negotiate the settlement if circumstances change.

The federal government also announced its intention to amend CEPA to include the related concept of "pollution prevention plans":[19]

> [...]
>
> The intent of the "pollution prevention" part of a renewed CEPA would be to shift the focus of environmental protection activities towards avoiding or minimizing the creation of pollutants and wastes rather than trying to manage them or clean them up after they have been created. Its goal is to turn thinking away from pollution control and waste treatment as preferred mechanisms for protecting the environment. Canadians would be encouraged to adopt "preventive environmental care" which encourages environmental and economic efficiencies through waste reduction and measures to avoid the creation of pollutants as early in an activity as possible. This approach would guide changes to existing activities and influence decision-making right from the conception, design and planning stages of new activities.
>
> [...]
>
> 6.3 The Government further proposes to amend CEPA to enable the Minister to require preparation and implementation of pollution prevention plans where there is an infraction of a CEPA regulation or where there is a finding of liability under the administrative monetary penalty system, which is also proposed to be included in CEPA.
>
> [...]
>
> 6.4 The "pollution prevention" part of a renewed CEPA proposes to provide authority for the Minister to formulate a model pollution prevention plan in the form of a guideline. The guideline could be expected to contain the following components:
>
> - a senior-level statement of commitment to prepare and implement the pollution prevention plan;
> - a clear statement of the objectives and environmental goals for the plan, and a schedule for meeting those goals;

[19] *Ibid.*, excerpt from Ch. 6.

- a comprehensive quantitative review of all activities including purchasing, processing, producing, generating, distributing, treating, disposing, or releasing of the substance(s) for which the plan is required;
- an identification, feasibility study, and ranking of opportunities to avoid or minimize the production, generation, or release of the substance(s) in all activities identified above;
- a selection of options to meet the environmental goals for the plan and preparation of a schedule for the implementation of the selected options;
- implementation of the selected options; measurement, tracking and evaluation of their success; and
- reporting on progress towards environmental goals.

6.5 Where a person is required to prepare a pollution prevention plan as outlined above, it is proposed that the person would be required to submit, within a specified time limit, a formal declaration to the Minister, indicating that a pollution prevention plan has been prepared in accordance with the guideline and the notice in the *Canada Gazette*. CEPA would also be revised such that failure to submit the declaration or submission of a false declaration, would be an offense.

4.2 Yukon Environment Act

The first statute in Canada to mention voluntary compliance expressly is s. 158 of the Yukon Environment Act.[20] It states:

1. An environmental protection officer may issue a notice of non-compliance to a person where the environmental protection officer believes that the person, or a development or activity under the person's control, is not in compliance with this Act, the regulations or a permit, order or direction.

2. A notice under Subsection (1) shall state (a) the nature of the non-compliance; (b) a request for voluntary compliance; (c) the steps which should be taken to achieve compliance; and (d) the date by which compliance should be effected.

This approach is perhaps more akin to a "warning," because the alleged offender plays no express role in defining its "voluntary compliance." It is similar to other voluntary compliance plans in that it is used to specify what the offender must do to reach compliance, and because of its emphasis on "voluntary" action. The provision makes no mention of prosecution immunity, but it does attempt to "shame" offenders by publishing their names:

3. The Minister may establish a public register of notices of non-compliance and, where such a register is established, shall cause a copy of every active notice of non-compliance to be placed on the register.

4. A register established under Subsection (3) shall be accessible to the public without charge during normal business hours at an office of the Government of the Yukon to be specified by the Minister.

5. Where an environmental protection officer is satisfied that a person to whom a notice of non-compliance was issued under Subsection (1) has effected compliance pursuant to the notice, he or she shall withdraw the notice of non-compliance and the Minister shall then cause the copy of the notice to be removed from the public register.

6. The Minister may cause all or part of the public register to be published.

[20] S.Y. 1991, c. 5.

The Yukon Enforcement and Compliance Policy mentions voluntary compliance plans when describing the range of enforcement responses available to enforcement personnel, from written warnings to prosecution.[21] When selecting a response from this range, regulators are required to consider:

- the nature of the violation,
- the offender's history of compliance,
- the expected effectiveness of the measure in achieving compliance, and
- consistency with other situations.

4.3 Ontario

4.3.1 Compliance Guidelines

The Ontario Ministry of the Environment and Energy (MOEE) compliance guideline gives an important role to compliance plans when front-line abatement officers exercise their enforcement discretion. It:

> documents the ministry's approach and provides guidance to ministry staff for achieving and maintaining province-wide compliance with its legislation and regulations[....It] describes how the ministry uses both abatement and enforcement to achieve compliance, and[...]sets out[...]the principles governing the ministry's enforcement of laws[....]

When faced with a problem of non-compliance, each officer must decide how to respond, and whether to invoke mandatory compliance measures (such as prosecution or control orders). In some cases, the guideline allows the officers to attempt to elicit "voluntary" compliance without coercive mandatory measures. As a first step, each situation of "non-compliance" must be evaluated and categorized. Immediate Ministry action is required and specified in cases of:

1. spills or similar emergencies.
2. immediate danger to human life, health or property, and
3. cases which require further investigation before the officer can judge whether there may be an immediate danger to human life, health or property.

In those cases where there is no emergency, and no immediate danger to human life, health or property, the provincial officer must assess whether voluntary or mandatory compliance measures should be used. The guidelines set out numerous criteria for not selecting voluntary compliance measures. If the officer attempts voluntary compliance even when these criteria apply, s/he must justify this approach in a memo placed in the ministry file. The criteria for not attempting voluntary compliance measures fall into two categories:

1. The seriousness of the impact of the non-compliance.[22]
2. The attitude of the offender.

This second criterion is expressed in several overlapping ways, each attempting to distinguish the well-intentioned offender, who is generally trying to achieve compliance, from one whose inten-

[21] Government of Yukon 1993.

[22] This is a reasonable and appropriate criterion: the greater the risk of causing material harm to people or the environment, the more important it is that the non-compliance be halted immediately.

tions are not good, but is simply trying to get away with something. To distinguish one from the other, the officer is instructed to consider:

1. the offender's compliance history, including previous occurrences of this violation and other compliance problems;
2. the cause of the particular violation, i.e., whether it was deliberate, negligent, or non negligent;
3. whether the offender shows an interest in and commitment to voluntary compliance;
4. whether similar voluntary approaches have succeeded or failed in the past; and
5. whether the offender's general operations are in compliance with its Ministry permits. [A person who makes a habit of complying with Ministry requirements is a better candidate for voluntary compliance than one who does not.]

If the officer decides that voluntary compliance measures should be attempted, s/he explains to the offender what s/he considers to be out of compliance and requests that the offender make a detailed plan to resolve it. The officer's request must be made or confirmed in writing; the offender must respond in writing, within at most thirty days. If a compliance plan is received on time, the guideline sets out criteria for assessing whether the response is adequate, i.e., whether the officer has reasonable confidence that compliance will be achieved. If the officer is satisfied with the plan, s/he should follow up later to see if the desired result was achieved. Some extensions to plan deadlines can be granted for good reason and when documented in writing, but mandatory compliance measures must be instituted if progress is unsatisfactory for more than six months or after two written warnings have been given.

4.3.2 Program Approvals

Compliance agreements are more formal versions of compliance plans which are formally approved or accepted by the regulator. They are contracts which exchange a limited statutory immunity from prosecution for agreed compliance measures.

Compliance agreements with polluters have been provided for in at least two Canadian environmental statutes. The key features of these compliance agreements are:

- a regulator need not have proof that the company is out of compliance;
- the company's proposal need not be restricted to reaching compliance; and
- the company is immune from prosecution for the matters covered by the agreement, as long as it complies with the agreement.

The earliest statutory provision of this type was s. 10 of the Ontario Environmental Protection Act,[23] adopted in 1971:

> 10.- (1) A person responsible for a source of contaminant may submit to the Director a program to prevent or to reduce and control the discharge into the natural environment of any contaminant from the source of contaminant. (2) When a program referred to in Subsection (1) is submitted to the Director, the Director may, with the consent of the Minister, refer the program to the Environ-

[23] RSO 1990, c. E.19.

[24] This is not the same as the Canadian Environmental Council established by the Standards Council of Canada for the purposes of ISO 14000. The "Environmental Council" referred to in the Environmental Protection Act was

(continued next page)

> mental Council for its consideration and advice.[24] (3) The Director may issue a program approval, directed to the person who submitted the program.
>
> 11.- (1) The Director shall, in a program approval, (a) set out the name of the person to whom the approval is directed; (b) set out the location and nature of the source of contaminant, (c) set out the details of the program, and (d) approve the program.

A person who complies fully with a program approval is immune from prosecution for the matters dealt with under the program.

Program approvals were designed to encourage businesses to move gradually towards improved compliance with the Act and regulations. Program approvals were originally designed for those businesses that took the initiative and wished to abate their polluting discharges, whereas control orders were designed to be imposed upon the recalcitrant. Because improved environmental controls may require considerable time and expense, businesses that undertake improvement programs were offered the important advantage of immunity from prosecution. Such immunity also applies to those who comply with orders.

In the early years of the Environmental Protection Act, program approvals were relatively numerous and mandatory orders relatively few. About five or ten formal program approvals were issued per year in the 1970s, as the MOEE threatened, cajoled, and bargained with the major polluters of the day. Although at that time prosecutions were few and fines modest, immunity from prosecution was an important bargaining tool and one that a formal program approval did provide. As a result of these approvals, of public pressure, and some high-profile prosecutions, some major polluters did substantially reduce their more visible emissions.[25]

In the second decade of MOEE's existence, program approvals fell into disuse. Because program approvals are not based upon proof that the business was breaking the law, it is not a punishable offense to fail to implement a program approval.[26] At worst, a defaulting business would lose the prosecution immunity that the program would have purchased for it, and could be directly prosecuted for any offenses it had committed. However, the MOEE may have failed to gather the necessary evidence. In practice, there were many cases in which the agreed deadlines were not met, or where agreed upon technologies did not adequately resolve a problem. Regulators were regularly accused of being "soft" on polluters. Some companies received one program approval after another, making little significant progress, without ever being sanctioned for their behavior, until the MOEE finally turned to prosecution.[27]

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[24] *(continuation)*

intended as a council of experts, and was the 1970s equivalent of public consultation. In fact, this council was never appointed.

[25] See, for example, the Abitibi Paper case discussed in Section 4.11.2 below.

[26] While breach of an order or of a certificate of approval is an offense (s. 186(2)), breach of a program approval is not. The only consequence of breaching a program approval is loss of the protection from prosecution granted by s. 186(4).

[27] *R.* v. *Union Carbide Canada Ltd* (1974), 20 C.C.C. (2d) 374, 6 O.R. (2d) 50 (Co. Ct.): A program approval or order provides protection from prosecution only in relation to the particular equipment or operation specifically governed by the approval or order. *R.* v. *Toronto Refiners and Smelters Ltd.* (6 October 1987), (Ont. C.A) [unreported]: Compliance with a program approval or order provides protection from prosecution only with respect to acts or omissions which occurred during the period of the order. *Re Canada Metal Co. Ltd. and The Queen* (1974), 20 C.C.C. (2d) 552, 5 O.R. (2d) 787 (H.C.J.), affd 24 C.C.C. (2d) 374, 8 O.R. (2d) 773 (C.A.): Compliance with an order before the time of prosecution but after the date contained in the order is not full compliance and does not provide immunity from prosecution. *R.* v. *Johns-Manville Canada Inc.* (1979), 9 C.E.L.R. 137 (Ont. Ct. (Prov. Div.)): The defendant has the onus of proving full compliance with all terms of a control order on a balance of probabilities.

In 1985, a new government came to power with a moral mandate to "put the environment first." The regulatory pendulum swung massively from negotiation to hard-edged enforcement. The enforcement branch increased five-fold, and then doubled again; prosecutions and fines underwent similar increases. Since that time, although program approvals have remained in the statute, the MOEE has not used them.

There were two main reasons for this disuse. For regulators, program approvals seemed less satisfactory than control orders. Substantial regulatory resources were required to negotiate program approvals with the company and to obtain internal department consent, both from senior management and from the legal branch.[28] The total resources consumed in this process are similar to those required to issue a control order (unless the company appeals the control order to the Environmental Appeal Board). Also, control orders better fulfilled the public appetite for visible government action against polluters, as any breach of the order would be an offense relatively easy to prosecute.

On the other side of the equation, the regulated community feared that there was no safe way to approach the MOEE about negotiating a program approval, as this means a company must reveal its non-compliance. Since 1985, any MOEE officer who learns of non-compliance has been required to notify the Investigations and Enforcement Branch. The branch was very enthusiastic in following up such notices. The regulated community believes that insufficient efforts have been made to distinguish the well-intentioned firms, who did not need to be punished in order to take the environment seriously, from deliberate offenders; both were prosecuted.[29]

Some efforts were made to explore the possibility of a "pre-clearance" system, comparable to that used to obtain tax clearances from the ministry of national revenue. This would allow a company to disclose their problem on a "no-name" basis, and to negotiate a resolution without disclosing their identity. Under the tax system, the company can legally rely on the settlement that is negotiated, provided that all relevant facts have been disclosed to the tax department. This suggestion was scornfully rejected by the Legal Director of the day, on the grounds that it was akin to making deals with Jack the Ripper. Thus, there was no safe way for companies to initiate negotiations for a program approval, and little interest by regulators in responding favorably to such an approach.

As environmental regulation continues to mature, as government resources become straitened and as jobs have fled, Ontario regulators have begun to reappraise program approvals. The first sign of this reappraisal appeared in the November 1995 *Policy and Guideline on Access to Environmental Evaluations*:

> MOEE encourages the voluntary sharing of information by those seeking pollution abatement through voluntary arrangements with Government. These arrangements may provide protection from prosecution for those who are committed to addressing environmental issues. This type of arrangement is provided for under MOEE's current compliance policy in the form of Program Approvals.
>
> Under the system of Program Approvals, a person responsible for a source of contamination may submit to a MOEE Regional Director a program to prevent, reduce or control the discharge of any contaminant into the natural environment. The MOEE may then approve the program and allow the business a specified period of time to implement its environmental plan.

[28] This resource demand is now further increased by the requirement of public consultation under the Environmental Bill of Rights.

[29] On at least one occasion, a company installed a multimillion dollar pollution control system and flew several regulators up for a grand opening. When MOEE representatives arrived, they discovered that the system had malfunctioned. The regulators prosecuted the company.

Voluntary programs play an important role in the Ontario government's consultation paper on regulatory reform, *Responsive Environmental Regulation*, released in July 1996.

4.4 Quebec

A somewhat similar pattern is apparent in s.116.2 of the Quebec Environmental Quality Act. This section has undergone some interesting changes. In 1978, it read:

> **116.2- Prosecution prohibited**—No proceedings may be instituted for an offense against Section 20 in connection with the emission, deposit, discharge or issuance of any contaminant likely to affect adversely the life, health, safety, welfare of comfort of human beings, to inflict damage or otherwise prejudice the quality of the soil, the vegetation, animal life or property, against the person responsible for the source of the contamination, if such person has submitted a depollution [i.e., pollution reduction] program which has been approved by the Deputy Minister and if he faithfully complies with its requirements and schedule of implementation.
>
> **116.3- Notice**—If the person responsible for the source of contamination requests the approval of a depollution program contemplated in Section 116.2, he shall publish a notice in two consecutive issues of a daily newspaper circulated in the region where the source of contamination is situated.
>
> [...]
>
> **Request transmitted**—The Minister shall also transmit the request for approval to the secretary-treasurer or clerk of the municipality where the source of contamination is situated. The latter shall place such file at the disposal of the public for a period of fifteen days.
>
> **116.4- Representations to the Minister**—Every person, group or municipality may submit representations to the Minister until the expiry of the period of fifteen days contemplated in Section 116.3 and the period of fifteen days following the publication of the second notice published under Section 116.3; these periods may be wholly or partly simultaneous.
>
> **Approval**—The Minister shall not issue his approval before the end of these periods.

In 1993 this section was further amended, and now states:

> **116.2- Prosecution prohibited**—Any person responsible for a source of contamination not resulting from the operation of an industrial establishment contemplated by Section 31.10 may submit a depollution program to the Minister for approval.

The 1978 version was a clear example of an Ontario-style "program approval," in which the government traded immunity from prosecution for an approved compliance plan. Unlike Ontario, Quebec required that proposed deals of this type be published for public comment before they were concluded. However, the 1993 amendments to the Environmental Quality Act removed the immunity from prosecution that an approved plan used to confer.[30]

There is a continuum between voluntary compliance plans and compliance agreements. Much of the analysis of compliance plans presented earlier also applies to negotiated compliance agreements.

[30] Oddly, the official title to s.116.2 continues to state "prosecution prohibited," even though the section itself no longer provides such immunity.

4.5 New Brunswick

The New Brunswick compliance policy is more open to voluntary compliance, and less wedded to maximizing prosecution. Its philosophy is quoted at the opening of this paper, and repeated here:

> The appropriate measure of the success of environmental law is not the number of convictions obtained in a year, or the dollar value of the fines[....]Environmental law should aim at least to preserve, and perhaps to improve, the existing environmental quality[....]Compliance by the violator in a timely manner, without further intervention or violations, is the desired result.[31]

Thus, New Brunswick has an express hierarchy of enforcement options, in which warnings and "Schedules of Compliance" are used before investigation and prosecution:

> If the inspector finds that the alleged violator did not take all reasonable steps to prevent damage to the environment, the inspector can initiate one or more of the following to produce compliance: warnings; schedules of compliance; ministerial orders; and injunctions. The normal course of action is to employ each of these options progressively.

Warnings are issued where non-compliance has occurred, but, as the document says, "the harm or potential harm to the environment, human life, or health is thought to be minimal." They include compliance deadlines:

> If the alleged violator is unable to comply immediately with the law, a schedule of compliance stipulating the action which must be taken to produce compliance will be drawn up. This schedule establishes a date by which compliance must be achieved. If the person does not comply, further action will be taken by the Department.

In both cases, the regulators will follow up to verify compliance:

> Follow-up inspections to verify compliance with previously agreed-upon actions are a critical component of the process. When compliance has been found, the enforcement process changes to a routine monitoring function.

The policy does not guarantee that "voluntary compliance" will avoid prosecution:

> As stated earlier, although the violation may have been brought into compliance, prosecution through the courts may still be brought against the responsible person for past infractions of environmental law[....]

This, however, is strongly implied in the case of companies that have made reasonable efforts to comply:

> The following criteria will be applied by enforcement officials when considering a course of action in response to suspected violations:
>
> **Effectiveness of Achieving Desired Results**—Compliance by the violator in a timely manner, without further intervention or violations, is the desired result. Factors considered by enforcement officials are the violator's history of action already taken to achieve compliance.
>
> **Equitable and Consistent Enforcement**—When faced with an infraction of environmental law, inspectors will attempt to ensure fairness by considering the circumstances and how similar situations have been dealt with before deciding how to bring about compliance[....]

[31] Government of New Brunswick 1994.

> The Department will pursue prosecution when[...]there is significant harm[...and] the alleged violator does not take reasonable steps to comply[...]a violation is repeated, warnings [are] disregarded,[...]the violation is deliberate[...or involves substantial negligence], or the alleged violator[...]conceals information of an offense[....]

4.6 Manitoba

The Manitoba Environment Enforcement Policy and Procedures takes a similar approach to that used in New Brunswick.[32] "Warnings" and "Negotiated Compliance" are the first enforcement options to be considered, and are clearly described as alternatives to prosecution:

> **Warnings/Negotiated Compliance—**Written warnings shall contain the following information:
>
> 1. the section of the Act, Regulation, License or Permit violated,
>
> 2. a time limit by which the warning must be complied with where appropriate, and
>
> 3. a mandatory statement that failure to rectify the violation can result in prosecution.
>
> If a decision is made not to engage in formal prosecution as a result of departmental negotiations, agreements are subject to the following requirements:
>
> 1. orders, agreements, directions and licenses are to be filed in the public registry[....]
>
> [...]The department will abandon negotiations regarding enforcement and engage in prosecution where there is non-compliant behavior with the department by the alleged offender, such as:
>
> 1. the alleged offender shows an unreasonable delay in responding to departmental requests for information or other correspondence,
>
> 2. the alleged offender takes an unreasonable or uncompromising position during negotiation with the department,
>
> 3. there is insufficient reason given for non-attendance at scheduled meetings or negotiation sessions by the alleged offender, and
>
> 4. in the opinion of the department, there is evidence that the alleged offender is delaying the progress of negotiations while the alleged offender continues to engage in an activity that may be an offense.

The policy is unusually clear in distinguishing those companies who "need" prosecution to change their behavior from those who are already doing what they can:

> Factors which may lead to warning and negotiations:
>
> 1. an old site or facility [is involved] and remedial action is difficult or impossible,
>
> 2. [there are] limitations [to the] pollution control technology,
>
> 3. immediate rectification of [the] problem is financially impossible,
>
> 4. [the] pollution problem was accidental and/or not readily foreseeable,
>
> 5. there is a history of compliance on the part of the violator,
>
> 6. reasonable efforts were taken to notify the department and mitigate the effects of the violation,
>
> 7. the infraction is of a minor nature or appears to be inadvertent, and

[32] This section was revised on 2 March 1995.

8. non-compliance will not endanger public health or create significant, long term, irreversible environmental damage.

However, there is still some ambivalence about the relationship between voluntary compliance and prosecution. In apparent contradiction to the rest of the policy, one paragraph states: "[...]the commencement of subsequent prosecutions is always an option for the department and at no time will the commitment be made that there will be no subsequent prosecution."

4.7 Other Canadian Jurisdictions

The Prince Edward Island Environmental Resources Enforcement Policy and Procedures are very similar to those in Manitoba. Other provinces, such as British Columbia and Alberta, make no special provision for voluntary compliance plans. They content themselves with allowing abatement officers to give written warnings to some offenders, on the assumption that well-intentioned offenders will act on the warning and cure their non-compliance. Alberta goes further, stipulating:

> Voluntary environmental audits are not a substitute for compliance. There is no defense to a charge or a limit on a business's responsibility to meet legislative requirements simply because an environmental audit was conducted[...]The Department will not modify an enforcement response in exchange for conducting an environmental audit[....][33]

4.8 Legal Authority

Yukon and Nova Scotia have specific statutory authority for voluntary compliance plans. Ontario has specific authority for compliance agreements. The federal government has proposed to add such authority to CEPA.

In the other provinces there is no specific legal authority for voluntary compliance plans, for compliance agreements, or even for the compliance guidelines that permit them. In strictly legal terms, compliance guidelines are merely internal documents for the guidance of public servants exercising their extensive statutory powers to impose mandatory compliance mechanisms.[34] Guidelines are not directly judiciable, i.e., persons dissatisfied with the decision-making that led to their prosecution cannot sue the regulator merely for that reason. However, compliance guidelines are made public with the specific intention that potential offenders should govern their conduct accordingly. Thus, it is conceivable that a prosecution brought in flagrant breach of the guideline could be an abuse of process. Those defending a prosecution might also point to a regulator's breach of the guideline when arguing for a lighter sentence.

It is noteworthy that the compliance guidelines do not expressly address the relationship between the corporate offender and its officers, directors and employees. This is a somewhat surprising omission, considering the high profile that director and officer liability has had over the last five years. As described above, the Ontario guideline takes some pains to prevent voluntary compliance measures from being used as a bar to prosecution of the principal offender; for the same reason, they would not bar prosecution of individuals related to the offender. In practice, however, it is unlikely that a regulator would prosecute individuals associated with a company if they were satisfied with the compliance status of the company as a whole. The only exception might be a rogue employee no longer associated with the company, who had had a strong personal role in committing an offense.

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[33] Enforcement Program for the Environmental Protection and Enhancement Act, Alberta Environmental Protection, 2 September 1994.

[34] Statutes such as the Ontario Environmental Protection Act authorize regulators to issue orders and prosecute those who are not in compliance.

4.9 Contracts and Consideration

A compliance agreement is a contract. As in any contract, each side must give something of value as consideration for the promises of the other; without consideration, the contract is unenforceable. The question of what consideration each side can give illuminates one of the essential problems of compliance agreements.

4.9.1 What Consideration can the Regulator provide?

Regulators have at most two valuable promises to offer: clarification of their regulatory requirements, and forbearance. Clarification could potentially provide consideration by specifying the level of due diligence demanded of a company. Companies often find it difficult to define the required level of due diligence, and therefore to ascertain what they must do to achieve compliance. It is arguable, although not certain, that clarification and limitation of a due diligence requirement could be sufficiently valuable to provide legal consideration.

However, Canadian regulators have consciously chosen not to provide such limitation. In agreements, approvals, and orders, ministries take pains to specify that their requirements are minimum requirements and that companies must, in addition, do anything else that the law requires. Thus, a department's specifications are only illustrations and not definitions of what the company must do. For this reason, it is unlikely that they could amount to legal consideration.

Thus, the only possible consideration remaining at the regulators' disposal is forbearance. Agreements that provide forbearance as to the substantive requirements of the law are discussed in Section 5 on Bill C-62, the proposed Regulatory Efficiency Act. Forbearance may also relate to:

- punishment for non-compliance that has already occurred, and/or
- punishment for non-compliance during a future "grace period."

The first type of forbearance is often used informally. One use of forbearance, the use of warnings and compliance plans rather than prosecution, was discussed in Section 4.8 above. When prosecution does occur and a plea bargain is contemplated, an important part of the bargaining concerns the compliance measures taken by the defendant after the offense occurred.[35] For example, in one recent case, the prosecutor was seeking fines in excess of $125,000.00 plus jail sentences, for prolonged offenses relating to illegal waste disposal. In exchange for cleanup of the site by the owner, however, a plea bargain was negotiated that included only three charges and a fine of $10,000.00.

More formally, immunity from prosecution for past non-compliance is provided by statute in s.70 of the Nova Scotia Environment Act, which states:

> 70. (1) Any person responsible who voluntarily provides the Department with detailed information obtained through an environmental audit or environmental-site assessment about non-compliance with the requirements of this Act by that person, shall not be prosecuted for the non-compliance, if the person complies with: (a) the terms of any agreement negotiated by the Minister and the person; or (b) any order issued under Part XIII to address the non-compliance by the person.

[35] Compliance after the charge is laid is also an important consideration in sentencing, although then it is the court and not the ministry that evaluates it.

> (2) Subsection (1) does not apply if the Department is independently aware of the non-compliance prior to receiving the information from the person.

That Act is discussed in more detail in Section 7.4.

Compliance agreements discussed in this section rely upon the third option: forbearance during a future grace period, in exchange for measures to improve compliance which are to be taken during that period.

4.9.2 What Consideration can the Company offer?

Suppose a company in this situation promises to take a series of steps to improve its environmental performance. In practice, these are the steps that it needs to take to achieve compliance. Is this consideration? One view is that, since compliance is already required by law, nothing additional is offered by a promise to achieve compliance, and therefore the company offers no consideration.[36] The other view is that consideration is provided when a party with legal obligations makes additional promises of concrete steps that s/he will take to meet those obligations. Although the company may suffer no *legal* detriment from such promises (in that it incurs no additional legal obligations), the regulator may get a *factual* benefit, if the additional promises make actual compliance more likely.[37]

There is a useful parallel to this debate in the general law of contract:

> Much difficulty arises in determining whether a person who does, or promises to do, what he was already legally bound to do, thereby provides consideration for a promise made to him.[38]

Professor Waddams described the problem as follows.

> "B" is already bound to deliver goods to "A." "A" promises to pay B $1000.00 for delivery. Theoretically, "A" is promising to pay $1000.00 for something he could have had for nothing. In practice, however, there may be good reason for "A" to attempt to make more probable the actual performance by "B" of his obligation.[39]

"A" may strongly prefer to pay the extra $1000, if that will permit him/her to obtain goods that s/he urgently needs without the (much greater) expense of suing for them.[40] In the same way, there are important resource savings for a regulator when compliance can be obtained through a compliance agreement rather than through a prosecution. However, judges and learned authors alike have been concerned about the risk of encouraging "B" (or others like him/her) to delay fulfillment of his/her original obligations in the hope of obtaining some additional benefit for performing them. Contract lawyers refer to this as a question of "public policy"; criminal lawyers refer to it as a question of "general deterrence."

The courts have divided sharply on this issue:

> In the case of a pre-existing duty owed by contract with a third person, the English and Canadian courts have generally held that "A's" promise is enforceable[....]The American courts, however, have held that it is contrary to public policy for "B" to demand or receive money from "A" for doing

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[36] This view is usually held by those who believe that compliance can and should be obtained only through punishments and threats, not through incentives. Environmental groups often hold this view.

[37] Lord Denning is among those who have argued for this position. See *Ward* v. *Byham*, [1956] 1 W.L. R. 496 and *Williams* v. *Williams,* [1957] 1 W.L. R. 148.

[38] Treitel 1993, 85.

[39] Waddams 1993, 89.

[40] For example, *Gilbert Steel Ltd.* v. *University Construction Ltd.* (1973), 36 DLR 3rd 496 affirmed, 67 DLR 3rd 606 (C.A.).

> something that he is already bound to do by contract with another. The fear is that "B" will be encouraged to threaten to break his contract with the third person in order to secure further remuneration from "A"[....]Where these pre-existing duties spring from statute or from agreement with "A," the English and Canadian courts have in general denied enforcement unless "B" promises something in addition to what he was already bound to do[...]it can hardly be doubted that they have been influenced by the fear of improper pressure being exerted by "B" in order to secure extra payment for what he is already obliged to do.[41]

This same concern exists for compliance agreements. Why should companies receive an enforceable promise of immunity for promising to do what they were already obligated to do, and which law abiding companies do without a promise of immunity? Wouldn't that simply encourage and reward improper behavior, i.e., non-compliance?

There is another aspect to this concern. Some cases have held that an act may constitute consideration even though there is a public duty to do it.[42] However,

> [...]a person does not provide consideration by forbearing to engage in a course of conduct that is criminal. To allow enforcement of such promises would encourage extortion; and it is this ground of public policy, rather than want of consideration, that accounts for most of the authorities that establish the present rule.

Is a compliance agreement an agreement to do one or more positive acts, (which may be required by statute) or an agreement to refrain from a course of conduct that is criminal, i.e., a type of extortion? A compliance agreement in which a company promised only "not to do it again" may be an "agreement to refrain from a course of conduct that is criminal." Such an agreement would not be enforceable under common law, and would not warrant a promise of immunity from regulators.

Both of these problems can be resolved by following the lead of the contract courts. They usually resolve such cases by examining whether B has offered something additional as consideration for the new contract. For example, shipbuilders were awarded an increase in the agreed-upon price for a ship when the currency specified in the contract was devalued. The court found that the builders had given consideration for the increased construction price by giving a corresponding increase in their own performance bond.[43]

Environmental regulators could avoid several kinds of difficulty by insisting that a company wishing to enter a compliance agreement provide some additional consideration, other than a bare promise to comply with the law. A detailed agreement to take a series of specific steps not required by statute, which will bring the company into improved compliance, offers more than mere forbearance from criminal conduct, and therefore could be deemed a binding contract under common law. This could avoid the legal problem of consideration. Similarly, additional consideration could be provided each time a company requests an extension to a deadline.

The ideal consideration for a compliance agreement would be financial assurance that would be forfeited if the company did not live up to the agreement. This would provide a meaningful performance incentive in almost all cases and eliminate the old abuses that left program approvals in disrepute. It would be seen as avoiding the general deterrence problem of rewarding non-compliance that creates incentives for undesirable behavior. It would also assist in demonstrating to the public the legitimacy of the agreements. At least a token amount of financial assurance should be appropriate in most cases. Alternative forms of consideration could include additional record keeping,

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41 Waddams 1993, 101.

42 *Ibid.*; Treitel 1993, 85.

43 *The Atlantic Baron*, [1979] Q.B.705.

regular progress reports, improved public information, grants to local agencies, or some form of community service.

4.10 Efficacy

There are no empirical data on the impact of voluntary compliance plans or agreements on compliance levels. However, a qualitative evaluation suggests that compliance plans can have a significant impact on lessening the cost of achieving compliance, if they are used with care.

Regulators at Environment Canada emphasize that voluntary measures are most effective when offered to those regulated businesses that are out of compliance but are "well intentioned," i.e., would prefer to be "in compliance." These constitute a very high proportion of some, although not all, regulated communities. The regulated communities most suitable for such voluntary compliance measures are those that are out of compliance due to inadvertence; least suitable are those that offend deliberately. For example, the *Compliance and Enforcement Report* studied violations of six regulations.[44] Compliance patterns and the usefulness of voluntary compliance varied dramatically among these six groups.

Pulp and paper mills and ocean dumpers had achieved high levels of compliance. Most violations of PCB and ozone-depleting substance regulations occurred because the offender was unaware of the regulatory requirements. For such offenders, a warning and an opportunity to comply were usually sufficient to produce compliance. In contrast, lack of awareness was not a significant factor for those illegally exporting hazardous wastes, and they would be poor candidates for voluntary compliance. This area of deliberate, profitable offenses has now become an enforcement priority.

When well-intentioned companies are caught, and offered an opportunity to comply (or face prosecution), a large number of them will comply without prosecution. These companies may not require prosecution for specific deterrence. For them, voluntary compliance plans can achieve an acceptable level of compliance at a lower cost to the regulator than if they were prosecuted.[45]

To give a regulated business a consistent incentive to improve compliance, and to keep the incentive as inexpensive as possible for the regulator, compliance guidelines must consider costs and benefits both before and after a non-complier is caught.[46] In law enforcement, the parallel concept is the balance between general and specific deterrence.

On the other hand, when a provincial officer mistakenly offers voluntary compliance to a deliberate violator, both compliance and prosecution are delayed with no corresponding benefits. A deliberate violator may ask for additional time to comply as a ploy when all s/he intends to do with that time is to make more money, or to move his/her assets outside the jurisdiction. The Ontario compliance guideline tries to avoid this undesirable result by setting many criteria for the use of mandatory compliance measures, most of which are intended to identify these offenders. However, no system is perfect; the availability of voluntary compliance measures will sometimes let deliberate

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[44] Environment Canada 1996.

[45] Compliance might be achieved more slowly than under the pressure of mandatory compliance measures—there is nothing like prosecution to attract the attention of senior managers. However, where voluntary compliance plans are offered only in cases which do not endanger the life, health, or property of others, a delay in achieving compliance may not have substantial social costs. In other words, the social costs of a possible delay in compliance on this occasion are often outweighed by the social benefits of avoiding prosecution. See Bardach and Kagan 1982.

[46] To be effective, it is essential that the entire range of influences affecting incentives acting upon a firm be properly coordinated, including tax policy and other economic mechanisms See, for instance, Cassils 1991. However, economic mechanisms and tax policy are beyond the scope of this study.

violators get away with behavior that should not have been tolerated. Mistakes in judgment by a regulator offering voluntary compliance measures to such persons could amount to regulatory negligence.[47]

More important, but harder to measure, are the impacts of voluntary measures on "general deterrence," i.e., the incentive for offenders to comply when they have *not* been caught. If not designed carefully, the availability of such measures will actually *reduce* the incentive for voluntary compliance. An offender aware of such measures may reduce or delay compliance, since s/he will have a "voluntary" (and penalty-free) opportunity to improve his/her compliance if caught. In other words, if "voluntary compliance" plans or agreements permit an offender to delay or reduce pre-detection compliance *without any cost or adverse consequences*, they create a positive incentive not to comply until the offender is "caught." In contrast, the opportunity to use voluntary compliance plans when non-compliance is detected can create a substantial incentive for improved pre-detection compliance, *where this opportunity is made highly valuable*, (i.e., includes some protection from prosecution) *and must be earned by previous efforts to improve compliance.*

What is the best way to allow potential offenders to "earn" access to voluntary compliance plans and agreements? Regulators want to encourage and reward companies that manage their environmental risks well. Companies with a high risk of environmental harm, such as those listed in the National Pollutant Release Inventory or those handling Priority Toxic Substances, should earn this privilege through sophisticated environmental management systems, such as registration to ISO 14000. For those who present smaller risks, lesser measures should be required, e.g., an external environmental audit at least every three years, documented implementation of the audit recommendations and appropriate employee training. These companies should not, however, become exempt from enforcement. If their management systems repeatedly fail to achieve adequate compliance, they should lose their privileges and be prosecuted.

To date, no Canadian jurisdiction has set such high standards for access to voluntary compliance plans or agreements. In part, this is because none of them have made voluntary compliance sufficiently valuable to potential offenders. In particular, Canadian regulators have been very reluctant to grant any protection from prosecution to those who engage in voluntary compliance. For example, an Ontario provincial officer who receives a proposed voluntary compliance program is allowed to judge whether it seems adequate to remedy the problem. However, no member of the enforcement staff is allowed to provide any assurance, written or oral, that voluntary compliance will remove the possibility that the Ministry might proceed with prosecution for ongoing or past non-compliance.

This seemingly self-defeating provision reflects the long-standing tension between the MOEE's abatement and enforcement branches. The abatement staff believe that, when enforcement is rigorous, promises of protection from prosecution can be a powerful bargaining chip in achieving voluntary compliance. Avoiding a prosecution has substantial economic value to an offender who can thereby expect to save, not only the cost of any fine that might be imposed in a prosecution (plus the 20% tax that now applies to such fines in one province), but also the huge drain on company resources that is entailed in defending a prosecution. In many cases, these defense costs dwarf any potential fine. They include the out-of-pocket expense of retaining legal counsel and expert witnesses, and huge demands on the time, attention and energy of company managers. In addition, there may

[47] The Nova Scotia Environment Act, s.143, specifically exempts a wide class of government employees and agents from civil action for damages for acts or omission in the conduct of an inspection.

be direct and indirect costs from adverse publicity, including reduced attractiveness to some customers, and demoralization of employees, This can be particularly important for smaller companies that often lack sufficient resources to defend against prosecution and simultaneously achieve compliance.[48]

Enforcement officers tend to see things differently. In their view, promises of immunity tie their hands should voluntary abatement prove unsatisfactory. In any event, they believe that voluntary compliance will be more likely if offenders always risk punishment. In this view, the more actual or potential offenders fear a regulator and the punishment it can mete out, the less likely they are to offend.

Abatement officers believe that an economically prudent offender who has been caught out of compliance is more likely to file a voluntary compliance plan and promptly carry it through when it obtains a substantial benefit for doing so. If the company will face prosecution no matter when it complies, it obtains relatively little reward for the expenditures required to achieve compliance quickly.[49] In contrast, avoidance of $50,000 in defense costs and fines can provide sufficient payoff to justify at least $50,000 in "voluntary" abatement expenditures.

However, robust enforcement is equally important. If the company will not face prosecution, whether or not it complies, it also has no incentive to incur the expenditures required to achieve compliance. Promises of protection from prosecution are worth little when the offender has no real fear of prosecution for its offense.[50] Thus, the absence of a credible program of mandatory compliance reduces programs for voluntary compliance to mere appeals for good citizenship. Repeated surveys of the public and of the environmental industry have shown skepticism about the effectiveness of such appeals.[51] The 1994 KPMG survey of environmental management confirmed that voluntary government programs are among the *least* effective mechanisms to motivate companies to address environmental matters.[52]

Regulators obtain maximum compliance for their enforcement dollar when they attach known and predictable consequences to a potential offender's compliance history. That is, using past violations to influence the probable frequency of future government inspections (and prosecutions) provides a significant incentive for pre-detection compliance.[53] For example, a voluntary compliance plan is a desirable response to a first breach, as long as second and subsequent breaches within a period of time are responded to by predictable and aggressive increases in regulatory scrutiny and severity. To put it into street terms, the regulator may be viewed as saying:

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[48] In one recent case, a waste management company was constantly out of compliance because it was unloading solid waste outside its storage building. The certificate of approval required unloading to take place inside, although everyone knew that the waste could not be safely unloaded under the low ceiling of the existing building. Thus, compliance could be achieved only by building a new building at a cost of about C$50,000.00. This was also the expected cost of a prosecution defense and fine. The company could arrange to borrow C$50,000.00 but not C$100,000.00 It wanted to come into compliance, but was fearful of spending the C$50,000.00 on the new building, lest it be unable to defend itself against the threatened prosecution. Thus, the non-compliance continued.

[49] The fine imposed is likely to be somewhat reduced for an offender who has come into compliance, as compared to that for one who has not. However, as this result could be achieved by complying shortly before trial, the offender has little incentive to comply earlier.

[50] For example, the federal government launched only eight prosecutions under the CEPA in the entire country in 1994.

[51] Gallon 1995; Environics Research Group 1995.

[52] KPMG 1994. The first page of the survey reports the motivating factors for addressing environmental issues. The need to comply ranks first (95%), while the presence of government voluntary programs is last (16%). Thus, purely voluntary programs unrelated to compliance but initiated by government are low on the list of what motivates companies to address environmental issues. The survey says nothing directly about the impact of voluntary programs on compliance.

[53] Russell 1990, 146; Scholtz 1984, 179

> If you don't do as I say you should, I will undertake a course of action neither of us really wants—checking up on you so frequently for such a long time that you will face a compliance "hell" and I will have to spend a considerable sum on your compliance alone. Behave in a reasonable fashion and I will offer occasional opportunities to relax[....]A "reasonable fashion" is implicitly defined as never failing two audits in a row.[54]

A somewhat similar structure is used by automobile insurance companies. A first accident, if minor, may result only in a warning. However, a second minor accident, or a first major one, results in an increase in premiums that lasts five years. Additional accidents raise the premiums even higher; a driver with five accidents in the previous five years will see his/her premiums rise enormously. This premium structure is effective because it always gives drivers a significant financial incentive to exercise prudence.[55] It is desirable to give companies an incentive to strive for compliance even if they have once failed to achieve it. Thus, environmental offenders should know that they can "earn their way back" to voluntary compliance by steady improvement in their compliance levels.

Another key element of an effective voluntary compliance program is a credible, public method of monitoring industry performance. The absence of a credible verification mechanism is the key weakness in most current programs of voluntary compliance,[56] and is itself sufficient to justify widespread public skepticism.

Voluntary compliance plans do not assist regulators in dealing with the difficult but regrettably common problem of an offender who would like to be in compliance but lacks the assets, the cash flow, or the management skill to achieve it. Such cases often present front-line regulators with their most difficult problems. There is no single mechanism that will always be effective in such cases. Even prosecution to the fullest extent of the law has often failed to bring such offenders into compliance, especially once their economic resources have been exhausted.

4.11 Relationship with other Enforcement Mechanisms

Compliance agreements, by intention, restrict the enforcement discretion of regulators. The restriction is limited by the scope of the agreement. That is, if the agreement is related to odor emissions from a tank and the company agrees to install scrubbers for those odors according to a certain schedule, the company will be immune from prosecution for any odors from that tank for the agreed-upon grace period. However, normal enforcement action would be unrestricted for other types of non-compliance, such as failure to manifest its wastes properly.

Compliance guidelines are generally published.[57] On a day-to-day basis, they are administered by the front-line abatement staff, who use them to decide how to respond to each of the numerous problems that are encountered each day. When questions arise as to the meaning or application of a guideline, front-line staff obtain direction from the line supervisors within their Department, up to and including the Deputy Minister, and from their legal branch. The latter are ultimately responsible for interpreting the guideline and for carrying out formal enforcement measures.

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[54] Russell 1990, 155.

[55] The good driver is rewarded both by low premiums and by a "one accident" forgiveness policy which is much appreciated by many drivers. Note that this premium system would be far less effective in encouraging driver carefulness if, after a single accident, a driver were elevated to the maximum premium level. Although a good driver would have a strong incentive to avoid a first offense or accident, a poorer driver who had already had one accident would have no further incentive to be careful, since s/he was already being treated as harshly as the system would allow.

[56] Leiss 1996.

[57] Most jurisdictions provide these to the public in paper form; some also use the Internet.

A problem arises when an offending company believes that it has not been dealt with in accordance with established policy. The issue has been raised, but not adjudicated. In *R.* v. *General Chemical Canada Ltd*., the company was charged with two spills of ammonia that were due to equipment failures.[58] The defendant alleged abuse of process, since the MOEE had not exhausted its "voluntary abatement" options before moving to prosecution. In the end, the defendant pleaded guilty to some charges, and the motion was never heard. The company was fined $80,000.

A second problem arises when an offender believes itself immune from prosecution because it has carried out voluntary compliance measures. For example, in the *General Chemical* case referred to above, the defendant, a company in full compliance with the Spills Reduction Strategy (a negotiated program of heightened measures to prevent and detect spills) alleged officially induced error, abuse of process and exercise of due diligence on the ground that it had voluntarily done everything the regulator had asked it to do. These problems are discussed in more detail in the following two sections.

4.11.1 Officially Induced Error

Regulators have experienced many problems with the defenses of officially induced error and abuse of process. By one informal estimate, at least one out of every five cases involves some miscommunication between the defendant and a regulator. In many of these, defendants claim to have been told by "someone in the Department" that what they were doing was "all right." Courts and prosecutors view these claims with a high degree of skepticism, particularly if they are not confirmed in writing.

Canadian courts have developed very strict rules for the application of the defense of officially induced error. The defendant must show that:

- it adverted to (considered) its legal position;
- it sought advice from a government official;
- the official was a person entrusted with the application and enforcement of the law in question;
- the defendant made full and candid disclosure of all the material facts to the official;
- the official gave erroneous advice;
- the advice was apparently reasonable;
- it was reasonable in the circumstances (including the relative expertise and knowledge of the parties) for the defendant to rely on the official's advice;
- the defendant did rely on that advice, innocently, and in good faith; and
- the offense occurred as a result.[59]

[58] *R.* v. *General Chemical Canada Ltd.* (18 July 1985), (Ont. Ct. (Prov. Div.)) [unreported].

[59] *R.* v. *Cancoil Thermal Corp.* (1986), 27 C.C.C. (3d) 295, 11 C.C.E.L. 219 (Ont. C.A.); retrial: *R.* v. *Cancoil Thermal Corp.* (1988), 4 W.C.B. (2d) 384, (Ont. Ct. (Prov. Div.)); N. Kastner 1985-86, 308; P. Barton 1979-80, 314; *R.* v. *Johnson* (1987), 78 N.B.R. (2d) 19 (Q.B.); *R.* v. *Imperial Oil Ltd*. 16 September 1990, Ont. C.A; *R.* v. *Robertson* (1984), 43 C.R. (3d) (Ont. Ct. (Prov. Div.)); *R.* v. *Gordon* (1984), 58 N.B.R. (2d) 319 (Q.B.); *R.* v. *Squires* (1986), 6 L.W. 638 (Ont. Ct. (Prov. Div.)).

For example, if an abatement officer employed to issue and enforce approvals under a water protection statute were to advise an industry that it was permitted to begin construction of a new wastewater treatment system whose approval the officer was handling, the industry might be immune from prosecution for commencing construction without having received the approval.[60]

Officially-induced error is not created merely by government laxity in regulation, or even by long acquiescence in illegal conduct. Officially induced error is not made out where the defendant did not ask for the official's advice,[61] even though government inspectors may have had knowledge of the defendant's activities and may have failed to object to them.

In *R.* v. *Richardson,* Richardson traded in securities in the belief that he was a prospector and therefore permitted to do so. In fact, he was doing no prospecting and had therefore ceased to be a prospector.[62] The Ontario Securities Commission knew about his activities; Richardson's legal counsel had contacted the Commission on his behalf and Commission investigators had visited Richardson's office and assisted him to reword the grubstake certificate he was selling. They never told him that he was not a prospector, but there was no evidence that he had ever asked. He was convicted.

It sometimes happens that a government employee who does not satisfy these criteria suggests a course of action which proves to be erroneous. One follows such suggestions at one's peril, especially if one has other information to the contrary. For example, in *R.* v. *Marbar Holdings Ltd.,* a construction company wished to drain an excavation.[63] Although an environmental inspector warned the company that the liquid in the excavation was toxic to fish and must be kept out of watercourses, the municipality refused to allow the liquid in the sanitary sewer. A municipal employee may have suggested that the company use the storm sewer. Without further inquiry, the defendants pumped the liquid out onto the road, from which it drained into a storm sewer and thence into a watercourse. The defendant was convicted of causing water pollution.

In *Minister of the Environment* v. *Vautier,* the defendant was disposing of wood waste by trucking it to a stream, following a suggestion made to him by the Expropriations Board during earlier proceedings.[64] Since that time inspectors from the Ministry of the Environment had repeatedly and correctly advised that this was illegal. The defendant was convicted.

The defense of officially induced error is akin to a type of entrapment defense. It entitles a defendant to an acquittal because it would be unfair to convict him/her; s/he might not have committed the offense had it not been for the negligence or bad faith of a government official involved in the enforcement process.

The compliance guideline is designed to minimize claims of officially induced error by requiring communications about voluntary compliance mechanisms between a department and the company to be made or confirmed in writing and also by providing that immunity from prosecution can only be

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60 *R.* v. *Morningstar*, [1988] 2 C.N.L.R. 140 (Ont. Dist. Ct.) and *R.* v. *Flemming* (1980), 43 N.S.R. (2d) 249 (Co. Ct.). It can be difficult for senior regulators to prevent their staff from triggering this defense inadvertently. Ontario regulators have devoted considerable effort, both to training their staff so that advice is given correctly, and to cautioning more junior staff to avoid giving such advice. One side-effect is a chilling of the ability of abatement staff to give helpful advice even to well-intentioned but ill-informed businesses, the very ones who might benefit most from it.

61 *R.* v. *Walker* (1989), 91 N.S.R. (2d) 173 (Co. Ct.); *R.* v. *Gant* (28 July 1988), (B.C.Co.Ct.) [unreported], [1988] B.C.J. No. 1777, *contra R.* v. *Johnson, supra*.

62 *R.* v. *Richardson* (1982), 68 C.C.C. (2d) 447, 39 O.R. (2d) 438n (C.A.), leave to appeal to S.C.C., refused 48 N.R. 228.

63 *R.* v. *Marbar Holdings Limited* (1983), 4 F.P.R. 109 (B.C. Co. Ct.).

64 *Minister of the Environment* v. *Vautier* (1982), 12 C.E.L.R. 96 (Que. S.C.).

given by a senior official, also in writing. This should be reasonably effective, but some claims of officially induced error still arise.

4.11.2 Abuse of Process

The abuse of process defense is similar to officially induced error, in that it entitles a defendant to an acquittal due to the negligence or bad faith of a government official involved in the enforcement process. However, the two defenses are procedurally distinct because abuse of process is typically invoked as a preliminary objection to a prosecution and results in a stay of proceedings, while officially induced error is typically invoked as part of the defense case and results in an acquittal.[65] The two defenses are also conceptually distinct because, as indicated above, officially induced error has become a relatively well-defined category of mistake of law; while in contrast, abuse of process remains vague, a residual category of judicial discretion to refuse to hear a case which offends the very principles of justice which the courts are intended to uphold.[66]

A prosecution may be stayed as an abuse of the court's process in "exceptional cases" where there has been "oppression, prejudice, harassment or manifest hardship on the accused" to a significant degree.[67] A prosecution may also be stayed as an abuse of process where the act of launching a prosecution breaches an undertaking given to the violator in exchange for valuable consideration, and on which the violator has relied to his detriment.[68]

For example, consider *Abitibi Paper Company Ltd. and The Queen.*[69] Following lengthy negotiations with local personnel of the Ministry of the Environment and Energy, a paper mill with serious water pollution problems volunteered to implement a pollution abatement program. To save time, the MOEE engineer decided that it was not necessary to formalize the program through a "program approval."[70] However, he warned the company that, should they fail to implement their program, the MOEE would issue a control order, and would enforce it through prosecution. Several months later, the engineer met with the company and advised that their implementation had been satisfactory.

The MOEE then charged the company with water pollution. The Ontario Court of Appeal ultimately ruled that the prosecution was "vexatious, unfair and oppressive," and therefore an abuse of the judicial process. Most of the court judgments were taken up with a legal point.[71] Little was said about why this *particular* prosecution was abusive, except a brief reference to "the conduct of the Crown in this case, in breach of an undertaking by one of its senior officers":

> [T]he appellant, as a reasonable person, would conclude on a fair reading of the [ministry's] correspondence that it would not be prosecuted provided that it completed its program within the period of grace of December 31st, 1976.

In other words, the prosecution was not barred merely because the company was already working hard, and successfully, to control its pollution; the prosecution was barred because those efforts had been purchased by an implied promise not to prosecute if the company took the agreed steps by the agreed deadline. In any other context, such behavior by a regulator would amount to breach of

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[65] That is, matters are prevented from proceeding without being resolved by either a conviction or an acquittal.

[66] *R.* v. *Young* (1984), 13 C.C.C. (3d) 1, *R.* v. *Jewitt*, [1985] 2 S.C.R. 128, 21 C.C.C (3d) 7, *Keyowski* v. *The Queen.*

[67] *Re Ball and The Queen* (1978), 44 C.C.C. (2d) 532 (Ont. C.A.); *R.* v. *Jarman* (1972), 10 C.C.C. (2d) 426 (Ont. C.A.); and *R.* v. *Navro Inc.* (1988), 5 W.C.B. (2d) 440 (Ont. H.C.J.).

[68] In such cases, it is a peculiar kind of mistake of fact, namely, a reasonable belief that one would not be prosecuted.

[69] *Abitibi Paper Co.* v. *R.* (1979), 24 O.R. (92d) 742 (Ont. C.A.).

[70] This would have provided the mill with express immunity from presecution.

[71] For instance, whether the court had the power to stop prosecutions which were vexatious and unfair.

contract or might be stigmatized as dishonest; the courts distance themselves from such conduct by staying the proceedings.

It is essential to note that the doctrine of abuse of process does not enable the courts to supervise or replace the proper exercise of prosecutorial discretion. There are many cases where prosecution is unnecessary, unwise, contrary to regulatory goals, and even unfair, but where the courts will not intervene.

For example, it is not an abuse of process for the Crown to lay multiple charges as a result of a single incident.[72] Nor does long tolerance of polluting activity by government regulators make a subsequent prosecution an abuse of process, even if launched without warning; government laxity does not give a polluter a right to continue polluting.[73]

The wide gap between abuse of process and unwise use of prosecutorial discretion was strikingly illustrated in a copyright infringement case, *R.* v. *Miles of Music Ltd.* In that case, the person charged had "every reason to regard himself as the victim of unfairness," but the court of appeal overturned the stay entered by the trial judge.[74] The defendants were a disc jockey and his personal company, who had carried on business for 13 years. Numerous other companies carried on the same business; none had ever been charged. The individual defendant made several attempts to determine whether his activities were in breach of copyright laws, and if so, if he could obtain any necessary license. He was advised that no licenses were available, but was not asked to do anything else.

Several months later, on the complaint of a disenchanted franchisee and of the company that had refused the copyright license, police obtained a search warrant. The police descended upon the defendants without warning and seized all of his records, equipment and music, far more than could possibly have been necessary as evidence. This instantly put the defendants out of business with disastrous economic consequences. They were later charged and convicted of copyright offenses.

In *R.* v. *Northwood Pulp Timber Limited*, a British Columbia prosecution was dismissed as an abuse of process.[75] When planning an expansion project, the mill was told that it could continue discharging alum sludge into the river. Shortly after the expansion was completed, Department staff demanded that they cease discharging the sludge. No other mill in the province was required to do so, and there was no known technology that could eliminate it. The MOEE's proposed standard for water returned to the river was cleaner than the water in the river. The company was given one year to resolve the problem, on pain of prosecution. The company then "voluntarily" undertook a pilot project to control the sludge. While the pilot project worked moderately well, it did not resolve the problem to the MOEE's satisfaction. When this became apparent, the defendant was charged.

The court said this was "unfair and oppressive." The defendant had been "singled out" by the regulators and had been assigned to develop a solution to a complex problem in a limited time. It had made diligent efforts in good faith to find and implement a solution, and had, with their knowledge, invested in a pilot project. Although the defendant had been unsuccessful in meeting the one-year deadline to reduce its suspended solids to the level chosen by the department, it was the department's conduct which was offensive.

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72 *Imperial Oil Ltd.* v. *The Queen* (19 February 1987), (Ont. H.C.J.) [unreported], (1990) 5 C.E.L.R. (NS) 81, (1990) 75 O.R. (2d) 28.

73 *R.* v. *Wells Foundry Ltd.* (1980), 9 C.E.L.R. 141 (Ont. Ct. (Prov. Div.)); *R.* v. *Zalev Brothers Ltd.*, [1989] O.J. 1658 (Dist. Ct.).

74 *R.* v. *Miles of Music Ltd.*, [1989] O.J. No. 391, (C.A.).

75 *R.* v. *Northwood Pulp Timber Ltd.* (22 June 1992), (B.C. Prov. Ct.); appeal (10 November 1995) (B.C.S.C.). The acquittal was upheld on appeal, but on the ground of due diligence. The abuse of process issue was not discussed.

The opposite result occurred in *R.* v. *Zalev Brothers Limited*. Zalev Brothers, a manufacturer with a noise problem, agreed to participate in an experimental citizens' environmental committee, believing that if it did so, no charges would be laid.[76] When the company was prosecuted, it was unable to prove that the MOEE had given a clear undertaking to this effect. Accordingly, prosecution did proceed.

4.11.3 Regulatory Negligence

A regulator cannot be held liable for regulatory negligence in adopting a compliance guideline; this is a policy function beyond the courts' review. However, the courts do assert jurisdiction over such administrative functions as policy implementation. Thus, faulty implementation of a guideline could lead to an action for regulatory negligence. Regulatory negligence claims have been arising with increasing frequency over the last ten years, encouraged by court decisions such as *Anns* v. *Merton London Borough Council* and *Just* v. *the Queen in right of British Columbia.*[77]

A recent case illustrated the hazards that can arise in even the most routine of Department functions. In *Gauvin* v. *Ontario (Minister of Environment)*, a home owner had had a septic system installed.[78] Ministry policy requires that before a use permit is issued, the contractor must certify that sufficient filter material has been installed to absorb the waste, and supply waybills as evidence of the purchase and delivery of the filter material. In this case, the permit was issued, although the contractor had not filed the necessary certificate and the waybills filed by the contractor did not specify where the filter media had been delivered.

In fact, there was not enough filter material, and raw sewage oozed out. The home owners had to dig up and re-bed their septic field at a cost of $15,000. They sued both the original installer and the MOEE, and were successful against both. The MOEE had not adequately implemented its own policy; the policy had been adopted specifically to benefit septic system users such as the plaintiffs and the plaintiffs had suffered a loss as a direct result.

The same result could occur with compliance guidelines. There are numerous ways in which environmental non-compliance can cause financial harm to potential claimants: failure to control noise can cause adverse affects on the health or businesses of neighbors, polluted waste water can harm downstream water users, dust emissions can trigger asthma, and improper waste handling can contaminate land. To avoid becoming liable for regulatory negligence, regulators must take reasonable steps to enforce their laws in an adequate manner, particularly those designed to protect third parties from damage.[79]

Voluntary compliance plans present regulators with two sets of risks:

1. The courts may consider voluntary compliance measures to be intrinsically inadequate as a response to non-compliance. Should this occur, the very use of voluntary compliance measures would expose a regulator to liability. This is unlikely to be a serious risk: first, because compliance guidelines are not judiciable by the courts; and second, because as this study shows, there are many good and valuable policy reasons for incorporating voluntary compliance plans into an overall compliance guideline.

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[76] *R.* v. *Zalev Brothers Ltd., supra*.

[77] [1978] A.C. 728; (1990), 64 D.L.R. (4th) 689 (S.C.C.).

[78] *Gauvin* v. *Ontario* (MOEE) (29 August 1995), (Ont. Ct. (Gen. Div.)) [unreported].

[79] Through provisions in its Environment Act, Nova Scotia has protected its officers from most regulatory negligence claims. N.B.: The duty or care required to avoid claims of regulatory negligence closely parallels Canada's obligation under the North American Agreement on Environmental Cooperation "to effectively enforce" its environmental laws.

2. The second and more serious risk is that courts will judge regulators to have been in error in applying the guideline. Such errors could occur if voluntary compliance measures were used where a front-line regulator:

- did not give enough weight to public complaints, or was unaware of complaints that had been made to another Department representative;
- incorrectly assessed the risk potential from non-compliance;
- did not accurately judge the usefulness of a proposed voluntary compliance measure; or
- did not give sufficient priority or resources to evoking mandatory measures when the voluntary program lagged or failed.

If this risk cannot be adequately managed, regulators will be highly reluctant to use voluntary compliance measures, and will therefore not accrue any of their potential benefits. Potential measures to manage this risk include: better training of the provincial officers, more exchange of information among them as to their experience in handling particular cases, careful documentation of the reasons for particular decisions, a computerized follow-up system to ensure that results are evaluated, non-compliance is punished, and a conscientious effort is made to identify and communicate with the victims of pollution (potential claimants).

What these tools have in common is a commitment to high quality management of each department's regulatory function. They are comparable to the task of reducing service failures in any service organization. As indicated in the case of *Gauvin* v. *Ontario* (see above), a potential for regulatory negligence is not unique to the problem of properly implementing voluntary compliance.

4.12 Third-Party Impacts

The current compliance guidelines give little attention to third-party interests. However, where inadequate compliance under a "voluntary compliance plan" may have adverse effects upon third parties, failure to consult those parties may increase a regulator's risk of a lawsuit for regulatory negligence. Some compliance guidelines attempt to avoid this problem by forbidding the use of voluntary compliance when human life, health or property is at stake, i.e., when regulators know of potential plaintiffs. In other cases, where regulators are not aware of anyone who will suffer material adverse affects if compliance is delayed, public consultation is less necessary.

The Ontario compliance guideline encourages businesses to provide indicators of progress and implies an obligation on the regulator to follow up to ensure that compliance has been achieved. However, this is not a public process. In the Yukon, non-compliance is a matter of public record, since notices of non-compliance are recorded on a register until the problem has been rectified.

There are no third-party rights of appeal from decisions to allow voluntary measures. Voluntary compliance plans have no express impacts on public rights to use common law remedies such as nuisance or negligence.

Compliance agreements also have no direct impact on the common law rights of action of third parties, such as nuisance. They might, though, have an indirect impact on negligence claims, because the company might be able to use the compliance agreement as a strong indicator of the appropriate standard of care. Thus, it may not be negligent if it has complied with the agreement.

There is substantial concern among some environmental groups that increasing the use of compliance plans and agreements, which are negotiated bilaterally, will erode the access to environmental

decision-making for which they have fought so hard in the last two decades. Some regulators and industry representatives are unsympathetic, pointing out that enforcement decisions have always been made bilaterally. This issue has become divisive because voluntary compliance measures blur the distinction between enforcement (where the public has traditionally had no role) and regulation/compliance (where they have gained one).

The other impact of compliance plans and agreements on third parties is that they may prolong the period during which those parties are exposed to adverse impacts caused by the company. Such impacts may occur lawfully during the grace period, or unlawfully should the company fail to comply with the agreement and other enforcement action be thereby delayed. Compliance agreements that may expose others to continued adverse affects should not be made without prior public consultation and should include financial assurance to ensure compliance during the agreed-upon grace period.

4.13 Accountability

Accountability is one of the key issues when responsibilities formerly exercised by regulators are delegated to or shared with the private sector:

> Another part of the changing nature of government is a much greater involvement by other parties in the design and delivery of federal programs. Examples abound: joint federal-provincial programs, contracting out, program delivery by non-governmental organizations, delegation of programs to client groups. In the February 1995 Budget, the government announced a number of measures that further increase the involvement of other parties in the delivery of federal programs.
>
> Joint programs offer many potential benefits. The interplay of different parties, each with different strengths and perspectives, can do much to improve client service and save money. But it also brings additional challenges[...]when the government participates in joint arrangements, it must take all reasonable steps to ensure that intended results are achieved. Accountability is not simply about acknowledging problems after the fact, it is also about working to avoid them. Particularly important is up-front agreement about the roles and responsibilities of the parties involved and the results to be achieved.[80]

One of the issues is accountability within government. The long-term responsibility for dealing with the regulated community rests with the front-line regulators (abatement officers). However, responsibility for formal "enforcement" (particularly through prosecution) is often transferred to a separate investigation and enforcement branch staffed by former police officers. When non-compliance occurs, Ontario abatement staff are required to notify the investigation staff in writing. The abatement staff can recommend to the investigation staff that no mandatory enforcement take place, and might do so if attempting to negotiate a voluntary compliance measure. However, the ultimate decision whether to prosecute is not up to the abatement staff; it is made by the legal branch and the investigators.

Voluntary compliance measures, though, are the responsibility of the abatement staff. Thus, use of these measures may delay or avoid shifting the responsibility for an offender from the abatement to the enforcement staff. Internally, transparency and accountability are provided for by requiring front-line regulators to document their reasons at every stage of the voluntary compliance process.

For the general public, there are more profound issues. Compliance plans and agreements fall in the fuzzy middle ground between regulation and enforcement. While it has become accepted that the general public has an important role in setting environmental standards and in issuing

[80] Auditor-General of Canada 1995.

environmentally significant permits,[81] the public has had no role in enforcement decision making.[82] There is no public consultation when a prosecution is launched; on the contrary, it is typically kept highly confidential until the defendant has been served. Even then, there is no systematic communication of all enforcement actions to the public. Press releases are provided at the prosecutor's discretion, but no notice is given to the general public.[83]

Current compliance guidelines treat compliance plants as enforcement decisions, i.e., as part of the prerogative of the Crown. Public consultation occurs only when a statutory instrument other than prosecution is used to obtain compliance, whether mandatory or voluntary (i.e., an order or a program approval.)[84]

Some environmental groups argue that ministry concurrence with a voluntary compliance plan is equivalent to program approval, and therefore should be the subject of public consultation. Under existing law, this is not legally required.[85] Public consultation is often unpalatable to the businesses concerned, because it delays decision making, may risk disclosure of trade secrets, and often makes a regulator less flexible in negotiations. Public consultation also increases resource costs to a regulator.

However, public participation may now be essential for formal compliance agreements, at least those with significant environmental effects. Many members of the public no longer believe that agreements made "behind closed doors" by government and business are fair, honorable and in their best interests. The credibility and legitimacy of negotiated agreements therefore depends upon some degree of transparency and accountability:

> [...]cooperative, negotiated frameworks for environmental protection[...]are grounded in intensive collaborations between governments and industry, but they are credible only when these collaborations are open, via robust reporting rules and participatory opportunities, to detailed scrutiny by diverse multi-stakeholder groups.[86]

Some public accountability for compliance plans and programs is provided through the political process and also through the accountability provisions of some recent statutes.[87]

The Ontario statutes illustrate the evolution of public expectations and rights in the area of public participation. The program approval sections were adopted in 1971, at a time when the government was accepted unquestioningly as representing the public interest. Accordingly, it did not provide for any "public consultation"; the "public" was involved because the government was. The 1993 Ontario Environmental Bill of Rights reflects a very different view of the proper role of government, and of who speaks for the "public." The Bill of Rights, therefore, makes extensive provisions for public consultation, when a wide variety of statutory powers are exercised. This includes the power to issue "instruments" with significant environmental effects.

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[81] These rights are given force in some jurisdictions by environmental bills of rights.

[82] Even the ministries of the environment do not have the last word on this topic, it is the prerogative of the attorneys-general to whom all prosecutors report.

[83] For instance, through the Ontario Environmental Bill of Rights Registry.

[84] See Section 4.3.2.

[85] Some environmental groups argue that ministry concurrence with a voluntary compliance plan is equivalent to a program approval, and therefore should be the subject of public consultation. Under existing Ontario law, this is not legally required. A voluntary compliance plan, as described in the compliance guideline, is not an "instrument" as defined in the Environmental Bill of Rights and therefore does not require public notice.

[86] Leiss 1995, 48.

[87] In Ontario, voluntary abatement measures, as non-instruments, are not posted on the environmental registry under the Environmental Bill of Rights. However, any two persons may request the Minister to investigate allegations of non-compliance. Where voluntary measures are being used, the Minister would presumably disclose them in his/her response to the request. Similar results occur under s.115 of the Nova Scotia Environment Act.

Ontario Regulation 681/94 defines both control orders and program approvals to be "class 2" instruments. This means that they cannot be made until notice of the proposed instrument has been published on the Environmental Registry and circulated by other appropriate means to those affected. Regulatory approval of the instrument cannot be given until the public has had an opportunity to comment and those comments have been considered.

The present process of entering into compliance agreements in Ontario and Quebec is more transparent than other enforcement mechanisms, in that the public is consulted or at least notified of the existence of the agreement. In Ontario, public participation in compliance agreements has expanded from the "Environmental Council" (which in any case was never appointed) to the general public through the Environmental Bill of Rights. As discussed above, additional consultation is essential where third parties are directly affected by the prolongation of pollution.

4.14 Fairness

There is significant potential for unfairness in the use of compliance plans and agreements, especially if one offender uses a voluntary compliance plan and goes unpunished, while another is prosecuted for essentially the same offense. This problem arises almost any time that front-line officers have discretionary powers that they may exercise according to the circumstances. Some compliance guidelines deal with this by requiring each officer to document his/her reasons for using voluntary compliance measures where, at first glance, mandatory enforcement would be appropriate.

Across regulatory jurisdictions, various regions may differ in their interpretation of the criteria, in the weight they give to off-site impacts, and in their tolerance of non-compliance. Thus a company in one sector or region may be prosecuted for non-compliance, while another company in similar circumstances elsewhere is offered a compliance agreement. Larger firms may be more aware of the unavailability of such agreements in some areas, and may better able to negotiate them in others. There is also an even greater risk of non-uniform responses by regulators in different jurisdictions which must be addressed by improving communication among regulators on how and when to use this tool. Within a single jurisdiction, problems of unfairness can be minimized through policies establishing clear criteria for their use. Consistency could be encouraged through an increased discussion of case studies among regulators. Continued review of the agreements by department lawyers should also help to improve clarity, and some measure of a common approach.

4.15 Conclusion

Voluntary compliance plans and agreements can be a valuable and cost effective method of improving regulatory compliance. Useful aspects of Canadian compliance guidelines include:

1. Voluntary compliance plans and agreements are expressly incorporated in an overall compliance policy.
2. Written criteria for their use are specified in writing, focusing on the environmental impact of the non-compliance and on the attitude and history of the offender.
3. Regulators must document in writing their rationale for offering voluntary compliance measures, especially where there are grounds to use mandatory measures.
4. Failure to carry out the voluntary measures is monitored and taken seriously.
5. Mandatory compliance measures must be used if voluntary measures do not produce acceptable results within a reasonable time.

However, greater effectiveness can still be striven for:

1. Voluntary compliance plans could be made more valuable (e.g., include some form of forbearance), and, on the other hand, more expensive, (e.g., they should be earned by previous efforts to improve compliance, as for example through pre-detection measures that have themselves indicated a commitment to compliance, and demonstrate some objective success in maintaining compliance over a prescribed period). They should never be offered to the deceitful, nor to the deliberate polluter.

2. Repeated non-compliance could be punished with a predictable, multi-step progression in the intensity and stringency of enforcement.

3. Program approvals could be granted only with reticence to companies that cause adverse environmental effects, and then only after public consultation.

4. The company could be required to provide consideration for the making of any agreement, and for any extensions or amendments to it. Normally, such consideration should include financial surety that will be forfeited if the company fails to comply with the agreement.

5. Regulators could insist that the program produce measurable results within a reasonable time, and should respond vigorously if this does not occur, for instance, through the company forfeiting the financial surety.

6. A mechanism, such as pre-clearance, would enable a company to conduct preliminary negotiations without furnishing the regulator with evidence for a prosecution.[88]

7. Plans and agreements (including control orders) could focus on environmental performance, not on the methods or technology used to achieve it.

[88] This objective could also be achieved by provisions in the compliance and enforcement policy that better focus prosecution on the irresponsible firms. There would have to be clear provisions for moderating penalties against reformed violators sufficient to reward them but not forgiving (and therefore rewarding) the previous lack of compliance.

5 Regulatory Delegation: The Proposed Federal Regulatory Efficiency Act

5.1 Introduction

In addition to the more traditional compliance plan approach described in the previous section, recently there has been a growing interest in alternative ways of achieving compliance with existing regulatory obligations. This appears to be driven both by a desire to reduce the government administrative burden and by a belief that regulations may impose unnecessary costs on regulated parties due to their alleged inflexibility. This section reviews an attempt by the federal government to address these concerns by means of a proposed Regulatory Efficiency Act (Bill C-62). Although the federal government ultimately did not proceed with the Bill past first reading, there are important lessons to be drawn both from its content and from the reaction to it.

Bill C-62 was designed as part of an overall effort to reform the federal regulatory regime. In 1993, the Parliamentary Standing Committee on Finance issued a special report recommending a reformed regulatory system focused more on achieving the goals of regulation, and less on technical requirements. In 1995 the government observed that "our federal regulatory regime is too complicated, costly and cumbersome," and that many federal regulations are "redundant and obsolete[... and] focus more on technical requirements than on goals."[89] The government then introduced a regulatory agenda comprised of eleven initiatives, including a review of all departmental regulations, a draft Regulations Act designed to "modernize" the regulation development process, and Bill C-62.

The provisions of Bill C-62 would have authorized regulated parties and the government to negotiate "compliance plans," specifying how regulatory objectives would be met and waiving specified regulatory obligations. The Bill also authorized individual Ministers and the President of the Treasury Board to seek cabinet approval jointly in order to designate specific regulations as subject to this regime. Once regulations were designated, the responsible Minister would then publish criteria and procedures for approval of compliance plans and publish them in Part 1 of the *Canada Gazette* (the official organ for disseminating government decisions such as regulations and orders in council). Individuals or businesses subject to the designated regulation would then be entitled to submit a proposed compliance plan to the appropriate minister.

The Bill stipulated that compliance plans would be authorized only in relation to technical provisions, and must comply with "the principle of sustainable development" and the "protection of health and safety." It would have required proponents to demonstrate how the proposed compliance plan would be "at least as effective" at meeting the regulatory objectives as the regulation, and it authorized the government to require proponents to pay for necessary analysis. The Bill also stipulated various procedural requirements, including obligations to consult, to publish the proposed plans in the *Canada Gazette*, and for *post facto* review of compliance plans by an appropriate Standing Committee of the House of Commons to determine compliance with regulatory objectives. Finally, it would have obliged the government to monitor the plans, with the authority to suspend or terminate the approval of a plan immediately upon commission of an offense, a breach of a term of the plan, or as required to deal with a threat to the safety or health of any person or to the environment. The Bill would also have authorized the government to terminate a plan on reasonable notice or as provided in the plan.

[89] Government of Canada 1995c, 1.

The government's rationale behind Bill C-62 was that if there were alternative, cheaper ways to achieve a regulatory goals, the regulatory process should authorize those approaches. It argued in its description of the Bill that "modern management techniques show that competitiveness and quality are not achieved by stipulating every detail of how workers do their jobs. What is important is the result of their efforts." Just as workers can often find better ways to achieve their production goals, so in the regulatory area "regulators and companies know that they can often meet regulation goals as well or better by doing things different from the regulations."[90] The Bill was designed to allow speedy, customized responses to such situations, since "changing regulations for special circumstances is complicated, expensive and time consuming."

5.2 Legal Authority

Although much of the criticism of Bill C-62 focused on its implications, some critics argued that the Bill raised constitutional and legal problems. In a paper prepared shortly after the Bill was introduced, for example, the secretariat to the Standing Joint Committee for the Scrutiny of Regulations (a joint Committee of the House of Commons and the Senate) argued that the grant of discretionary authority to set aside regulatory requirements would have been unconstitutional for a variety of reasons.[91] The report argues that the Bill would have revived the power of dispensation declared illegal in the 1689 Bill of Rights in England and that it would have violated the constitutional conventions of the "rule of law," fairness and equality, and governmental accountability.

The claim that Bill C-62 would have violated the 1689 Bill of Rights appears tenuous. Section XII of the Bill of Rights provides, in part, that "no dispensation of or to any statute or any part thereof shall be allowed but that the same shall be null and void and of no effect *except a dispen - sation shall be allowed of in such statute"* (emphasis added). In reviewing the contemporary legal position on this issue, the Manitoba Court of Appeals has stated:

The legal status of these powers today is well described in 7 Hals. (3d) 230, para. 486, thus: "The Crown may not suspend laws or the execution of laws without the consent of parliament; nor may it dispense with laws, or the execution of laws; and dispensations by non obstante of or to any statute or part thereof are void and of no effect, except in such cases as are allowed by statute."

Since, in Bill C-62, the power to dispense with the application of a specific regulation was granted by Parliament and would have been subject to review and repeal by Parliament, the validity of the problem raised by the Joint Committee secretariat is debatable.

On the other hand, the legal capacity of the government to authorize subordinate officials to issue dispensations and variances is less clear. In Canada, typically a law will authorize the Governor in Council (or Lieutenant Governor in Council for provinces) to promulgate regulations with respect to specified issues. The law is clear that the Governor in Council cannot, without legislative authorization, then authorize a third party (e.g., an official) to grant individual dispensations or variances to the regulation. It is less clear, however, whether the Governor in Council, by virtue of its authority to make regulations, can also issue dispensations and variances itself without explicit legislative authority to do so.[92]

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[90] Government of Canada 1995c, 6.

[91] Secretariat to the Standing Joint Committee for the Scrutiny of Regulations 1995.

[92] Various constitutional authorities have argued that the discretion to grant individual exceptions to a law made by a delegate must be provided explicitly or by necessary implication by Parliament (see, for example, the authorities cited in the Ninth report of the Standing Joint Committee for the Scrutiny of Regulations, 1993, and in the Standing

(continues)

Critics also raised concerns about the constitutional capacity of Parliament to authorize negotiated arrangements which could have the effect of imposing criminal liability on an employee of a company negotiating a compliance agreement: "citizens could be convicted and fined or imprisoned, not because they disobeyed a law, but because they disobeyed a private agreement between a designated regulatory authority and their employer."[93] These critics argue that this aspect of Bill C-62 would have violated the Canadian Charter of Rights and Freedoms, which declares that Canada "is founded on principles that recognize the rule of law."

The implication of the "rule of law" principle for the Bill is unclear. The "rule of law" signifies, among other things, that all are equal before the law and that the law binds all equally. According to the Supreme Court of Canada, this aspect of the "rule of law" requires that there be "equality in the administration or application of the law by law enforcement authorities and the ordinary courts of the land."[94] It is not clear, however, whether the Bill would have violated this principle, since it arguably would have provided equal opportunity to apply for a compliance plan. The Joint Committee secretariat argued that this equality of opportunity is illusory, since in practice only large corporations will have been able to afford to gain the advantages of customized compliance agreements. While this is undoubtedly a valid policy consideration, it is less clear that this observation represents a legal impediment to the Bill, particularly in light of the acknowledgment in the same report that there already exist various legal statutory exemptions in other federal statutes.

One of the most important criticisms of the Bill, in fact, was the observation that it would have been unnecessary in many cases. Various federal laws already provide for regulatory exemptions and specialized compliance plans (e.g., the Transportation of Dangerous Goods Act, s. 31, Canada Oil and Gas Operations Act, s. 16(1), Aeronautics Act, s. 5.9, Railway Safety Act, s. 22, Canada Grains Act, s. 116, and CEPA which, as noted in Section 4 above, provides for the development of customized compliance plans). In other cases, it might have been expedient to revise particular Acts rather than create an omnibus authorizing statute.

5.3 Impact on Compliance

An important assumption by the proponents of the Bill was that parties negotiating compliance agreements would be more likely to comply with their negotiated obligations than with the regulatory obligations, allowing government officials to "reallocate scarce enforcement resources to problem cases."[95] Proponents argued that business is reluctant to comply with patently bad regulations, and that high compliance costs are resulting in non-compliance, loss of jobs to automation and the failure to introduce new jobs into Canada. By contrast, they asserted, a company would be more likely to abide by a compliance plan tailored to its own circumstances, especially since it would have exposed itself to public scrutiny in applying for the plan. Some critics of the Bill responded that its impact on compliance levels would likely be negligible since few companies could be expected to go through the procedural requirements to obtain a plan.

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[92] *(continous)*
Joint Committee's report on Bill C-62, 1995). By contrast, however, certain obiter statements in a recent Federal Court of Appeal decision imply that a delegate empowered to make subordinate law has the power to grant dispensations from the law he or she makes, unless it appears that it was Parliament's intention that the delegate not have this power: *Carrier-Sekani Tribal Council* v. *Canada (Minister of the Environment),* [1992] 93 D.L.R. (4th) 198; *Save the Bulkley Society* v. *Canada (Minister of the Environment.,* [1992] 93 D.L.R. (4th) 198.

[93] Secretariat to the Standing Joint Committee for the Scrutiny of Regulations 1995, 6.

[94] *A.G. of Canada* v. *Lavell,* [1974] S.C.R. 1349, 1366.

[95] Government of Canada 1995c, 6.

More important concerns were raised by those who asked about the potential symbolic impact of the Bill on compliance. Compliance is, at least in part, a function of social norms.[96] What message would this Bill convey about the value of regulatory compliance? The perceived premise underlying the Bill might be that compliance can be unnecessarily costly. By offering an opportunity to comply with less onerous requirements, would the Bill imply that compliance can be problematic and should be avoided whenever possible (either through the negotiation of a compliance agreement, or otherwise)? More fundamentally, what signals would the Bill convey about the acceptable level of risk in society? Would it imply that regulated parties should question the risk protection measures to which they are subject, simply because compliance might impose an onerous burden?

5.4 Relationship with other Government Activities

A widespread criticism of the Bill is that it would have increased, rather than decreased, the government's administrative burden. The Bill would have placed the onus on proponents to demonstrate that a proposed compliance plan would meet or exceed the regulatory objectives. The Bill would also have allowed government to require proponents to pay for necessary analysis. Nonetheless, the requirements that both the responsible government department (or other designated regulatory authority) and a parliamentary committee review the proposed compliance plans, and that the government publish them in the *Canada Gazette*, provide for consultation, and monitor approved plans, would inevitably have imposed new administrative burdens on government.

Given the dramatic reduction in resources within government, would Ministers have diverted resources from regulatory development and compliance and enforcement activities to review proposed plans? Alternatively, would they have been more likely simply to refuse to approve any compliance plans, rendering the Bill meaningless?

Government representatives responded to these criticisms with three assertions:

- the administration of a number of customized plans would have been no more difficult than the application of a uniform regulation to a number of different situations;
- companies interested in convincing government to approve a compliance plan could have been forced to develop alternative, more efficient methods of monitoring compliance; and
- since application for a plan would have placed a spotlight on the applicant, only companies with good records would have been likely to apply, meaning that enforcement officials could confidently focus on other parties.

5.5 Impact on the Regulatory Standard of Care

A major concern about the Bill was that it would lead to an erosion in standards. The Bill would have required proponents to prove that a proposed compliance plan would meet or improve on the existing regulatory objective. Although it had not done so before introducing the Bill, the government had undertaken to develop criteria to restrict the Bill to regulations that "prescribe technologies, product or process standards of a technical nature, or that are administrative or procedural in nature." Critics questioned whether it would be possible to develop such criteria. More fundamentally, they argued, it would be inappropriate to assume that "technical" specification standards are not sometimes the essence of the regulatory objective, for those standards are often "what give regulations

[96] See, for example, Roy 1992.

substance and teeth; they impose specific requirements on parties[...]and, because they are concrete, they are in principle easy to enforce."[97]

These criticisms were significant. Had the government restricted the Bill to regulatory provisions not affecting the regulatory objective, it appears likely that the Bill would have become too narrow in scope to be useful. If it had applied only to minor issues like written versus electronic reporting requirements, few regulated parties would have been willing to go to the expense of obtaining a compliance plan. Had the Bill been broader, however, then it would have threatened to become an instrument of deregulation.

5.6 Accountability

Regardless of the Bill's impact on performance standards, critics argued that it would have engendered fragmented and inconsistent decision making, eroding the levels of transparency and accountability ensured by the current regulatory regime. Critics also argued that the Bill would have enhanced the potential for powerful business interests to "capture" the government agenda "by inviting businesses, lobbyists, and political buddies to meet privately with ministers and negotiate profit-oriented deregulation agreements" and by empowering ministers "to accommodate the preferences of businesses, without the scrutiny and accountability of a public regulatory process."[98]

There is no question that by subdividing basic regulatory obligations into particularized agreements, the Bill would have made it harder for government to ensure uniformity, or for third parties to oversee the decision-making process. The current reality, however, is that enforcement officials routinely exercise discretion. Indeed, proponents argued that the regime proposed in the Bill would have been preferable, since the discretion embodied in compliance plans will be subject to a minimal level of scrutiny—through the requirement to consult and publish the proposed and final plans—whereas most enforcement-level discretion occurs almost completely behind closed doors.

Critics rejected these assertions by emphasizing the distinction between standard-setting and standard-interpreting functions. In recent years many environmental and health and safety regulations have been developed in Canada on the basis of extensive consultation. Environmentalists and other public interest advocates argue that they struggled long and hard for the current system, which ensures them significant levels of access into the regulatory development process. They fear that initiatives like Bill C-62 will undermine that access and thereby undermine the capacity of the public to understand what rules are being developed to apply to which parties in what circumstances.

Bill C-62 also raised troubling questions about how a private citizen could be expected to know what standard a regulated party was required to meet: that specified by a regulation, or one stipulated in a customized compliance plan? The Bill would have required the government to publish proposed and approved compliance plans in the *Canada Gazette*—the same publication process used for regulations. Critics argued, however, that the regulatory development process as a whole is much more transparent, allowing interested parties to become familiar with a regulation before it is gazetted. They also argued that the regulatory regime provides more certainty, whereas under the Bill a private citizen would have to inquire whether the regulation still applied to a neighboring enterprise.

The government responded to early concerns about the lack of government accountability and transparency by adding a requirement that parliamentary committees review each proposed plan. Critics rejected this amendment on two grounds. First, they argued that committee oversight would

[97] Bennett 1995.

[98] CELA 1994, 2-3.

have placed too much responsibility in the hands of backbenchers, and avoided the real requirements of Cabinet responsibility that are at the heart of parliamentary governance. Critics also argued that scrutiny of proposed plans would have required technical skills beyond the capacity of committee members. As with departmental officials, this oversight role would have strained committee resources with the result that they would either have rubber stamped the plans or diverted resources and attention from their more appropriate role of policy development and review.

5.7 Fairness

Given the expense of obtaining a plan, many observers worried that the Bill would only have been utilized by a few large companies, raising concerns about creating an "uneven playing field." This issue is difficult to assess. What about the playing field ought to be level? Should government be concerned if a company gains an economic advantage through the development of a cheaper way to meet a regulatory objective? Is this not consistent with the basic, innovation-rewarding philosophy of the marketplace?

5.8 Conclusion

The reaction to Bill C-62 emphasizes the many difficult legal and policy-related issues that will have to be overcome in order to delegate the responsibility for designing and administering regulatory obligations to the private sector.

The reactions to this initiative also suggest the importance of maintaining public trust in the public policy process. The issue of trust arises because of the various ways in which reforms of this type could alter the balance of power between the public, the government and the regulated parties. The public would probably end up with less input into decisions. It would also have less ability to oversee the implementation of those decisions. How is the public to know, for example, that regulatory objectives are being attained? Or that regulated parties are complying with legal standards? More fundamentally, how is the public even to know what the standards are, since these might change through the accumulation of a series of special arrangements? Any attempt to promote reforms of this type in the future will have to address these issues at a symbolic level as well as legally and substantively.

6 Lender Liability Agreements

6.1 Introduction

Lender liability agreements make an interesting contrast to the Regulatory Efficiency Act. Like the REA, lender liability agreements originated as an individualized, contract-based alternative to conventional regulation. In practice, however, negotiating such agreements on an individual basis has proved so difficult and problematic that both regulators and the regulated community have agreed to return to a conventional, quasi-regulatory approach.

The principal difference between the REA and lender liability agreements is that the REA proposed to establish statutory authority allowing regulators to grant exemptions from regulatory requirements in exchange for other desirable behavior. The lender liability agreements did precisely the same thing without statutory authority. In the REA, there was no limit to the regulatory requirements that could be bargained away; in lender liability agreements, what was bargained away was the extent of liability for pre-existing problems that regulators could impose upon non-polluters.

In this study, the term, "lender liability agreements," refers to those agreements negotiated between a regulator and an innocent party who is willing, under certain conditions, to take possession of contaminated land. Most of these agreements have been negotiated with lenders (usually mortgagees). Creditors who are contemplating re-entry on contaminated property require such agreements because of the risk that, once in possession, they would have unlimited liability for the contamination. For example, the Ontario Environmental Protection Act allows the MOEE to impose unlimited liability on anyone who "owns, occupies or has charge, management and control of land," whether or not they were at fault in causing the contamination. Lenders, rationally desiring to minimize cost, will not expose themselves to this risk if there is a possibility of significant contamination.

Following a landmark Alberta case that imposed liability for a cleanup upon a secured creditor in priority to its security, lenders across the country began to refuse to go into possession of contaminated sites. This has threatened to cause many sites, some containing substantial hazards, to be abandoned, even when the debtor had some valuable assets.

Environmental regulators quickly realized that they could obtain a better environmental result if the banks (which generally operate with a high degree of environmental responsibility), could be induced to take control of these sites. They could go into possession, realize on whatever assets did remain, and use some of the funds to assess and address urgent environmental problems that the debtor had left behind. However, the banks were adamant that they would not do so if they thereby exposed themselves to significant liability. In fact, once regulators indicated that they considered any actions on the property to be acts of possession, the banks were afraid even to commission environmental audits of the suspect properties. This was not the result that the regulators desired. They soon conceded that it was in the best interests of both regulators and lenders if creditors could assess in advance what it would cost them (from an environmental point of view) to go into possession of contaminated sites.

Thus, a practice of negotiating "lender liability agreements" was evolved to apply to the situation when a bank proposed to take over control of a contaminated site. Initially, each site was considered separately with individual terms negotiated for it. However, the process was rapidly standardized into two-stages: (1) a limited agreement allowing a lender to commission an environmental audit without liability, provided that the audit was given to the regulator, and (2) a further agreement that would allow the bank to take possession of the land without incurring more than a specified liability for the costs of cleanup. The amount to be spent on site cleanup ranked after the fees of

the trustee or receiver, and was limited to a specified proportion of the funds recovered from the debtor's assets. In exchange, the bank would advance its own funds to take urgent measures, e.g., to remove hazardous wastes from the site, and share all environmental information in its possession with the MOEE.

As a result, both the MOEE and the banks were better off. Lenders benefited by being able to realize profits on their security without exposing themselves to liability for the contamination caused by others. The MOEE benefited by having a competent, cooperative, solvent person studying the site and improving its most urgent problems, without prejudicing the MOEE's rights against the actual polluter.

The initial agreements were difficult and time-consuming to negotiate, requiring many weeks and repeated meetings. Nevertheless, demand was brisk because the economy was in recession and insolvencies were widespread. Creditors reported intense frustration at the delays, and at regulators' reluctance to conclude clear, binding agreements. Regulators reported equal frustration about the enormous additional workload that the demand for these agreements imposed, just at the time that their own resources were increasingly strained.

There were other problems as well. One was the impossibility of maintaining consistency and fairness between agreements on different sites and in different regions. After all, no one knew how much the regulators should be demanding, or even what precisely they were giving up. When lawyers in the head offices became involved, consistency improved but at the price of even longer delays. Another problem was what role to give to the creditor's debtor, and/or to members of the public. They were generally excluded from the negotiations, and from the agreement, but not all found this exclusion acceptable.

Eventually, regulators developed standardized patterns for these agreements, which were made public informally and in speeches to the legal profession. A year later, a standard first-stage agreement was published on the environmental registry for general public comment. After comments were received, a formal pattern was published.[99] Today it is more difficult to persuade regulators to individualize these agreements.

The Ontario pattern includes the following elements:

1. The agreement limits the creditor's liability for pre-existing contamination, not for any negligence or non-compliance which may occur while the lender is in possession of the property.

2. The ministry does not and can not protect the creditor from claims by third parties.

3. The creditor must keep the ministry and prospective purchasers or tenants fully informed of any environmental problem on the property known to the creditor.

4. The creditor must provide the ministry with any information known or available to the creditor that will assist the ministry to pursue those responsible for the environmental problem.

5. The creditor must make some contribution to resolving the environmental problems of the site. This may include:

[99] This process resulted in *The Standard Agreement between Lenders and MOEE to Clarify Liability* (PA5E0018), accessible through <www.ene.gov.on.ca/samples/search/Ebrquery_reg.htm>.

- carrying out studies,
- keeping the premises secure,
- performing some cleanup
- ensuring proper waste disposal and/or,
- dealing with newly-discovered problems.

5. The agreements typically specify a maximum amount for this contribution.
6. The creditor can acquire the right to walk away from the property without further liability, upon giving the ministry reasonable notice (usually twenty-one days) and having completed the agreed-upon work.
7. The agreement may include a maximum monetary level for the environmental responsibilities of the lender. The nature of these levels remains variable. They may be as high as the total net recovery of the lender from the property, some proportion of that net recovery, a fixed dollar amount, or different percentages of the net recovery from different categories of assets (e.g., 100 percent of the value of the land plus 50 percent of the inventory on hand).
8. The ministry typically demands the right to terminate the agreement upon notice if the receiver remains in possession of the property for a prolonged period of time, e.g., two years. This is particularly so where the receiver is going to operate an ongoing business.
9. If the agreement is to be incorporated in a court order (usually in the Bankruptcy Court), the order must permit the Ministry and other public authorities to enter the property for emergency purposes.
10. Any special provisions in the court order (e.g., a provision deeming the receiver not to be in possession of the property) should be expressly limited to protecting the receiver from the Ministry issuing orders or taking enforcement steps, and there should be an acknowledgment that the Ministry may apply for an amendment to the order if there are reasonable grounds, (e.g., if the receiver is negligent or behaves in an illegal manner).
11. If the creditor does not hold a first charge on the property, the court order may authorize the Ministry to issue remedial orders for the purpose of better enabling the receiver to carry out his responsibilities. This will allow the environmental expenses of the receiver to take priority over prior secured creditors.
12. The Ministry will not keep arrangements with lenders confidential indefinitely but may be prepared to negotiate confidentially while a creditor is making an application for the appointment of a receiver or trustee.
13. Each case is treated on an individual basis and other requirements may be added.

This is an illustration of *voluntary* compliance by which a regulator was able to induce the banks, who were not obliged to do so, to invest funds in improving the environmental condition of contaminated sites. It is also an aspect of voluntary *compliance* because the investments were made to ameliorate significant problems of non-compliance left by the previous owners.

6.2 Legal Authority

No statutory authority exists for such agreements. The only requirement in the Ontario Environmental Protection Act for the making of agreements is that they be made by the Minister and approved by the Lieutenant Governor in Council (Cabinet); neither occurs with lender liability agreements.[100] Banks rely upon these agreements, notwithstanding their lack of expressed authorization, because any action by the MOEE to impose liability upon them could be successfully defended as an abuse of process.

Responsibility for negotiating lender liability agreements rests with the abatement staff of each region of the MOEE, with the assistance of the legal branch. Thus they are handled as a normal extension of pollution abatement.

6.3 Efficacy

Regulators believe that lender liability agreements have had some beneficial effect in achieving environmental improvement of contaminated sites and in preventing them from being abandoned. Receivers and bankers agree that lender liability agreements have had a positive impact on the priority given to environmental problems when a lender takes over contaminated property. Receivers and trustees have numerous duties, some of them fiduciary, when it comes to disposition of the assets of an insolvent debtor. On one level, the duty of a trustee or receiver is to maximize assets for the creditor who appointed him/her; this approach does not encourage them to make environmental expenditures. When a lender liability agreement is made, and often court approved, the trustee or receiver has a clear duty and complies with that duty to the best of their ability.

However, there are no data on how many such agreements have been negotiated, nor on how many properties were affected. Nor are there any data on what environmental improvements were obtained under such agreements. There is no formal process for evaluating and reporting on such improvements, although lenders do agree to provide the MOEE with any environmental information that they have.

6.4 Fairness

Because lender liability agreements have been negotiated for individual sites in six different regions, the agreements have varied from region to region and from site to site. This lack of consistency has raised questions of fairness that are troubling to the MOEE, to the banks, to the debtors and to others concerned with the process. The MOEE has achieved greater consistency at the expense of flexibility by becoming more rigid when negotiating these agreements. In partial response to the variation in agreements, a group of concerned parties was convened to develop underlying principles. From this, a draft, standard Lender Liability Agreement was posted on the Environmental Registry for public comment in April 1995. Regulators and lenders alike believe a standard agreement will reduce delays, inconsistency, and the heavy resource costs now involved in individually negotiating such agreements.

Negotiated lender liability agreements are unlikely to have any direct effect on “forum shopping” in the establishment of new businesses, however. New businesses are seldom established with the expectation of failure. However, banks are keenly interested in the fairness and terms of such agreements when they decide whether to make new loans on environmentally risky activities. Canadian banks frequently point out that US banks do not incur Superfund liability when they take

[100] See Section 4 of the Act.

ownership or possession of contaminated property solely to protect their security. In this respect, Canadian banks and Canadian businesses are at a disadvantage compared to those in the United States. This concern cannot be separated from the overall approach of each jurisdiction to vendor liability; the agreements are only one aspect of this problem.

6.5 Relationship with other Enforcement Mechanisms

Negotiated lender liability agreements are, and are intended to be, restrictions on the exercise on the MOEE's other enforcement powers. The promise of forbearance in the imposition of liability is the consideration offered by the MOEE that made the agreements possible.

Because negotiation of these agreements requires the use of regulatory discretion, there is a possibility of subsequent claims of abuse of process or regulatory negligence, whether by banks, by others with interests in the relevant property, or by third parties adversely affected by the site. This risk is no greater than in other areas of regulatory discretion. Precautions taken to limit the risk have included the requirements that all agreements be in writing, be reviewed by Department legal counsel, and be signed by a senior manager.

6.6 Accountability

Public participation in these agreements remains rare. There is no mechanism to allow it, and both of the principal parties are reluctant to permit it. Likewise, third parties have no access to lender liability agreements during negotiations, and little afterwards.

Public interest groups report some dissatisfaction with the closed-door nature of these agreements. Their only opportunity to participate has been the publication of the "standard" agreement for public comment. On the other hand, the increasing standardization of lender liability agreements according to a pattern that is known to the public decreases the importance of public involvement in individual agreements.

The decision-making process is not "transparent." There are no third-party rights of appeal, even for the debtor. The debtor may have a right to challenge the bank on the grounds that the agreement was "improvident" and therefore a breach of its duty to him/her, but such a challenge seems unlikely to succeed.

Negotiation of lender liability agreements typically shifts the focus for at least the immediate cleanup from the original polluter/debtor to the lender. Ultimate accountability for the cleanup remains with the original polluter, who is often without assets.

6.7 Conclusion

Individually negotiated agreements for lender liability have filled an essential gap in Canadian environmental law—a gap that was leading to serious adverse effects on the management of contaminated land. They have brought a measure of certainty to lender liability for contaminated land, and induced banks to invest in environmental improvements for such land. However, the huge resource costs involved with negotiating such agreements for individual properties, the lack of public accountability, and the unfairness that can result from inconsistent agreements, has driven regulators and the business community away from individually negotiated contracts towards a standard, "regulation"-type pattern that has benefited from public consultation.

7 Environmental Audit Privilege Policies in Canada

7.1 Introduction

In recent years, environmental self audits have emerged as increasingly important business practices to help ensure compliance with environmental laws and satisfy potential lenders and shareholders about environmental liability issues. Self audits can also be useful sources of information to government enforcement officials, however. Accordingly, governments have wrestled with what policies, if any, are required to create incentives for companies to conduct and comply with environmental self audits, while allowing governments access to available information to ensure effective enforcement.

This section of the report summarizes the self audit policies for government enforcement staff from three Canadian jurisdictions: the federal government's Canadian Environmental Protection Act (CEPA) "Compliance and Enforcement Policy," the Ontario Ministry of Environment and Energy's "Policy and Guideline on Access to Environmental Evaluations," and the provisions in the more recent Nova Scotia Environment Act concerning the voluntary disclosure of violations detected in environmental audits and assessments. Many of the provisions and issues discussed in this section overlap with those discussed in Sections 4 (compliance plans) and 6 (lender liability agreements). Since self auditing is an important part of an environmental management system (EMS), this section also discusses a number of the issues that arise in the development of EMS codes, such as ISO 14000, which is discussed in more detail in the next section.

7.2 Privilege Law in Canada

Policies concerning the extent to which self audits will be used for enforcement purposes impact the legal issue of whether or not such self audits should be accorded an evidentiary "privilege," i.e., whether they should be considered private property beyond the reach of government enforcement officials. Canadian common law accords very few evidentiary privileges. The primary privilege rule relates to solicitor/client privilege, and has consistently been very narrowly defined by Canadian courts. Environmental audits are routinely prepared for a wide variety of purposes, including planning, due diligence, ascertaining the causes of incidents and ordering remedial steps, and addressing changes in the risk control system to prevent recurrences. As a result, "the contents of an environmental audit report will not normally be protected [under solicitor/client privilege] since the purpose of the audit, as it is generally defined, is not for the use of counsel in litigation."[101]

The farthest the courts have gone in Canada has been to acknowledge that a client is entitled to use an agent to put the facts before counsel without losing solicitor/client privilege. So far, this reasoning has been restricted to accountants.[102] Some commentators argue, however, that it ought also apply to professional auditors retained by lawyers or by a client for the express purpose of providing information enabling a lawyer to prepare a legal opinion:

> Corporate directors and senior management are forced, in the face of increasing personal risk, to obtain legal advice regarding environmental compliance. Solicitors practicing in this field are fully conscious that [such] advice cannot be given in the large majority of cases without some form of environmental audit. Clients are therefore left in the impossible position of choosing between disclosing what may be incriminating information without an assurance of confidence or privilege in order to obtain advice, or possible criminal liability for failing to obtain that very advice.[103]

[101] Edwards 1990, 34.

[102] These cases have followed *Susan Hosiery* v. *Minister of National Revenue*, [1969] 2 Ex. C.R. 27.

[103] Cotton and Mansell 1991, 122.

Notwithstanding the assertion by Cotton and Mansell that "it is this dilemma that the rule of solicitor/client privilege was expressly developed to avoid," Canadian courts have been very cautious about extending solicitor/client privilege to environmental audits.

7.3 Federal and Ontario Policies

7.3.1 Canadian Environmental Protection Act: Enforcement and Compliance Policy

In 1988, Environment Canada published the *Canadian Environmental Protection Act Enforcement and Compliance Policy* (1988, reprinted 1992). One of the first formal enforcement policies in Canada, it also contained the first statement about the use of environmental audits for enforcement purposes, defining audits as, "internal evaluations by companies and government agencies, to verify their compliance with legal requirements as well as their own internal policies and standards." The *Policy* states that "Environment Canada recognizes the power and effectiveness of environmental audits as a management tool[...]and intends to promote their use[....]" Accordingly, "inspections and investigations under CEPA will be conducted in a manner which will not inhibit the practice or quality of auditing." Specifically, the *Policy* limits the grounds when government officials can access audits: The *Policy* also states that "any demand for access to environmental audit reports during investigations will be made under the authority of a search warrant. The only exception to the use of a search warrant is exigent circumstances, that is when the delay necessary to obtain a warrant would likely result in danger to the environment or human life, or the loss or destruction of evidence."

7.3.2 The Ontario Policy and Guideline on Access to Environmental Evaluations

The Ontario Ministry of Environment and Energy released its *Policy and Guideline on Access to Environmental Evaluations* in late November 1995. The *Policy* arose partly in response to pressure from industry representatives for criteria guiding the very broad information-collecting discretion granted to Ministry officials under the Ontario Environmental Protection Act. The impetus for the *Policy* came from a project jointly sponsored by the agricultural community, the government, and a local university to develop a farm self-assessment process. In the early 1990s the MOEE agreed to grant immunity to participants in a pilot version of the self-assessment project. Following the pilot application, the agricultural community indicated to the MOEE that its members were reluctant to implement self-assessment more comprehensively without assurances of immunity from prosecution, regardless of the information generated. In response to these concerns, the MOEE sponsored a multi-stakeholder task force which reported in late 1994. After a further year of negotiations, the MOEE released its final version.

This *Policy* is designed as a compromise between the previous situation, which granted open access for audits, and an absolute privilege rule. It states on page one:

> By providing greater certainty, this Policy will encourage environmentally responsible companies and individuals to develop and use environmental evaluations. It will also continue to allow the MOEE to carry out its responsibility to take action to protect the environment in urgent or serious environmental situations.

The Ontario *Policy* further states that "MOEE will respect the confidentiality of self-initiated evaluations and will not, as a matter of course, demand or request access to environmental evaluations." The *Policy* then sets out the exceptional circumstances in which the MOEE may require access, and describes the steps that staff must follow to obtain access. The process is similar for both inspections and investigations. The government official must first request access from the company. If access is denied, the official must obtain authorization from the regional head of investigation and from legal counsel to seek a judicial inspection order under the Act or a search warrant. For inspections, these two must be satisfied that the requesting inspector believes on reasonable

grounds that the evaluation's findings will be relevant in addressing the environmental problem, the information cannot reasonably be obtained from other sources, and the information is necessary for administering the Act. For investigations, the officials must also be satisfied that an offense has been committed, that the evaluation's findings are relevant to the violation and necessary to its investigation, and that the information cannot reasonably be obtained from other sources. Like the CEPA policy, the Ontario *Policy* waives the requirement for a judicial inspection order or search warrant where the attendant delay would likely result in an immediate danger to health and safety, serious risk to the quality of the environment, or the loss or destruction of relevant evidence.

The Ontario *Policy* also encourages companies to submit their environmental evaluations to the MOEE along with a plan for a program approval (a plan to address the problems brought to light by the evaluation). If a party complies with a program approval, it will be "immune from prosecution for the matters dealt with under the program." This part of the *Policy* essentially reiterates the existing provisions for program approvals which are reviewed in Section 3 of this report, above. Finally, the Ontario *Policy* states that environmental evaluations will not be used against a company (even if no program approval is in place) provided the company can demonstrate "good faith in taking environmentally responsible action."

7.3.3 Legal authority

The Ontario and CEPA *Policies* concerning access for audits are operational policies. As such, they are not judiciable. They were, however, developed in consultation with the public, and subsequently published with the intention of providing guidance to the regulated community. Accordingly, it is conceivable that a request for an audit in violation of the policy could be construed as an abuse of process (see the discussion of abuse of process in Section 4.11.2, above).

7.3.4 Impact on Compliance

The main argument favoring the protection of audits rests on the premise that they are extremely valuable tools to promote environmentally responsible behavior, and that public policy should therefore encourage their use. Commentators agree that "from the perspective of industry, audits are good business."[104] As a 1986 review observed, "by identifying non-compliance, audits allow a regulated entity to "manage pollution control affirmatively over time instead of reacting to crises."[105] Frequent and open scrutiny heightens awareness and can therefore prevent violations. Audits can also be an effective means of improving a company's environmental management system, and, if followed up properly, can be used to demonstrate due diligence as a defense to criminal or civil actions.

In addition to the direct compliance-related benefits, self audits are playing an increasingly important role in the financial management of many businesses. Regular audits can enhance an organization's relationship with government agencies and its public image. They may help retain or attract environmentally conscious consumers, and can address the requirements of purchasers and suppliers who have made environmental performance a criteria of their purchasing or contracting practices. Similarly, companies conducting environmental audits can help reassure potential investors, shareholders, and creditors. Experience suggests, moreover, that the detailed knowledge of a facility's conditions generated by self audits can help "expedite negotiations for the sale of an asset, facilitate purchasing pollution insurance, speed negotiations with lending institutions for loans, and contribute critical information for planning future growth."[106] Finally, as official policies of both the

[104] Darnell 1993, 125.

[105] US EPA, 1986.

[106] Ronald 1994, 5.

US EPA (1986) and Environment Canada (1988) acknowledge, to the extent that self-policing by industry can promote compliance, the regular use of audits can reduce government enforcement-related expenses.

Proponents of audit privilege rules, therefore, argue that a policy allowing government officials to force the disclosure of self audits might deter companies from initiating them in the first place. Companies might be deterred from carrying out audits if they are concerned about the potential prejudice the audits may cause if their results are made public. The disclosure of an audit could be prejudicial to a regulated company if the audit reveals evidence of non-compliance to a regulator or of negligent behavior to a neighbor. The disclosure of an audit might also reveal information of benefit to a competitor.

Advocates of audit privilege policies also argue that fear of disclosure will inhibit the effective use of audits. Efforts to ensure that audits are protected by solicitor/client privilege might lead companies to limit access to audits to a handful of senior personnel (and the company lawyers), thereby inhibiting full and frank disclosure within the company, thus diminishing the effectiveness of the audit.[107] Similarly, some argue that fear of disclosure might impede companies from thoroughly following up on findings of deficiencies by an audit.

Critics offer two main reasons to oppose privilege policies. First, they argue that the public benefits associated with a general policy of disclosure outweigh any private costs that such a policy might entail. Second, and more fundamentally, they argue that the benefits to the individual company of conducting an audit are large enough to outweigh the possible costs of disclosure, and therefore no policy is required to ensure the use of audits. These arguments are summarized briefly below.

Critics of audit privilege policies argue that any sort of evidentiary privilege represents an exception to the general principle that all relevant evidence should be before the court in order to enable it to adjudicate most effectively. Privileges are not readily granted because of the importance of this principle. Some commentators argue that this general principle may be even stronger in the area of environmental policy, which has been characterized in recent years by a trend towards increased disclosure. Similarly, a policy to restrict access to environmental audits would run counter to recent trends toward more, not fewer, discovery privileges in both criminal and civil law.

Opponents of environmental audit privileges argue that privilege would impede legitimate enforcement action:

> Cases that otherwise might constitute viable and appropriate enforcement actions might founder for want of evidence. Criminals may escape detection, the deterrence value of the law may be diminished, and those not complying may receive competitive advantage vis-à-vis their complying peers.[108]

This problem may be compounded, some argue, by the lack of a uniformly accepted definition of an environmental audit. A broadly defined audit privilege policy might therefore protect information that, heretofore, would have been utilized by enforcement agencies. Critics also argue that enforcement may become more expensive, as defendants seek to delay or deter enforcement action through litigation over privilege disputes.

The main argument against protecting audits is the assertion that a privilege policy will not lead to the desired results. Responsible companies, it is claimed, will conduct audits regardless of threat of disclosure. They will recognize that the benefits of conducting audits outweigh the possible

[107] Moore 1995, 3.

[108] Johnston 1995, 341.

damage associated with disclosure. Third parties will continue to require audits for insurance or banking requirements or in the case of purchases, mergers, public financing or other transactions. Besides, as with financial audits, companies can take a variety of measures to ensure that environmental audits are treated in a confidential manner in the absence of an actual prosecution. By contrast, critics argue, an audit privilege policy will not be sufficient to induce irresponsible firms to change their ways.[109]

There is a lack of empirical evidence about the existing incentives and disincentives for conducting audits. Anecdotal evidence suggests that many Canadian companies remain cautious about audits because of a fear of disclosure and some lawyers continue to provide very cautious advice on ensuring the confidentiality of audits.[110] As a result, some companies may not conduct audits as regularly as would be desirable, while others may not distribute their audit results as widely as they should to be most effective. Despite this, recent data suggest that environmental self audits are becoming an increasingly common business practice. The recent KPMG Canadian Environmental Management Survey found that 78 percent of the 361 respondents use environmental audits.[111]

Moreover, there is still no data to demonstrate that those companies not conducting audits are deterred primarily due to concerns about disclosure. In fact, the KPMG survey found that the main reason companies have not developed comprehensive environmental management systems (which would include regular audits) is a concern about cost.[112]

7.3.5 Relationship with other Enforcement and Compliance Mechanisms

7.3.5.1 Impact on Enforcement Activities

Federal officials assert that CEPA audit policy has not inhibited enforcement activities. They advise that, since federal investigators can obtain adequate evidence from sources other than audits, they have not yet had to request an audit during an investigation under CEPA. Once a company is charged, however, prosecutors routinely request access to any audits that have been conducted. Officials observed that if a company has conducted an audit as part of an ongoing environmental management system, it will be keen to produce the audit, once charged, as evidence of due diligence. On the other hand, if the company claims solicitor/client privilege, then prosecutors can reasonably infer either that the audit discloses previous knowledge of the violation or that it was produced only to respond to the enforcement action. In either case it would not have been produced as part of standard management practice, and will therefore not be relevant to a defense of due diligence.

By contrast, some observers, governmental and nongovernmental alike, worry that the philosophy behind the Ontario policy could undermine ongoing enforcement activities. They argue that the scope of the policy is too broad—that it extends far beyond the traditional notion of an audit as a compliance review and covers information that investigators would previously have requested routinely

[109] Edwards 1990, 11; CELA 1995, 2.

[110] See, for example, Thompson 1993.

[111] KPMG 1994.

[112] In the US, observers on both sides of the issue generally agree, some of the concern about auditing was stimulated by the dramatic increase in criminal prosecutions in the late 1980s. These worries were exacerbated by the simultaneous relaxation in the *mens rea* (criminal intentionality) standard for environmental crimes. In Canada, by contrast, most environmental violations are considered strict liability offenses, which, since the 1978 Supreme Court of Canada decision in *R.* v. *Sault Ste. Marie*, merely require the Crown to prove the *actus reus* (the act prohibited by the law—regardless of intention to do so), shifting the onus to the defendant to demonstrate due diligence. Thus, the American concern about the potential for information disclosed in an audit to be used as evidence of *mens rea* (intention to commit the crime) does not appear to be as relevant in Canada, and therefore should be less of a disincentive.

without a warrant. The policy applies to "evaluations," defined as "internal, formal and structured evaluations or self-initiated assessments of existing or potential environmental impacts[...which] may be conducted for a wide range of purposes, including risk assessment, compliance verification, property dealings, business and financial interests, and management systems." The only significant restriction in scope is that the policy does not cover "reports specifically undertaken as a result of an incident that has already taken place" or information required by law (e.g., pursuant to a self-reporting requirement in a law or regulation.)

The breadth of the definition can be explained in two ways, one specific to Ontario, the other common to the audit privilege debate elsewhere. The first explanation is that the policy had to protect more than just compliance audits in order to cover the agricultural self-assessments that helped initiated its development in the first place. The second, more generic explanation relates to the absence of a standard definition for environmental audit. Notwithstanding the work of the International Organization for Standardization, the Canadian Standards Association and other standards-setting bodies interested in environmental auditing, there is not yet an environmental equivalent to accounting practices that have general acceptance.

Other criticisms of the policy are the fear that the requirement to obtain search warrants could drain government enforcement resources due to the time required to prepare applications for search warrants; the prediction that the existence of a formal policy will induce resistance to enforcement activities; and the possibility that the "good faith" test in the policy may not really protect a company from prosecution because of information revealed in an evaluation obtained under the policy. Critics expressing this last point argue that it effectively reverses the traditional test for strict liability offenses. The criteria stipulated in the policy by which "good faith" can be established to gain immunity are:

- undertaking an environmental evaluation;
- initiating timely action to correct or prevent any environmental deficiencies; and
- cooperating fully and promptly with the authorities in addressing issues of non-compliance identified in the evaluation.

According to one observer, these are factors relevant to a defense of due diligence, and are therefore "traditionally matters which are adjudicated by a court of law in determining the culpability of a client and the appropriate penalty upon conviction."[113]

Recent case law casts some doubt on this argument. In *Re Safety Kleen Canada Inc.* Mr. Justice Salhany of the Ontario Court of Justice, General Division ruled that, "it is not, in my view, part of the justice's determination in an application for a search warrant to consider whether the accused has acted with due diligence."[114] Similarly, in *R.* v. *Domtar Inc.*,[115] the Supreme Court of British Columbia ruled that s. 487(1)of the Criminal Code, the provision governing the issuance of search warrants, ought to be given strict interpretation because it authorizes state incursion into the individual's rights of property and privacy, and stated that:

[113] CELA 1995, 9.

[114] [1991] O.J. No. 1055.

[115] (11 October 1995), 28 W.C.B. (2d) 483. See also *Canadian Oxy Chemicals* v. *Canada* (1996) 138 D.L.R. (4th) 104, affd. 145 D.L.R.(4th) 427 (B.C.C.A.).

> Establishing whether or not due diligence has been exercised may entail a detailed enquiry into the affairs of a corporation over a period of several years[...].If intrusions of this nature into the rights of privacy and property are to be authorized in respect of the potential defense of due diligence, the legislation should clearly state this as a ground for obtaining a search warrant. It is not so stated in s. 487(1).

7.3.5.2 Regulatory Negligence

During its development, some participants raised the possibility that the Ontario policy might contribute to a claim of regulatory negligence since it limits the government's capacity to enforce its own laws. This is unlikely to be the case, however. Although there is little case law in Canada on regulatory negligence, some decisions imply that it would not arise in the case of a policy that restricts statutory authority where there are reasonable grounds to assume that the policy will further the underlying policy objective of the statute.

7.3.6 Impact on the Standard of Care

It is unlikely that either of these policies (Ontario or CEPA) will have a significant impact on the standard of care. Jurisprudence in Canada has already well established the precedent that environmental due diligence requires regular audits.[116]

7.3.7 Third-Party Impacts

The Ontario policy bars third parties from bringing private prosecutions on the basis of information obtained from self-initiated evaluations. Critics argue that this restriction is contrary to provisions in the Environmental Protection Act (s. 174) and the Ontario Environmental Bill of Rights (s. 105) which protect whistle blowers.

7.3.8 Accountability

Both policies ensure some accountability for the decision to request access to an audit. Both require search warrants. In addition, the Ontario policy stipulates that senior officials must be satisfied that certain criteria have been met. The converse does not apply, however. Neither policy mandates the maintenance of records to ensure the accountability of decisions not to request an audit.

7.3.9 Fairness

Not all jurisdictions in Canada have audit privilege policies similar to those reviewed here. This lack of uniformity may raise the concern expressed in the United States where some commentators have bemoaned the current "patchwork" of privilege laws, observing that companies with operations in more than one state might conduct an audit in a state that has a privilege policy, only to find the audit results used as incriminating evidence in another.[117] Canada has not yet addressed this issue but may have to do so soon.

7.4 The Nova Scotia Environment Act: Section 70

7.4.1 Introduction

The Nova Scotia Environment Act, proclaimed in 1995, specifies the conditions under which immunity from prosecutions will be provided upon the voluntary submission of information obtained

[116] See, for example, *R.* v. *Crown Zellerbach Properties Ltd.*(1988), 49 D.L.R. (4th) 161, 40 C.C.C. (3d) 289 (S.C.C.); *R.* v. *Placer Developments Ltd.*; and *R.* v. *Bata* (1992), 7 C.E.L.R. (N.S.) 245 at 287.

[117] See, for instance, Porter 1995.

through an environmental audit or environmental site-specific assessment of non-compliance. Similar to the Ontario Program Approval policy described above, Subsection 70(1) of the EPA provides immunity if the person volunteering the information complies with the terms of an agreement negotiated with the Minister of the Environment or with any order issued under Part XIII (Ministerial control orders, stop orders, litter control orders, and emergency orders). Subsection 70(2) states that immunity will not apply if the Department is "independently aware of the non-compliance prior to receiving the information from the person."

Rather than adopt the federal and Ontario models, which emphasize incentives for conducting audits, the Nova Scotia provision focuses on incentives for information disclosure. According to officials from the provincial Environment Department, Section 70 reflects the overall philosophy in the Nova Scotia Act to move away from command and control regulation and promote self enforcement and voluntary compliance. The provisions also stem from the Department's desire to address the concerns of receivers and trustees in bankruptcy cases concerning contaminated sites. Apparently, there were fears that any active measures to enter and assess a site could lead to unrestricted liability and this was inhibiting receivers and trustees from even conducting phase one site assessments to determine the extent of contamination and the potential clean-up costs. As a result, the government found itself faced with growing numbers of orphan sites.

7.4.2 Impact on Compliance

The objective of the provision is to create incentives for businesses to identify their own violations and come forward to the government with a plan to remedy the situation. The impact of the policy will likely depend on three factors: a) the degree to which the policy can reduce uncertainty among the regulated community; b) the likely cost of the negotiated agreement (the severity of the requirements the government will impose in return for immunity); and c) the likelihood and probable cost of detection and prosecution:

a) Reducing uncertainty

Uncertainty is perceived as a cost by business because it undermines the ability to plan and commit resources. Thus, the more certainty a policy or provision can provide, the more it will benefit business—and thus the more likely it is that the provision will be used. It is therefore unfortunate that the wording of the Nova Scotia provision raises a number of questions. For example, ss. 70(1) does not indicate what requirements the government will impose as *quid pro quo* for offering immunity from prosecution. In addition, it is not clear when immunity will be lost under ss. 70(2). Two representatives of the department stated in response to interviews for this project that the department intends the provision to apply to independent departmental inspections, and not to whistle blowers. They recognize that this interpretation raises the possibility that a company (upon learning about a whistle-blower's report) might request an audit solely for the purpose of claiming immunity. Given the very general wording of the provision, however, presumably the government could refuse to grant immunity in such cases.

The Association for Professional Environmental Auditing in Nova Scotia (APEA) has raised concerns about the uncertain relationship between Section 75 and Section 122, which authorizes inspectors to seize information obtained during an inspection. APEA has asked "would a person be protected from prosecution if they show information to an inspector during an inspection, who then seizes the information pursuant to s. 122? Will this constitute voluntary submission of an audit pur-

suant to s. 75?"[118] Finally, could evidence gathered by the department solely as a result of a voluntary submission be used against the person who made the submission.

b) The likely cost of the negotiated agreement

Economic theory suggests that if the likely cost of an agreement under ss. 70(1) is low, then businesses may be willing to fall out of compliance and then negotiate an agreement which ensures immunity from prosecution. If the likely cost is high, however, businesses will be less likely to come forward.

c) The likelihood and probable cost of prosecution

Again, economic theory suggests that the greater the likelihood of prosecution and the higher the expected penalty, the greater the incentive for businesses to come forward and seek immunity under the provision. This incentive will probably be magnified to the extent that directors or senior officers face a possibility of personal liability.[119]

Together, the insights suggest that in order for the Nova Scotia provision to have a positive impact, the government may have to continue a vigorous enforcement program. If the requirements are too costly and the chance of prosecution is low, then companies will not use the provision. Thus, if enforcement decreases in severity or frequency, then the government will have to decrease the stringency of the requirements it can impose under ss. 70(1). Accordingly, the Government of Nova Scotia could strengthen the impact of the provision by:

- providing guidance about the type of requirements that will be imposed under ss. 70(1);
- ensuring that those requirements are stringent, but less so than the expected costs of prosecution; and
- ensuring a high likelihood of prosecution.

7.4.3 Impact on Third Parties

The Nova Scotia law does not specify whether the information supplied to the government is deemed to be confidential. APEA has argued that the information should not be available, for example, to enable a neighboring landowner to file a civil suit against a polluter. Given that the final version of the Act does not clarify this issue, presumably third-party rights will be governed by the province's Freedom of Information and Privacy Act.

7.4.4 Fairness

The use of the term "audit" raises the same issues discussed above—the absence of a standard definition of an environmental audit and the lack of certified auditors. The Nova Scotia Act does not define environmental audit. Nor does it specify what might be accepted pursuant to an "agreement" negotiated under ss. 70(1)(a). Broad discretion thus appears to be granted to departmental officials in implementing the exemption provision. This could arguably create the possibility of unequal treatment through private deals. It might also lead to claims of regulatory negligence, alleging that standards or obligations were effectively relaxed through individual compliance agreements.

[118] APEA 1994.

[119] Saxe 1990.

7.4.5 Public Response

Public reaction to the law has been largely positive, although a number of industry representatives have recommended deleting the provision altogether. In its response to the 1994 discussion draft of the EPA, for example, the Canadian Petroleum Products Institute argued that audits are voluntary internal management tools, and therefore any reference to "audits" in the Act would "be a disincentive to their increasing use and acceptance as a management tool because of the perceived risks posed by disclosure of confidential competitive information and the threat of self incrimination."[120]

7.5 Conclusion

The debate over audit privilege in Canada remains polarized. The business community increasingly recognizes that environmental self audits are good business practice that can increase compliance and decrease potential costs. Proponents of privileges for self audits argue that, in order to ensure that companies continue to conduct audits and respond to them as effectively as possible, governments should do everything possible to reassure business that it will not rely on audits when enforcing environmental regulations. On the other hand, many in the environmental community argue that enforcement officials inevitably operate with inadequate information and should be entitled to utilize any information they can obtain. They also argue that sensible businesses do not need incentives to conduct audits, and that any privilege policy will only protect those with something to hide. Some even argue that audits ought to be compulsory.

The overall impact on enforcement and compliance of audit privilege rules like the Ontario and federal policies reviewed in this paper is likely to be minimal. Federal officials assert that the CEPA policy has had almost no impact on their ability to enforce CEPA effectively. Given the relative specificity of CEPA regulations, this is not surprising. By contrast, however, the Ontario policy may actually impede certain enforcement efforts. Its breadth means that officials will now lose access to information previously available to them. And the procedural requirements to obtain access may drain enforcement resources. It is well established that the threat of enforcement (though not the only factor) is a key to influencing compliance decisions. It is therefore reasonable to assume that the Ontario policy will decrease direct enforcement activities and will lead to a decline in compliance among companies whose primary motivation to comply is the threat of enforcement. There is little evidence, however, to suggest that this effect will be significant.

It must also be observed that this decline may be offset by an increased use of audits by more responsible businesses. Both the Ontario and federal policies are premised on the assumption that privileging self audits will increase the likelihood that businesses will conduct and follow up on audits, and that this, in turn, will increase compliance levels and improve environmental behavior in general. This impact is also likely to be minor, however. Responsible businesses face a number of strong incentives to conduct audits: because they are a key element of due diligence, because they want to avoid non-compliance, and because audits are "good business." It is possible that these policies will have some impact at the margins. And maybe they will help ensure that businesses follow up on audits, rather than hide the results in their lawyers' offices. Like the potential negative impacts, then, the positive impacts of these policies on compliance are likely to be minimal.

[120] CPPI 1994, 18.

Rather than focusing on the direct impact of these policies on compliance levels, they should be evaluated in terms of their symbolic ramifications concerning governments' desire to promote self regulation: i.e., to achieve the same result through a different means. Governments are seeking new ways to influence private sector activity. But as part of the *quid pro quo* for demanding that the private sector take on more responsibility for ensuring environmental quality, governments may have to ensure a stable and certain regulatory regime exemplified by the type of clear criteria developed in the Ontario policy to guide future enforcement action.

In contrast to the Ontario and federal privilege policies, the Nova Scotia initiative appears to be an innovative approach to environmental audits charting a middle ground between the hands-off and the full access positions. Although it violates the basic philosophy that government should treat all audits as voluntary, internal, and confidential activities, few anticipate that it will have a chilling effect on self auditing in Nova Scotia. Indeed, many—particularly in the trustee and receivership community—are pleased with the certainty offered by the provision.

On the other hand, the lack of clear guidance concerning its appropriate application has raised a number of concerns and could weaken the overall effectiveness of the incentives it is designed to create. The government could remedy these concerns by:

- providing guidance about the type of requirements that will be imposed under ss. 70(1);
- ensuring that those requirements are tough, but less than the expected costs of prosecution; and
- making good on the threat of prosecution in the event of non-compliance.

8 ISO 14000

8.1 What is ISO 14000?

ISO 14000 is a set of international voluntary standards and guidelines for the process of managing the environmental aspects of an organization.[121] It was developed by the International Organization for Standardization[122] in response to various initiatives at the international level by industry, governmental and nongovernmental organizations to identify the elements of a sustainable environmental management system (EMS).[123] Based on the success of the ISO 9000 quality management standards, and the high profile given to corporate environmental behavior by the Rio Earth Summit, the International Organization for Standardization undertook the massive job of negotiating a world-wide standard for EMS. Canada has played an important role in this task.[124]

The ISO 14000 series is intended to cover a wide range of issues, including not only EMS but also the auditing of such systems, performance evaluation, eco-labeling and life-cycle assessment. Presently, the ISO 14000 series contains one core "specification" document and several explanatory "guidance" documents. The core document is ISO 14001,[125] which is the mandatory "specification" for an EMS. The specification "contains only those requirements that may be objectively audited for certification/registration purposes[....]"[126] Anyone adhering to ISO 14000 must accept and comply with this specification. It requires each company to have a coherent framework for setting and reviewing environmental objectives, for assigning responsibility to achieve these objectives, and for regularly measuring progress towards them. The specification also requires companies to have appropriate management structures, employee training, and a system for responding to and correcting problems as they occur or are discovered. Regular internal review audits are an essential part of the process.

In addition to ISO 14001, the series will contain several "guidance documents." ISO 14004, for instance, sets out general principles, systems, and supporting techniques for designing and implementing an EMS. ISO 14010 sets out general principles for all forms of environmental auditing. ISO 14011 provides specific guidance for auditing the type of EMS that ISO 14000 companies must have to ensure that the management system itself is well-structured and operating properly. ISO 14012 sets out the minimum qualifications for the auditors who should perform these environmental audits.

ISO 14001 contemplates a verification hierarchy for companies adhering to its standards. Each company will have the choice of "self-declaration" (which costs less but also has less credibility) or "registration" (which depends upon a thorough audit by independent auditors). Those who elect full registration apply to a registrar accredited by the Standards Council of Canada. The registrar, in turn, assigns an accredited, independent auditor to assess the applicant's management systems for

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[121] It is modeled to some extent on the ISO 9000 series standards for producing high-quality goods and services.

[122] The International Organization for Standardization is a worldwide federation founded in 1946 to promote the development and use of international standards and is composed of member bodies from more than 110 countries. The Standards Council of Canada, a federal agency, is the Canadian representative and is responsible for negotiating and implementing Canada's adherence to international standards agreements.

[123] These initiatives include: i) The British Standards Institute system known as BS7750 adopted for use in England, Finland, the Netherlands and Sweden; ii) the Eco-Management and Audit Scheme published in 1993 by the European Union and iii) "The Business Charter for Sustainable Development" developed by the Business Council on Sustainable Development and the International Chamber of Commerce.

[124] The work of developing the ISO 14000 series has been performed by a technical committee, TC 207. Canada holds the Chair and hosts the Secretariat of TC 207. The Secretariat is administered by the Canadian Standards Association on behalf of the Standards Council of Canada.

[125] ISO 1996.

[126] *Ibid*., p. vi.

their compliance with the criteria set out in the ISO 14000 series documents. The company must be in full compliance with the specification document and generally in compliance with the applicable guidance documents.

To understand the contribution that this process may make to ensuring environmental compliance, it is important to understand the scope of ISO 14001. First, the ISO 14001 standards are system-based and do not set environmental performance goals, such as specific emissions standards.[127] It is considered to be the responsibility of provincial and federal governments to address performance standards in their laws and regulations. Second, ISO 14001 does not measure regulatory compliance. For these reasons, ISO standards can supplement regulations, but cannot replace them. Instead, they set forth a series of management processes to help companies understand, assess, measure and manage the environmental impacts of their various undertakings. The underlying theory is that adverse environmental impacts will be reduced through good management.

8.2 Management Systems and Due Diligence

A pattern of voluntary compliance depends upon the exercise of due diligence. In practice, it has proved as difficult for the regulated community as for regulators and courts to determine exactly how much diligence is enough. Due to the huge variability of pollution control problems and the need to encourage innovation and pollution prevention, it is not possible to set a benchmark for due diligence which consists of an exhaustive set of concrete solutions to problems.

An alternative approach to due diligence with a global application in a wide variety of situations is an attentive and responsive system of management. This is borne out by the fact that many incidents involving health and safety issues have been attributed to poor or inadequate management strategies or systems. For example, Braithwaite's study of coal mine safety revealed that a small number of organizational defects were characteristic of most of the disasters in which five or more miners died: poor or no planning to deal with hazards, a general pattern of sloppiness in safety matters, poor internal communication, inadequate staff training and inadequate definition of responsibilities.[128]

Similar defects in management systems are also characteristic of many environmental cases. For example, in *R.* v. *Imperial Oil Ltd.*, 15,000 liters of gasoline spilled while unloading a tankcar.[129] Approximately half of this escaped into the sewers, causing explosions in seven houses and many other adverse effects. The accident would not have occurred had the person unloading the tankcar been properly trained and had there been better internal communication. Moreover, the court found that there was a general pattern of carelessness about environmental matters, including a total lack of planning for the possibility of an accident: e.g., there was no impoundment around the unloading dock, the exact locations of the sewer openings were unknown, and there was nothing available to block them after the spill.

In the famous decision in *R.* v. *Bata Industries*,[130] which first made corporate boards across the country take notice of environmental requirements, Judge Ormston proposed the following tests of due diligence for directors:

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[127] There was very strong debate about including performance standards in ISO 14000, as some other standards (e.g., in Europe) do. However, this approach did not receive the majority support of the international community in a 1995 meeting in Oslo.

[128] Braithwaite 1985.

[129] *R.* v. *Imperial Oil Ltd.* (16 September 1990), Ont. C. A.

[130] *R.* v. *Bata* (1992), 7 C.E.L.R. (N.S.) 245 at 287.

- Did the Board of Directors establish a pollution prevention "system" as indicated in R. v. *Sault Ste. Marie*,[131] i.e., Was there supervision or inspection? Was there improvement in business methods? Did he exhort those he controlled or influenced?
- Did each Director ensure that the Corporate officers [had] been instructed to set up a system sufficient within the terms and practices of [the] industry of ensuring compliance with environmental laws,[...]that the officers report[ed] back periodically to the Board on the operation of the system, and[...]that [they were] instructed to report any substantial non-compliance to the Board in a timely manner?
- The Directors are responsible for reviewing the environmental compliance reports provided by the officers of the Corporation but are justified in placing reasonable reliance on reports provided to them by corporate officers, consultants, counsel or other informed parties.
- The Directors should substantiate that the officers are promptly addressing environmental concerns brought to their attention by government agencies or other concerned parties including shareholders.
- The Directors should be aware of the standards of their industry and other industries which deal with similar environmental pollutants or risks.
- The Directors should immediately and personally react when they have noticed the system has failed.

These requirements are essentially an elaboration of the earlier test: *have the directors been careful, methodical and attentive?* This includes:

- establishing a general pattern of attentiveness in relation to environmental matters, including good internal communications;
- clearly defining environmental responsibilities, and making them part of the main job of every line manager in the company; and
- systematically identifying and planning how to deal with the environmental hazards of the company's activities, including use of appropriate equipment.

A company using this approach will be in a position to deal systematically with each of the traditional elements of due diligence, such as:

- the commitment of corporate executives, including written environmental policies;
- regular supervision and control by senior management;[132]
- a regular program of systematic inspections or environmental audits;[133]
- a systematic program to manage the hazards that have been identified;
- adequate equipment design and maintenance;
- clear assignment of environmental responsibilities;
- appropriate staff training;
- a contingency plan to deal with potential accidents;

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[131] *R.* v. *Sault Ste. Marie* (1978), 40 C.C.C. (2d) 353 (S.C.C.).

[132] *R.* v. *Southdown Builders Ltd.* (1981), 57 C.P.R. (2d) 56 (Ont.).

[133] *R.* v. *Crown Zellerbach Properties Ltd.*; *R.* v. *Placer Developments Ltd.*

- internal reporting systems to ensure that information about environmental hazards and unsafe practices is promptly conveyed to senior management, as well as to other line departments that require the information; and
- a system for follow-up, monitoring and response.[134]

ISO 14001 expands upon the due diligence requirement set out in the *Bata* case. It not only requires the design and implementation of an EMS, periodic reporting to top management on system performance, auditing of the system and review of the system by top management, but in addition requires each company to:

- establish a detailed environmental policy and make it public;
- identify all environmental aspects of its activities that it can control;
- set detailed objectives and plan how to achieve them;
- implement that plan with adequate resources;
- give appropriate training to everyone whose work may have a significant impact on the environment;
- improve internal and external communication;
- keep detailed records which can be easily located;
- be prepared for emergencies; and
- monitor and measure those activities with a significant impact on the environment.

An EMS is an organized system for carrying out due diligence. The proponents of ISO 14001 hope that this standard will be universally adopted. This would held clarify and simplify the job of measuring due diligence. It is noteworthy that gradual implementation of an EMS was accepted as due diligence in *R.* v. *Courtaulds Fibres Canada*, even though the company continued to have numerous spills.[135]

It is too early to tell whether the ISO 14000 series will become the leading world-wide benchmark of proper environmental management. For many large international companies and those who rely on export, adherence to ISO 14000 may have important trade and competitive advantages. Thus their adherence will be "voluntary," in the sense that it will not be coerced by government action, but will be market-driven.

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[134] For example, in *R.* v. *Toronto Electric Commissioners* (13 February 1991), 6 C.E.L.R. (N.S.) 301, (Ont. Ct. (Gen. Div.)), two different departments inspected the same transformers. One group, the transformer testing and reclamation section, found leaks in certain transformers in the course of their ordinary inspections, but gave no thought to the possibility that they contained PCBs. The leaks would not be serious for an uncontaminated transformer. A second group, which was responsible for identifying PCB contamination, identified a number of transformers containing PCBs, but did not know that they were leaking. As a result, neither group reacted promptly, and a PCB contaminated transformer leaked into the sewers for months. This, the court held, demonstrated the defendants' lack of diligence. If either department had known what the other knew, or if senior management had known all the facts, the PCBs would not have escaped into the lake.

[135] (19 June 1992), (Ont. Ct. (Prov. Div.)) [unreported]; 9 C.E.L.R. (N.S.) 304.

8.3 Legal Authority

The legal authority for the development of the ISO 14000 series comes from the International Organization for Standardization. As such, it will not be a formal or directly judiciable part of Canadian law. However, it is not necessary to enact a Canadian law for an international standard to be used as a benchmark of due diligence, should Canadian regulators so choose. The Canadian concept of due diligence allows incorporation of other standards by reference.

Courts have traditionally looked to other standards to measure due diligence or to determine the standard of care. For example, one traditional basic benchmark for due diligence is the custom of the trade.[136] Where minimum standards for proper conduct in a trade have been established, they are an essential part of due diligence.[137] The reports and standards of industry task forces and research institutes are a traditional source of such standards. For example, in the *Imperial Oil* case discussed in Section 8.2 above, the court used report 80-3 of the Petroleum Association for Conservation of the Canadian Environment on oil spill prevention as a benchmark of the company's failure to use due diligence. The report described the need for and method of constructing proper impoundments at railcar unloading facilities. Imperial Oil's unloading facility had no such impoundment.

8.4 Efficacy

Because ISO 14001 has only recently come into force, there is no empirical data on its impact on compliance. However, a review of decisions in environmental prosecutions shows that many offenses could have been avoided if the defendants had had an effective EMS.[138] For example, in *Regina* v. *Texaco*, a documented leak in a containment dike went unrepaired for more than five months, until a major spill finally occurred.[139] *Regina* v. *Toronto Electric Commissioners*[140] concerned a PCB-containing transformer that was allowed to leak for months. One department that knew the transformer was leaking did not know it contained PCBs, while another department that knew it contained PCBs did not know it was leaking. In *Regina* v. *Transcontinental Printing*, a new plant manager did not keep the records required by his plant's certificate of approval, because he had never been made aware of the certificate requirements.[141] It is these unintentional errors and accidents by companies with the resources to avoid them that are likely to be reduced through implementation of an EMS such as ISO 14001.

The effectiveness of an EMS may also be gauged from the improved environmental performance of the larger, more sophisticated companies that have already adopted them. In the last twenty years, companies such as Dofasco and Ontario Hydro have invested heavily in pollution control, pollution prevention and environmental management. In many cases, they have reduced certain emissions by as much as 90 percent. Data also shows that companies with a sophisticated EMS are increasingly rare among those convicted of environmental offenses. The majority of those now convicted are small to medium-size enterprises who may lack the information or resources required to implement such a system.

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136 *R.* v. *Consumer's Distributing Co. Ltd.* (1980), 57 C.C.C. (2d) 317, 54 C.P.R. (2d) 50 (Ont. C.A.); Morris 1942; Linden 1988; Keeton 1992, 241; *Monkman* v. *Singh* (1989), 62 Man. R. (2d) 277 (Q.B.); *Koerber* v. *Kitchener Waterloo Hospital* (1987), 62 O.R. (2d) 613 (H.C.J.).

137 *R.* v. *Dupont* (23 January 1986), (Ont. Dist. Ct.) [unreported]; *R.* v. *Hodgson* (1985), 4 F.P.R. 251 (N.S. Prov. Ct.); Fleming 1987, 111; Dugdale and Stanton 1989, 241, 254.

138 Summarized in Saxe 1995.

139 *R.* v. *Texaco* (23 November 1987), (Ont. Prov. Off. Ct.) [unreported].

140 *R.* v. *Toronto Electric Commissioners (supra).*

141 *R.* v. *Transcontinental Printing* (31 March 1993), (Ont. Prov. Off. Ct.) [unreported].

8.5 Relationship with other Mechanisms

ISO 14001 as a major benchmark of due diligence may be used to complement, not compete with other compliance mechanisms used by environmental regulators. First, ISO 14001 can exist independently of other compliance mechanisms and may be a tool used by companies to improve their regulatory compliance. Because of their negotiation at an international level and because these standards are voluntary and not government-imposed, ISO requirements may be perceived as fair and objective and therefore, more acceptable to businesses.

Second, ISO 14001 is more detailed and more demanding than any environmental management measure yet proposed by the Canadian courts and gives businesses clearer guidance as to what is expected of them. Proponents of ISO 14001 anticipate that it can play a valuable role in promoting voluntary compliance. Even though ISO 14001 does not set specific performance targets, it does require each firm to set its own targets, measure its progress toward them, document that progress, and then report on that progress to top management.

This is similar to the process used in Ontario waste minimization regulations. Regulation 102/94 compels all large firms in specified industries to audit their wastes, set their own waste reduction targets, formulate plans for reaching those targets, monitor their progress, and then post progress reports for their employees to see. Government plays no role in setting the goals or monitoring the progress towards them, and no one has yet been prosecuted under this regulation. Nevertheless, it has had substantial impact upon responsible companies with adequate resources.

For these companies, such regulation works by building on the strengths and sensitivities of good business management, rather than by enforcing an external norm. It is very difficult to manage what has not been measured. In fact, most companies were unaware how much pollutant waste they were generating and how much it was costing them. Once compelled to measure it, pride and opportunities for cost reduction gave senior managers the incentive to set substantial waste reduction targets. When a target has been set, with responsibilities and deadlines assigned, achieving it calls upon familiar and well-honed business management skills. The requirement to publish progress reports creates periodic pressure for actual progress, particularly if employees are interested in the subject.

Third, ISO 14001 may offer cash-strapped regulators an opportunity to use their limited resources to better effect. Costs to develop and implement an ISO 14001 EMS and the audits necessary to verify adherence to ISO 14001 are paid for by the firms themselves. Authorities in some jurisdictions are considering offering incentives to industries participating in voluntary compliance schemes. These incentives may include fewer inspections, diminished administrative/reporting burdens, fast-track permit procedures and reduced penalties in the sentencing process, all of which arguably lessen the strain on government resources.

The value of ISO standards as a possible cost-saving mechanism has been specifically recognized by some Canadian regulators in other areas. For example, with respect to quality assurance, the *Report of the Parliamentary Sub-Committee on Regulation and Competitiveness* specifically recommended that the level of inspection and monitoring by government officials should be reduced for ISO 9000-adherent companies.[142] The federal government response was positive, indicating that all federal departments would be asked to consider how this could be done.[143] However, although governments have participated in the development of the ISO 14000 series, the government

[142] Government of Canada 1992b, report recommendation 7.3.

[143] Government of Canada 1993, 28.

representatives have tended not to be from the enforcement offices and as yet there has been no official government statement on how ISO 14001 will affect the delivery of enforcement obligations.

Although audits of an ISO 14001 EMS are cost-free to government, this does not necessarily relieve the government of its responsibility to verify legislative compliance. As indicated above, the presence of an ISO 14001 EMS does not guarantee regulatory compliance. The regular audits required under the ISO 14001 EMS are performed internally, are not required to be disclosed to the public or to government regulators and are audits of "system compliance." Compelling disclosure of a company's ISO 14001 audits would subvert the "voluntary" nature of ISO 14001, and in any event would not necessarily provide the government with the information it needs on regulatory compliance. There is accordingly little change in the government's perceived enforcement operations. Accordingly, it is still an open question whether an ISO 14001 registration could entitle a company to a reduced inspection schedule.

For the reasons outlined above, adherence to ISO 14001 could lead to a higher level of regulatory compliance and a lower level of environmental harm than a generalized exhortation from regulators or the courts to "use due diligence." It is still too early to tell whether the required commitment to regulatory compliance in the environmental policy which ISO 14001 registrants must adopt will ensure that the EMS is structured to promote and enhance regulatory compliance.

Several questions which have been raised about the use of ISO 14001 as a benchmark for due diligence are examined in the subsections below.

8.5.1 Will ISO 14000 replace Regulation?

The ISO 14000 series cannot replace regulation, and should not be interpreted as doing so. It is a systems approach to managing environmental aspects of operations and activities. The ISO 14001 standard expressly states that it does not set "specific environmental performance criteria." Regulatory environmental performance standards provide the background against which an EMS must operate and which it must take into account. Where regulatory standards exist, ISO 14000 may help companies to measure, monitor and manage their compliance at the level of those standards. As indicated above, an ISO 14001 registration does not ensure actual regulatory compliance but rather a "commitment to comply with relevant environmental legislation and regulations."[144]

Moreover, ISO 14000 is a voluntary standard. Not all firms will choose to establish an ISO 14001 EMS. Regulations, and a credible threat of enforcement, are needed not only to govern the conduct of firms that may not choose to make the substantial investment that ISO 14000 entails, but also to establish a performance level against which the effectiveness of an EMS can be measured.

8.5.2 Will Companies Accredited to ISO 14001 be Immune from Prosecution?

Accreditation to ISO 14001 is akin to holding a license or permit. It is not enough to hold the permit, one must also comply with its terms. Although proof of ISO 14001 registration may be accepted as *prima facie* evidence of due diligence in the management of environmental risks generally, it is not a guarantee of regulatory compliance. When an incidence of non-compliance occurs, additional information will be necessary to assess whether the company actually complied with its ISO 14001 EMS on that occasion, or even whether the EMS had been properly designed in the first place. In other words, the company must still demonstrate that it had appropriate procedures in place to prevent the offense. It will also have to show that it took appropriate corrective action in response

[144] ISO 14001, s. 4.2(c).

to any previous non-compliance. Persistent polluters, including those with an ISO 14001 EMS, will probably be exposed to prosecution, since they will not be able to demonstrate due diligence. Many businesses have expressed the concern that ISO 14001 might increase their exposure to prosecution, since its requirements are more detailed and more easily measured than those of common-law due diligence.

8.5.3 Is ISO 14000 Relevant only to Large Firms?

Commercial pressures to adhere to ISO 14000 standards will be felt primarily by firms that compete in international markets. Many of these are large multinationals. Adherence to ISO 14000 does entail substantial management effort, documentation and fees, especially for those who are externally audited. Experience of business entities who have registered under the ISO 9000 quality management system indicates that this registration process is extremely costly. Although is questionable whether this cost will be justifiable for small and medium-size businesses, promoters of ISO 14000 expect that the standard can also be used by small to medium-size enterprises in good financial health. Most of these smaller enterprises are expected to "self-declare" rather than incur the substantial costs to register. Regulators will have to decide how much weight to give such declarations.

ISO 14001 is stated to be applicable to any type of organization. No concessions are made to size or resources. By way of contrast, the European Union's Eco-Management and Audit System (EMAS) allows for special assistance to small and medium-size businesses for information, training and technical support, provides a simplified verification process and requires less frequent reporting.

8.5.4 Does Use of ISO 14000 as a Benchmark prevent any Public Control of Due Diligence?

"Isn't deference to a business-developed standard like putting a fox in charge of the chicken coop?" Some fear that ISO 14000 will be little more than a smoke screen, whose fine words may delude governments and the public into believing that mandatory action is not necessary. This is a legitimate concern. Nevertheless, courts and regulators (and through them the public) retain the ultimate responsibility for determining whether and in what circumstances ISO 14001 is an appropriate benchmark.

Control by regulators:

Total quality management systems are already used by regulators to reduce inspection costs and improve overall compliance. For example, the Department of Fisheries responded to demands for increased enforcement of fish processing plants by requiring the plants to develop ISO-type quality management systems as a prerequisite to selling fish outside their home provinces.[145] Similar programs have been proposed for other ministries.[146]

At present, due diligence is generally determined by the courts on a case-by-case basis. This is resource-intensive both for regulators and for business, and creates considerable uncertainty.[147] To avoid this uncertainty, some regulations and guidelines incorporate private standards by reference.[148] This occurs only after the regulator is satisfied that the private standard is appropriate. This is similar to the concept of equivalency agreements under the Canadian Environmental Protection Act. Such agreements enable federal regulators to balance their responsibility to enforce appropriate national standards with the numerous advantages of avoiding overlap with the provinces. To achieve both of

[145] Government of Canada 1992a, Part II, vol. 126: 514.

[146] Government of Canada 1994, 99, 107, 154.

[147] Businesses are more willing and able to comply with a standard that is specified ahead of time. Such a standard can also make a regulator's life easier, although it reduces flexibility.

[148] See e.g., the Ontario Gasoline Handling Code, O. Reg. 521/93.

these objectives, the federal government may decline to enforce their regulations in provinces with a provincial scheme that federal regulators consider to be "equivalent" to their own. Not all private standards would pass the equivalency test, but regulators may feel that the internationally adopted ISO 14000 series does. There is also nothing unusual in reliance on third-party certification to determine whether a person meets proper standards. This is a common feature of the many statutes that grant some measure of self-regulation to regulated communities.[149]

One potential avenue to subject ISO 14001 to public scrutiny would be to submit to public consultation any amendment of enforcement policies to refer to ISO 14000 as a due diligence standard. Certain jurisdictions, including Ontario, have either consultation policies or legislation requiring such consultation.

Control by the courts:

The January 1996 decision of the Alberta court in *R.* v. *Prospec Chemicals Ltd.* is an example of courts using ISO 14001.[150] Prospec, a member of the Canadian Chemical Producers Association, participated in the much-lauded voluntary program, "Responsible Care." Nevertheless, the chemical plant had repeated problems with emissions of carbon disulfide, an odorous, toxic chemical. On the first conviction, the company was ordered to implement specific remedial measures. Prospec complied with this order but failed to solve the problem. On the second conviction, the company and the prosecutor made a joint submission for an order requiring Prospec to register itself in compliance with ISO 14001 by June 1998. The judge accepted the recommendation and issued the order accordingly.

This illustrates one of the ways that ISO 14001 can provide a valuable supplement to the regulatory process. To comply with ISO 14001, Prospec will need to update its EMS to a level of thoroughness and sophistication that neither regulators nor judges could specify or evaluate because they lack the necessary technical knowledge. The company itself is in the best position to identify the environmental impacts of its activities and to design an EMS to bring such impacts into regulatory compliance.

The court order has added a great deal of power to the ISO standard which it would otherwise lack. For Prospec, ISO 14001 compliance is now mandatory, not voluntary. Prospec will forfeit $40,000 if it has not registered by the court-imposed deadline. Because the court order is a public document, the obligation to register is now of public record and anyone will be able to verify whether the company has complied with the court order to register.

This case also demonstrates that regulators can gain advantages from ISO 14001 without giving up their discretion or their responsibility for environmental management. In Prospec, judges and regulators used that discretion to pursue a result that had been unattainable by other means. Presumably, the prosecutor and the judge evaluated whether an ISO 14001 EMS would elicit the compliance that they wanted from Prospec. They then used the certification process incorporated into ISO 14001 as a reasonable method to determine whether Prospec would comply with the order. Although expert ISO 14000 auditors will now determine whether or not Prospec complies with the mandated EMS standards, it was the judge who chose and imposed those standards.

The ability of the public to have access to information about regulatory compliance is an important component of control over monitoring due diligence. One of the criticisms leveled at ISO 14001

[149] See e.g., Mackenzie 1994.

[150] *R.* v. *Prospec Chemicals Ltd* (1996), 19 C.E.L.R. (N.S.) 178 (Alb. Ct.).

is the lack of mandatory disclosure of audit results to regulators or the public. This is discussed further in Section 8.9 below.

8.6 Abuse, Negligence

Purportedly, use of the ISO 14000 series, as a benchmark for due diligence, as a component of an overall compliance guideline, would involve no direction or discretion by individual regulators. In such cases, it offers very little scope for claims of officially induced error, regulatory negligence, or agency capture.

However, as is the case with all government policies, care would be required to avoid misunderstandings about its scope. In particular, it may be necessary to adopt a policy to make it clear to industry that ISO 14001 certification does not necessarily meet regulatory compliance requirements. It would be advisable to ensure that all Canadian agencies adopt a consistent approach to ISO 14000 in their policies and actions. For example, problems could potentially arise and lead to confusion and the possible defense of officially-induced error if one division were to encourage use of ISO 14001 on the basis that ISO certification satisfies environmental compliance obligations. In addition, because ISO 14000 audits measure EMS efficiency rather than regulatory compliance, regulators cannot rely solely on this type of audit in their enforcement practices.

8.7 Impact on the Standard of Care

As discussed above, the ISO 14000 framework arguably requires a standard of care for the regulated industry which is least as high as the general common-law standard of "reasonable care." A business which has a registered or self-declared ISO 14001 EMS will have gone a long way towards preparing the groundwork to establish that it has exercised the required standard of care. Because ISO 14001 is a management system, it is not the complete answer to determining what the standard of care is for all industries or all circumstances. Reference will still be required to industry custom and practice.

An obvious shortcoming is that a 14001 EMS does not ensure compliance with legislation. Furthermore, the internal audits required to satisfy the ISO 14001 system requirements, are only of the system itself and not of any regulatory compliance. This may mean that the enterprise will have to produce evidence of efforts or systems in addition to ISO 14001 which demonstrate to enforcement agencies or courts *bona fide* attempts to comply with regulatory requirements.

8.8 Third-Party Impacts

Adherence to ISO 14000 would not bar third-party common-law claims for nuisance and negligence. However, if thorough adherence to ISO 14000 contains all the elements of due diligence, it could provide a defense to claims of negligence in a civil suit. ISO 14001 has no direct impact on the potential liability of third parties such as officers, directors and employees. However, individuals associated with companies that subscribe to ISO 14001 will be less likely to be involved in offenses, and more likely to exercise their own due diligence. For example, the directors of such companies would in all likelihood have established the pollution prevention "system" demanded by Judge Ormston in the *Bata* case discussed above.

8.9 Accountability, Transparency

The process by which the ISO 14000 series was developed is in theory designed to include input by all interested parties, and ensure that businesses do not dominate the decision making. A voting formula is used by TC 207 and its subcommittees, both nationally and internationally, to maintain

a balance between business, government, the professional/service sector and NGOs (non-governmental organizations such as environmental groups).

In Canada, the Canadian Environmental Council, an advisory group formed by the Canadian Standards Association to act as a steering committee in the development of ISO 14000, includes in its roster representatives of environmental groups, government, resource industries and manufacturers, and the environmental service sector. Although this is a multi-stakeholder process, participation has been heavily weighted in favor of industry, particularly large industry which can afford the heavy commitment in time and resources to prepare for and attend meetings, many of which occur in far-flung international venues. Input from government and public interest groups has occurred at a stage when much of the policy direction was already set. The resulting standards are not everything some had hoped for with respect to public reporting or performance standards, but they will require significant efforts from many businesses.

Lack of sufficient public accountability is one of the main criticisms leveled at ISO 14001. One component of an ISO 14001 EMS is a regular internal process of setting environmental performance targets and measuring the progress towards them. However, ISO 14001 does not require firms to make these reports public.[151] Although many businesses are expected to do so, whether for marketing purposes, to satisfy the increasing disclosure requirements of securities regulators and financiers, or to demonstrate that they are good corporate citizens, the lack of any mandatory reporting requirement is viewed by some as a way for ISO 14001 registrants to shelter information about regulatory non-compliance.

Another area of concern is how the ISO 14000 audits fit in with the current audit practice. Certain jurisdictions have adopted disclosure policies and rules for audits which reach a compromise between encouraging voluntary audits and using the information gathered in such audits for prosecution purposes in accordance with strict guidelines. It is unclear whether the use of ISO 14000 standards would jeopardize the continued use of these audit disclosure policies or rules.

8.10 Fairness

It may be fair to use ISO 14000 as a benchmark of due diligence for those who have voluntarily chosen to adhere to it. It is designed to be equally applicable to businesses of all types and in all regions. It has been promoted as a means to ensure a "level playing field" among trading partners. This level playing field will exist only if all have equal access to the system.

One type of unfairness could occur if certain jurisdictions accept ISO 14000 as a benchmark of due diligence and others do not. Because of the high level of concern and uncertainty about environmental risks among the business community and among lenders, it is possible that this could have some impact on forum shopping. This problem could be avoided in Canada if all Canadian jurisdictions, perhaps through the Canadian Council of Ministers of the Environment, agreed to treat ISO 14000 adherence in a uniform fashion.

Another type of fairness issue may arise with respect to the cost of adherence to ISO 14000. It is recognized that ISO 14001 registration is resource intensive and requires a substantial degree of management skill and sophistication. It also requires a high degree of motivation. Many businesses, especially the small and medium-size enterprises, may find this a very heavy burden. It would be unfair and counter-productive to require all regulated businesses to register with ISO 14000. This

[151] By way of contrast, the Eco Management and Audit Scheme adopted by the European Union does require public reporting.

would distort the essential voluntary nature of the standards, and would be wastefully demanding of small businesses and those enterprises which present few environmental risks. However, if ISO 14001 registration is used by enforcement agencies as prerequisite to any "parallel-track" incentive program which replaces controls under the regulatory system (i.e., through reduces monitoring, easier permit procedures, etc.), will this disadvantage smaller businesses who cannot afford ISO registration but may nevertheless be able to demonstrate regulatory compliance? Furthermore, it is unclear whether the ISO 14001 registrants whose internal audits are protected from disclosure are benefiting from a privileged regime unavailable to non-registrants.

On the other hand, some consider it fair to reward those companies who choose to adhere to ISO 14000, provided such companies could show that ISO practices and procedures were being fully implemented at all times.[152] It is proposed that in exchange for doing more to control environmental risks, ISO 14000-adherent firms would enjoy a certain tolerance for inadvertent errors. This would not exempt them from cleaning up spills (which everyone is required to do regardless of due diligence), but it would protect them from prosecution for inadvertent errors. This is arguably appropriate because, by adhering to ISO 14000, companies would demonstrate real commitment to environmental compliance. Punishing those who have already demonstrated commitment is more likely to decrease compliance than to improve it.[153]

8.11 Conclusions

ISO 14000 may present a valuable opportunity for regulators to raise the regulated community's standard of care, particularly in the case of larger firms. If ISO 14000 is accepted as a benchmark of a high level of due diligence, those who adhere to it will be rewarded with clearer expectations of what is required of them, may have fewer incidences of non-compliance, and may be granted a measure of regulatory tolerance should inadvertent non-compliance occur. This would be a substantial benefit for the more sophisticated, environmentally committed members of the regulated industries, and would likely increase levels of overall compliance for such industries given the same or even reduced resources for enforcement.

Acceptance of ISO 14000 as a benchmark of due diligence may allow regulators to focus their enforcement resources on the uncooperative violators. Fewer routine inspections would be necessary for firms already paying qualified independent auditors to inspect and evaluate their operations. Fewer resources would be necessary to assess the due diligence of such businesses once a detailed external benchmark exists, particularly since ISO-adherent firms must methodically document their EMS performance. What remains to be reviewed by policy makers and enforcement agencies, however, is how best to use a "standard" that measures system performance in situations where measurement of regulatory performance is required. At the very least, the adoption of an ISO 14001 EMS by those businesses who choose to do so, is a step towards ensuring that attention is paid to identifying and managing the environmental effects of their operations.

[152] Since ISO 14001 requires an active response to spills and other instances of non-compliance, repeated instances of the same non-compliance would itself be evidence of either failure to adhere to ISO 14001 standards or else an improperly designed EMS.

[153] See Saxe 1990, 45-53.

9 Environmental Memoranda of Understanding

9.1 Introduction

In the last few years, a number of Canadian jurisdictions have begun to experiment with the use of memoranda of understanding (MOUs) to promote environmental improvements such as pollution prevention. The Ontario government is pursuing a wide range of MOU-type initiatives, including informal arrangements with specific companies, provincial-municipal agreements, provincial-industrial sector MOUs, and a number of provincial-federal MOUs with high profile sectors, including the Canadian Chemical Producers' Association (CCPA), the Motor Vehicle Manufacturers' Association (MVMA), the Automobile Parts Manufacturers' Association (APMA), and the Ontario Fabricare Association. While some have been developed quickly, the establishment of most of the formal MOUs has required up to two years.

Most of the Ontario MOUs, including all those co-signed by the federal government, follow the same pattern. They explicitly state that participation does not change any existing regulatory requirements. And while they do not formally create new obligations, presumably the fact of negotiating and signing an agreement imposes some good faith obligations to cooperate in trying to ensure the success of the endeavor. All state that regulatory compliance is a prerequisite to participation, and that they are focused on extra-compliance issues, in most cases related to promoting pollution prevention. Most provide for a governmental-industrial steering committee to establish a plan for information sharing within the affected sector.

In many cases, either the MOU or the steering committee also develops a candidate list of substances to be addressed, provides a methodology for developing and implementing pollution prevention plans within the sector, creates reporting procedures, and establishes the infrastructure for supporting the initiative. In most cases, the members of the sector can agree to participate individually. If they choose to participate, they undertake studies of their premises, processes and products, draft an inventory of substances used, and propose projects to reduce the use or release of these substances. While all emphasize information sharing, the nature of the public reports and the involvement of third parties in the process varies considerably. Unlike some comparable US initiatives, the MOUs do not commit industry to any changes, nor do they commit government to any relaxation of enforcement of existing regulations.

The Saskatchewan government has chosen to focus on bilateral agreements with specific industries. It has one agreement in place, is negotiating two more, and is considering a number of others. Like the Ontario regime, the Saskatchewan MOUs focus on information sharing and are not intended to be legally binding. Unlike Ontario, however, the plans negotiated pursuant to Saskatchewan agreements address regulatory obligations, and therefore take a more comprehensive approach to a participant's environmental operations.

The British Columbia government is introducing MOUs on a pilot basis as part of an overall reform of its environmental policies which may also include an increased use of performance-based standards to decrease reliance on site-specific permits. In July 1995, the government signed a framework MOU with the Canadian Chemical Producers' Association (CCPA) with four specified companies from other sectors. This agreement committed the signatories to help develop more specific agreements and projects under the oversight of broadly based public advisory and steering committees. In addition to promoting pollution prevention within the participating companies, this project is designed to help the government learn how to promote pollution prevention more effectively.

Although the rationale for entering into MOUs varies by jurisdiction and by agreement, there are some common considerations. Both government representatives and industrial participants look to the MOUs as a way to engender a less adversarial, more open mutual relationship. All see information sharing as one of the main benefits of MOUs. Various government representatives believe that such agreements may represent the most effective way to induce companies to adopt pollution prevention techniques. Indeed, some have maintained that government can only promote the type of cultural change required to support pollution prevention through a trust-based process, such as that engendered by the MOUs. Some industrial participants, on the other hand, are motivated at least in part by an ethical obligation. Many also perceive the advantage of creating an active climate of change which may avoid, or at least help shape future regulatory developments. The remainder of this section explores some of the possible implications of these new enforcement and compliance activities related to existing regulatory obligations.

9.2 Legal Authority

Few of the agreements developed to date specify detailed, legally binding obligations. Some jurisdictions, such as British Columbia, are exploring opportunities to use MOUs to replace existing permit requirements. Similarly, the federal government is studying the potential for negotiated agreements, or "eco-covenants," to control substances designated as "toxic" under CEPA. These extensions of current MOUs will have to be grounded in legislative authority, which, in some cases, will require amendments to existing legislation. In this regard, it is noteworthy that the federal government's 1995 response to the committee contemplates such an approach.

9.3 Impact on Compliance

Environmental behavior depends on a wide range of factors, only some of which will be influenced directly by a particular instrument. Accordingly, the potential impact of an MOU on regulatory compliance (and on environmental quality in general) will depend on the policy and social context into which it is introduced.

MOUs can create pressure for increased compliance. They can, for example, increase awareness of existing regulatory obligations. Since most MOU regimes expressly require regulatory compliance as a prerequisite for participation, in many cases, the early phase of government support for existing MOUs has included workshops and other information on regulatory obligations. In any event, proponents believe that since considerations of ethics, market image, or reputation are among the main reasons for entering into an MOU, most participants tend to be particularly conscious of the need to ensure compliance.

Unfortunately, these positive incentives could be at least partially offset in some cases by increased non-compliance by non-participants in the MOU. A common theme among proponents of MOUs is that, if successful, they will make environmental efficiency and pollution prevention become a key element of competitiveness. Ideally, this will force non-participants to either implement similar improvements or go out of business. There is always the possibility, however, that companies which do not enhance their environmental efficiency may face increased pressure to cut costs by not complying. Continued enforcement of existing regulations is therefore critical to the success of these initiatives, and is strongly supported by those involved in MOUs.

The question of "free riders" also arises: to what extent will non-participants benefit from the good will generated by others' participation in the MOU? To what extent will such "free riders" gain economic advantage, either from an enhanced market image within their sector or from a relaxation of enforcement efforts due to the perception that the entire sector is preventing pollution? The

severity of the problem varies considerably between sectors. Some industrial sectors, like auto manufacturing, include so few companies that self-policing should suffice to avoid free riding. Others, like the auto parts manufacturers, are characterized by suppliers whose work embraces the whole sector and thereby ensures that there are few secrets within it. The CCPA has attempted to address the free rider problem through a strong sectorial self governance code—"Responsible Care"—designed to create internal pressure to behave in an environmentally appropriate manner. But for some, free riders pose a particular problem that may require legislative intervention. A recent study of the National Packaging Protocol—a national voluntary program to achieve 50 percent diversion from landfill by the year 2000—found that, while most large firms were active participants, many small firms were not. As a result, leading participants are now requesting field-leveling legislation.[154]

Finally, there is also the possibility that parties to MOUs will decide that some existing regulatory provisions impede adoption of the integrated approach to environmental management promoted by most MOUs.[155] This could create a backlash against certain provisions and lead to pressure for their reform—or non-enforcement.

9.4 Impact on the Standard of Care

If successful, MOUs could help increase the standard of care with respect to *existing* regulatory obligations in two ways.[156] First, since government support for MOUs typically entails education about existing regulatory obligations, the instruments should diminish the possibility of a defense alleging mistake of fact.[157] Second, successful MOUs could also help raise the standard for a due diligence defense. Canadian courts have emphasized that due diligence requires a management system, with such elements as regular audits, clear assignment of responsibilities, training, instruction and supervision of employees, information systems and effective lines of communication.[158] The implication of this jurisprudence is that successful MOUs could alter the standard of due diligence to be expected within the affected sector. The premise of the MOUs is that they will help disseminate pollution prevention and environmental efficiency awareness and practices, thereby promoting behavioral change throughout a sector. At some point, then, it is reasonable to anticipate that certain characteristic elements of such practices—e.g., pollution prevention—may become adopted by a significant enough proportion of the sector that they attain the status of a "custom of practice" and thereby become an element of due diligence.

Similar reasoning suggests that successful MOUs could influence the standard of care owed by a participant to a third-party. Civil suits of negligence and nuisance are based on tests of reasonable behavior. If MOUs raise the standard of care reasonably expected of a business in the participating sectors, they could indirectly influence the standard of care owed by those businesses to their neighbors.

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154 Labatt 1995.

155 See the discussion of legislative barriers in Pollution Prevention Legislative Task Force 1993, and in Government of Canada 1995a.

156 As noted above, most public welfare standards in Canada—including most environmental regulations—establish strict liability offenses. Once the Crown has proved the *actus reus*, strict liability offenses reverse the onus onto the defendant to avoid liability offenses. Once the Crown has proved the *actus reus*, strict liability offenses reverse the onus onto the defendant to avoid liability by demonstrating that it exercised reasonable care and was not negligent. In the precedent-setting case of *R.* v. *Sault Ste. Marie (supra)*, the Supreme Court of Canada held that reasonable care consists of two parts: that the accused exercised "due diligence"—that it took all reasonable steps available to it to avoid committing the offense—or that the accused committed the prohibited act or omission because of a reasonable mistake of fact.

157 See the description of the mistake of fact defense (officially-induced error) in Section 4.11.1, above.

158 See the discussion of the environmental due diligence jurisprudence in Section 3.3, above.

In addition to these indirect influences, it is also possible that MOUs may directly influence the standard of care the federal government establishes for federal activities and facilities. Currently much activity that occurs on federal lands, in federal facilities or that is performed by federal agents is not subject to provincial law. Accordingly, there exists a "regulatory gap" in environmental areas of provincial jurisdiction (such as solid waste disposal) where the federal government has not promulgated parallel regulations. The federal government is currently studying a number of options for addressing this gap. Among the various standards to which it is considering making reference (in addition to provincial legislation, federal-provincial guidelines, and such third-party standards such as the CSA and the ISO) are the sectorial standards established pursuant to MOUs.

9.5 Relationship with Enforcement and Compliance Activities

The implementation of the existing MOUs has required an "up-front" commitment of resources by the government. To a certain extent, this investment may decline over time as governments learn how to implement MOUs. The issue of how this investment compares to regulations has not been assessed in Canada. There are also a range of important issues surrounding the coordination of MOUs with regulatory programs.

Some investigators and government counsel responsible for the enforcement of regulations have expressed concern about whether official support for non-regulatory measures will increase the likelihood of one arm of a department overlooking evidence of non-compliance, thereby creating a possible defense of "abuse of process" or "officially induced error."[159] Although some industry representatives argue that the problem is moot, since regulatory compliance is a pre-requisite to participation in the MOUs, government officials acknowledge that the problem can and does arise—promoters of MOUs occasionally turn a blind eye to infractions or, instead of reporting the infractions, focus on negotiating other ways to achieve compliance instead of imposing a sanction.

Many believe that this problem is simply an extension of the traditional "compliance promotion"—enforcement tension.[160] Most enforcement agencies in Canada have attempted to reduce this tension by functionally separating the two activities. Many officials assert that such a functional separation will also address the MOU promotion/enforcement tension.

It is not clear whether this problem can be resolved so readily. To a certain extent, separation might exacerbate the problem. While they are distinct functions, enforcement and compliance promotion focus on the same objective: regulatory compliance. By contrast, in most cases the activities promoted by the MOUs do not explicitly include compliance obligations. A senior federal official therefore argues that governments need to plan compliance promotion and enforcement initiatives "as part of an integrated response to a perceived problem."[161] Such an approach may have important implications for traditional models of the enforcement process, whereby:

> enforcement action and prosecution are undertaken selectively, in the context of a strategy to procure voluntary compliance and a desire to develop cooperative partnerships with the public. This involves the application of strategic filters in case selection.[162]

[159] Canadian courts have the inherent jurisdiction in both criminal and civil cases to stay proceedings if the judicial process is being used in an unfair, oppressive or vexatious manner: *R.* v. *Jewitt* (fn. 66, *supra)* and *R.* v. *Mack*, [1988] 2 S.C.R. 903—criminal; *Abitibi Paper Co.* v. *R.* (fn. 69, *supra)*—civil.

[160] The classic exposition of this tension is Hawkins 1984.

[161] Egar 1996.

[162] *Ibid.*

There is no easy solution to this problem. Lack of coordination and inconsistent behavior by officials from different offices could undermine enforcement by raising defenses of abuse of process or officially induced error. On the other hand, an overly close relationship between MOU administrators and enforcement officials could undermine the trust between industrial participants and the government that is required to make the MOUs effective. Given the embryonic nature of the MOU approach in Canada, few governments have addressed this problem explicitly. Federal officials hope that the separation of the promotion and enforcement activities will suffice. Ontario officials acknowledge that sustained vigilance is required, but have taken little action to improve coordination. Officials in British Columbia have commissioned various legal opinions and are considering institutional and policy solutions to prevent the problem from arising.

Some promoters of MOUs argue that the coordination problem may not be resolvable under the current regulatory regime. They argue that pollution prevention represents the most powerful concept available to policy makers to ensure environmentally sustainable development. But they also argue that prevention strategies will require a fundamental cultural shift that must be predicated on trust. They then suggest that the strict enforcement of regulations precludes the development of trust among government officials promoting pollution prevention and their industry "clients." At a minimum, the effective promotion of pollution prevention may therefore require them to overlook regulatory violations, and to focus their efforts on helping a client change its behavior. More fundamentally, they question whether it will be possible to promote the systemic change of culture that will be required to make pollution prevention a reality with the existing regulatory regime in place.

These are among the forces driving almost all Canadian environmental agencies to investigate the connections between regulatory design and voluntary action. More experience with the type of systematic approach to environmental performance that is encouraged by the MOUs (among other initiatives) will undoubtedly reveal problems with existing regulations. To the extent this leads to the reform and improvement of the existing regime, this pressure will be beneficial. In the interim, however, it will be important to ensure that existing regulatory obligations are not overlooked without adequate legal authority to do so.

9.6 Relationship with the Ongoing Policy Development Process

Much of the reluctance public interest groups express about MOUs focuses on the role of the government in supporting voluntary action. Their main concern is that for government to be involved sanctioning voluntary actions like MOUs could have adverse impacts on future policy development, in terms of both process and substantive outcomes. The process concerns largely derive from the way in which MOUs are typically negotiated. Most existing MOUs were conceived as private agreements between industry and government with no outside involvement. Critics worry that this can allow business to "capture" the negotiations, after all, business often does control the information required to make decisions. Some critics also worry that government support of such processes might pressure government officials to reach agreements regardless of their merits.[163]

More fundamentally, some warn that particularized negotiations could reduce the accessibility of public policy decisions to public scrutiny. This is the heart of the advocacy group's process-related concerns about government-endorsed voluntary initiatives in general. They have invested considerable energy in "opening up" the regulatory process at all levels of government, whereas a process exclusively focused on bilateral negotiation will be much less accessible, and therefore much less accountable.

[163] See, for instance, Latin 1985.

In response to these concerns, various MOU initiatives have sought ways to enhance public access. Some have ensured public access to membership in the steering committees (e.g., the Ontario Fabricare MOU and the various CCPA MOUs). Others, like the CCPA, also encourage the use of community advisory panels to address site specific issues. Regular workshops have been sponsored so that concerned parties can discuss the ongoing status of the MOU (e.g., the MVMA MOU). Over time, many have provided for increased and more detailed publication of results (e.g., the Ontario MVMA and the initial Saskatchewan MOUs). And in British Columbia, the government is seeking to ensure community representation on the steering committees being established to oversee the design and administration of the bilateral agreements that will be negotiated under the Framework MOU.

Many industry participants argue that the MOUs are informal, bilateral agreements, largely focused on technical information sharing, and are therefore not appropriate initiatives for third-party participation. Some also emphasize the difficulty in getting members to come to the table to discuss pollution prevention, since the concept represents a new way of doing business. Skeptical businesses need to be convinced that pollution prevention is in their self-interest. This may require a recognition that past ways of doing business may have been inappropriate. The information sharing premise of most of the MOU arrangements also represents a change for many businesses. Faced with these challenges, proponents argue, the presence of potentially critical advocacy groups may deter industry participation, particularly if their objective is not to make the MOU work, but to oppose the concept in principle.

The issue of public involvement in the MOUs thus goes to the heart of a number of important aspects of these initiatives. Are MOUs informal, private arrangements, or do they represent public policy in a new form? Many critics argue the latter, asserting that government support of bilateral voluntary arrangements could have important substantive implications for future environmental policy. Some argue that the MOUs might preempt a transparent public debate over specific policies. In a critique of four of the Canada-Ontario-industry MOUs, the Canadian Institute for Environmental Law and Policy (CIELAP) observes, for example, that most of the MOUs adopt a definition of "pollution prevention" that is contrary to the definition advocated by most ENGOs—i.e., they include promotion of reuse and recycling.[164] While recognizing that the MOUs are structured as non-binding, private agreements, CIELAP suggests that this might establish expectations among the parties to the MOUs about the appropriate definition. In effect, CIELAP argues, the MOUs may have preempted a very important debate that has not yet been officially resolved.

Critics also observe that the MOUs may represent "cream skimming," in the sense that they provide for an easy way for the government and industry to demonstrate some progress on relatively easy issues, but may preclude future advances on more difficult issues. ENGOs and labor groups have criticized some of the Ontario MOUs for adopting only a limited number of relatively high profile target substances, but remaining silent about some substances identified as problematic by organizations such as the International Joint Commission, or even some that have been declared toxic by the federal government under CEPA.

Critics therefore worry that the MOUs may effectively preclude future regulatory intervention by creating a parallel system in which industry agrees to do more than the status quo, in return for which government tacitly agrees not to regulate. Some further argue that the MOU regime may also preempt regulatory and policy development because the MOUs create "hostage technologies." Capital investment decisions obviously have a direct bearing on the speed and capacity of a company to

[164] Clark 1995.

implement new technologies or processes. The concern about MOUs is that they may induce companies to invest in certain types of processes and controls. Although these decisions are voluntary and do not receive official sanction or approval from government, the fact that government representatives participate in the steering committees of these MOUs may effectively preclude governments from subsequently introducing a policy that would require different investments.

In short, critics of the MOUs worry about the opportunity costs of formal government involvement in voluntary industrial initiatives. These are important concerns that need to be thought through carefully. While some MOUs address a wide range of "tough" issues, others appear to represent "cream skimming." Some of the lists of substances of concern to be addressed under various MOUs, for example, do not even include all relevant substances that have been assessed as "toxic" under CEPA.

It is not clear, however, whether this is a fatal criticism. Proponents of the MOU approach argue that the type of fundamental cultural change contemplated by pollution prevention is best developed by building on success—by focusing on high result, low risk activities first, and gradually building acceptance. Proponents also observe that the "hostage technology" problem is receding as capital investment cycles shrink in response to the ever more rapidly evolving technology requirements of the global marketplace. Finally, proponents of the MOU process argue that removing the need to regulate a particular issue by resolving it through an MOU is positive, since it allows regulatory resources to focus elsewhere on more intractable issues.

Any policy initiative inevitably has opportunity costs—it is unlikely that policy will ever be "optimal," given the many constraints and issues that must be addressed. The key questions that must therefore be asked are: a) how do the opportunity costs associated with the MOU model compare to any feasible alternatives? and b) how can these costs be minimized? These issues have not yet been addressed systematically in Canada.

9.7 Accountability and Transparency

Regardless of how the issues identified in the previous section are ultimately resolved, it would appear that, at a minimum, government support for such initiatives must be accompanied by measures to assure explicit accountability. The Canadian Parliamentary Sub-Committee on Regulations and Competitiveness, recommended that support for discretion-based initiatives include greater involvement by the parties concerned to define goals and determine how to achieve them.[165] The federal government's response to that report echoed that conclusion—recommending that any increase in discretion be accompanied by an increase in accountability.[166] The following sections review the extent to which current MOUs incorporate four potentially important accountability mechanisms: access to judicial review, clear objectives, reporting, and the development of agreed-upon indicators of success.

9.7.1 Judicial Review: The Trade-Off between Flexibility and Certainty

In her review of a number of federal-provincial-industrial sector MOUs containing non-binding agreements, Clark concluded:

> On the one hand, the non-binding nature of the agreements appears to offer a degree of flexibility and freedom within the bound of the agreements. On the other hand, however, the non-binding nature of the agreements creates a high degree of uncertainty regarding the actual, or perceived commitments of the signatories.[167]

[165] Government of Canada 1992b.

[166] Government of Canada 1993.

[167] Clark 1995, 8.

The way in which this trade-off is made in any given agreement will have wide ramifications. In particular, it may influence third-party rights concerning ventures undertaken or actions pursued under the agreement. If a government-negotiated agreement results in a binding obligation, for example, then presumably some rights to judicial review arise. Most of the MOUs negotiated to date in Canada have not created binding obligations, however. In this case, it is much less clear what formal recourse third parties would have to ensure attainment of the agreement's objectives.

The Japanese experience with "administrative guidance" may be of some interest in this regard.[168] There the experience has been that the use of administrative guidance creates "quasi rights." In the absence of a statutory or common law property-like right to a specific level of environmental quality, when the local authorities induce polluters to negotiate and bargain, they create in the affected residents something resembling a right or entitlement: "while not a binding legal right, it does, within the constraints of reasonableness, confer on the residents a private right to bargain [for example] for the proper degree of sunlight and ventilation."[169] Because the process does not create a specific obligation, however, it creates only very limited rights of judicial review:

> Lacking legal compulsion, the courts look to administrative accountability, and judge bureaucratic actions according to societal consensus rather than formal procedure, thus trying to protect the flexibility which is central to the bureaucracy's use of administrative guidance. The courts may also invoke the 'abuse of rights' doctrine, which requires that rights must be exercised only within a scope judged to be reasonable in light of the prevailing social consensus.[170]

Given the limited application of formal judicial review, the effectiveness of the Japanese administrative guidance model depends largely on the social pressure to respect whatever decision is reached. Of course, such pressure is considerable in Japan. Given that the same level of cultural respect for consensus does not exist in Canada, is there a need for additional, formal accountability mechanisms with respect to MOUs?

9.7.2 The Need for Clear Objectives

The way in which objectives are articulated will influence the degree to which the public (and government) can measure progress and hold parties to MOUs accountable. At present, few Canadian MOUs have measurable environmental objectives. Rather than specific performance standards related to use reduction or reduced releases, for example, most are quite general, focusing on objectives such as increased awareness, the development of appropriate supportive infrastructure, the development of acceptable reporting, verification and consulting processes, for example. As a result, according to a recent evaluation of the four main federal-Ontario-industrial MOUs, assessment of whether their objectives has been met is necessarily "very subjective."[171] By contrast, the federal ARET program, the US Project 33/50, and many European agreements contain very precise, quantitative objectives.

Most of the emerging literature on regulatory reform and on "redefining government" emphasizes that enhanced flexibility must be accompanied by the clear articulation of performance objectives.[172] Similarly, the European Union (EU) Environment Commissioner recently stated that a

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[168] According to Young 1984, 369, "...administrative guidance works essentially as follows. A local bureaucracy puts an industrial concern (for example, a potential polluter) on notice that it wants a certain result (perhaps an agreement between the polluter and local area residents as to emissions, conduct and so on). The notice has no formal, coercive legal effect. However, the bureaucracy can and will resort to collateral enforcement (such as withholding a building permit) in the event the polluter does not cooperate."

[169] Leane 1991, 371.

[170] *Ibid.,* 372.

[171] Energy Pathways Inc. and William A. Nef, Inc. 1995, 20.

[172] See Osborne and Gaebler 1992.

condition of EU support for voluntary agreements would be that the objectives of the agreement, a timetable for implementation, and the responsibilities of the parties must be clearly defined and, if possible, quantified.[173] These conditions should be considered for all future government supported voluntary initiatives.

9.7.3 Reporting Provisions under MOUs

There is wide agreement that public reporting is a key stimulus ensuring that voluntary initiatives are effective, and minimizing "free riders."[174] Notwithstanding the recognition of the role that public reporting can play in ensuring accountability, however, some of the initial MOUs had limited public reporting. A recent review suggests that this was perhaps due to concerns over confidentiality and exposure to liability.[175] This appears to be changing, however. In interviews for this study, Ontario officials observed that with each successive renewal of many Ontario MOUs, for example, went an increase in the extent and content of reporting requirements. In addition, a number of sectors, such as the CCPA and MVMA, have committed themselves to considerable public reporting.

9.7.4 The Need for Indicators to Measure the Impact of the MOUs

The absence of agreed-upon indicators of success for pollution prevention is a critical factor affecting the MOUs. If pollution prevention does entail a fundamental cultural shift within an organization, it is conceivable that 10 to 15 years may be required before the policy is implemented in a systematic manner throughout the economy. Indeed, it may take considerable time to become implemented even within a given organization. The difficulty in measuring cultural change will challenge any public attempt to oversee these initiatives and measure progress. It will similarly impede government officials from demonstrating "results," making it less likely that they will be rewarded for their efforts in comparison with more traditional regulatory programs. And the absence of clear indicators may also limit the extent to which companies will be able to recognize the benefits of pollution prevention, and measure their own progress.[176] Presumably, this is an issue in which all participants have an interest, and on which much effort should be devoted in the future.

9.8 Conclusion

Canadian governments are increasingly looking for alternative ways—such as MOUs—to promote improved environmental performance. Their premise is that considerable progress can be made voluntarily by establishing a forum in which government can share information with business and businesses can share information and experiences with each other.

These initiatives could improve environmental performance beyond regulatory requirements, and increase the level of compliance with existing regulatory obligations. By creating a new norm

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173 Environment Watch 1995, 15.

174 Recent studies of the US 33/50 program, for example, concluded that public reporting is critical because it influences a participant's public image, an important determinant of voluntary environmental action (Arora and Cassin 1994a and b). These researchers concluded that the potential for voluntary programs to augment regulation is increased when their progress can be tracked through publicly available information that introduces accountability for pollution control and rewards pollution reduction efforts beyond those required by law (Arora and Cassin 1994a and b). In her previously mentioned statement concerning the criteria the EU intends to place on the development of voluntary agreements, the EU Commissioner for the Environment acknowledged that transparency and close monitoring of results will be essential (Environment Watch 1995, 15). Public reporting is also a key component of the successful ARET initiative, a multi-sector emissions reduction challenge program.

175 Energy Pathways, Inc. and William A. Nef, Inc. 1995.

176 The extent of emissions reductions is one clear indicator that can readily be tied into reporting and is at the heart of a number of successful initiatives, including ARET and the CCPA's National Emissions Reduction Masterplan (NERM) annual emissions reports.

for behavior premised on pollution prevention practices, they may also augment the standard of care expected of companies asserting due diligence or presenting reasonable behavior defenses to regulatory charges or civil suits.

Government support for MOUs raises important coordination questions, however. In some cases, there are concerns that government support for MOUs might lead officials to overlook evidence of minor regulatory violations in order to maintain the trust industry might require for its continued receptivity to the challenges posed by the agreement. In some circumstances this could give rise to a defense of officially induced error or abuse of process by a party subsequently prosecuted for that violation. Some of those interviewed for this study argued that the solution to this problem is rigorous communication and cooperation between government officials. Others, however, worry that the existing regulatory regime is fundamentally incompatible with initiatives like voluntary MOUs that are directed at influencing attitudinal change.

These initiatives also raise a number of fundamental issues about government's role in supporting voluntary measures. These issues are still in the process of being addressed in Canada. Despite widespread agreement that government should *encourage* voluntary action, for example, some critics argue that government should not be officially involved with them. The concern is that, although MOUs officially are non-binding agreements, formal government sanctioning of them could preempt future policy development, creating mutual expectations that regulations will not be developed so long as participants demonstrate a good faith pursuit of the MOU initiative, locking in second-best technologies and processes in some cases.

If the premise that the promotion of pollution prevention requires careful, trust-based relationships is correct, then the resolution of these concerns will not be easy. It appears that many of the current MOU initiatives could allay some concerns by emphasizing stronger accountability measures. At a minimum, future MOUs should include measurable objectives, a timetable for implementation, and clearly defined responsibilities. The role of third parties in negotiating and overseeing the implementation of these agreements is more difficult, but also needs to be addressed. None of these changes will address the root suspicions about the possibly preemptive nature of these initiatives, however. Nor will they adequately address the potential problems of incompatibility between regulatory and voluntary measures. These issues cannot be resolved here. The point is that they must be addressed explicitly. If they are not, these concerns—and the distrust that failure to address them may engender—risk undermining the potential benefits of all such existing and future initiatives.

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Appendix: List of Interviews

Environment Canada

David Couture, Enforcement

Brad Cumming, Ontario Region

Denis Durrant, National Office of Pollution Prevention

Dave Egar, National Programs

Paul Gavrel, Legal Services

Beverley Hobby, Legal Services, Pacific and Yukon

Dale Kimmett, Office of Enforcement

Ned Lynch, Stewardship Office

James Riordan, National Office of Pollution Prevention

Tony Stone, ARET

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John Dauvergne, Regulatory Affairs

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Ontario Fabricare Association

Vic Vandermolen

Canadian Chemical Producers' Association

Gordon Lloyd

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Mexico

Mexico

1 Introduction

A series of measures have been gaining force in Mexico that differ from the traditional concept of inspection, oversight, and sanctions as a vehicle to achieve environmental and ecosystemic protection. These new approaches are known generically as "voluntary compliance measures" since they have in common that they are not generated through an oversight authority's coercive action but rather with its encouragement and support, and with the conviction and initiative of individuals.[1]

Voluntary compliance measures have been more and more widely used in the three member countries of the North American Free Trade Agreement, to the degree that they were discussed in the North American Environmental Cooperation Agreement, which establishes that:

> With the aim of achieving high levels of environmental protection and compliance with its environmental laws and regulations, each Party shall effectively enforce its environmental laws and regulations through appropriate governmental action, subject to Article 37, such as: [...]
>
> c) seeking assurances of voluntary compliance and compliance agreements;

In the United States and Canada, voluntary measures are more numerous and have been in existence for quite a few years. In contrast, the experience with voluntary compliance measures in Mexico is much more limited. Except in the case of the Environmental Audit, in which very significant advances have been made, technically, practically, and legally, voluntary compliance measures are still in a pilot phase.

The objective of the present study is to recount briefly the activities and experiences that Mexican environmental authorities have had with voluntary compliance measures or voluntary compliance programs. Section 2 will analyze the basic legal framework governing implementation and use of voluntary measures in Mexican environmental law. Section 3 then reviews the development, implementation, effectiveness and success of the measures employed up to now, or those which may be used in the future, including legal and *de facto* limitations of the mechanisms.

[1] The term "voluntary" is used to emphasize their alternative character (as opposed to traditional inspection, oversight and sanctioning measures), as well as the spontaneity with which individuals implement these measures.

2 Legal Framework

2.1 Constitutional Framework

The Political Constitution of the United States of Mexico (*Constitución Política de los Estados Unidos Mexicanos)* includes two sections relating to environmental matters, Sections 27 and 73, Subsection XXIX-G,[2] which authorize the environmental legal framework in force in the country. As well, Sections 4, 25, 26, 115, 122 and 124, while not explicitly relating to environmental matters, should also be noted as they relate to public and private rights. However, there are no constitutional provisions which specifically contemplate or regulate the mechanisms of voluntary compliance with legal obligations of private parties. Rather, self-regulatory instruments are non-enforcement mechanisms that belong to the category of working agreements *(concertación)* between government and private parties. In the Mexican legal system, such working agreements are considered to be those mechanisms reached voluntarily between the public sector and the social or private sectors for the implementation of actions aimed at complying with national policies. Working agreements are contemplated in the Constitution under Section 26, paragraph 3 which provides that:

> The Law[...]shall determine[...]the grounds upon which the Federal Executive will coordinate through compacts with the governments of the Federate Entities and *encourage and arrange with private parties those actions to be undertaken in order to establish and fulfill them [emphasis added].*

2.1.1 Concurrent Powers

Mexico is a federation consisting of three different government levels: municipal, state and federal. The federal government possesses all those powers that are delegated to it by the Constitution, either expressly or by implication. These powers are enumerated principally as powers of Congress in Section 73. Section 124 indicates that state governments possess those powers not given to the national government or prohibited to the states, and Section 115 defines the exclusive jurisdiction of municipal governments. Apart from the exclusive powers of each level of government, there are certain subjects that can be dealt with by either federal or state authorities, each acting independently of the other. In Mexico, this is the case where the powers related to environmental matters are shared by the three levels of government.

Under the original terms of the 1917 Federal Constitution, most of the powers in these environmental matters and in questions related to natural resources and activities that could cause environmental effects were granted to the Federation. In 1987 this situation changed upon adding Subsection XXIX-G to Section 73, granting the Congress of the Union the legislative power to:

> [...]issue laws establishing the concurrence of the Federal government, of the State governments and of the Municipalities, in their respective areas of jurisdiction, in matters concerning environmental protection and preservation and restoration of the ecological balance[...].

As a result of this amendment, powers concerning environmental and ecological matters are granted to the States, thus establishing a concurrence of legislative powers in these areas between the states and the Federation.[3]

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[2] These constitutional precepts were amended and added by Decree published in the *Diario Oficial de la Federación* on 10 August 1987.

[3] This principle, nevertheless, has important exceptions in the case of subjects that are the Federation's exclusive jurisdiction. This is the case, for example, for anything related to hazardous wastes, the mining industry, federal public works, and other headings indicated in Section 5 of LGEEPA.

The concurrence of powers in environmental matters also exists with the municipalities. Section 115, Subsection II, of the Constitution specifies in its second paragraph that:

> The municipal councils are authorized to issue[...]police and good government proclamations and regulations, notices and general administrative requirements in their respective jurisdictions.[4]

In turn, Subsection V of Section 115 provides that:

> The municipalities shall have the power to participate in the creation and administration of their land reserves; control and supervise the use of the soil[...]participate in the creation and administration of ecological reserve zones. For this purpose and pursuant to the goals listed in the third paragraph of Section 27 of this Constitution, they shall issue the necessary administrative regulations and rules.

In the aforementioned sections, a triple concurrence of powers in environmental and ecological matters can be observed among the three levels of public administration: the federal, the state, and the municipal. This simultaneity of powers among the authorities of various levels of the public administration does not imply an overlap of jurisdictions among the agencies of these entities, but rather, within the universe of environmental and ecological issues, we find a series of branches that are expressly assigned to each of the federal, state, and municipal environmental authorities.

The reality in legal practice is that the federal authorities have taken the reins in directing environmental policy and regulations, while the state and municipal authorities are in a developmental and organizational stage. It is to be hoped that in the near future these authorities may begin to establish some new environmental mechanism, such as voluntary compliance measures.

Nevertheless, it is clear that the trend must be toward encouraging state and municipal authorities to take the leadership for the design and establishment of voluntary compliance measures. The use of voluntary compliance measures at the state and municipal level will lead not only to a greater level of acceptance, but also to a substantial increase in their use (but see also footnote 23, below).

2.2 Secondary Legislation

2.2.1 General Act on Ecological Equilibrium and Environmental Protection (Ley General del Equilibrio Ecológico y la Protección al Ambiente—*LGEEPA*)

The LGEEPA is the statutory body of law under which the constitutional principles regarding environmental matters are regulated. The Act has been in force since 1 March 1988. Its original wording did not contemplate the existence of voluntary compliance measures which were introduced in amendments passed by the Congress of the Union in November 1996, as follows:

> [...]the voluntary and concerted initiatives undertaken by businesses and manufacturing organizations aimed at improving their environmental performance *beyond that required by statute*, prove to be a most efficient vehicle for environmental management. By promoting self-regulation and voluntary certification, the authority may considerably widen the scope of environmental protection through voluntary programs and standards for the furthering of technological change *[emphasis added]*.[5]

[4] Also, Subsection III of this Section establishes that the municipality is in charge of the following public services, among others: potable water and wastewater, cleaning, street, park and garden water or any other services that the local legislatures establish, depending on the municipalities' land and socio-economic conditions, as well as their administrative and financing ability.

[5] Proposal of Decree amending, adding and repealing several provisions contained in the LGEEPA, 15 October 1996.

In accordance with the new wording of the Act, self-regulatory instruments are defined as follows:

> Section 38.- Manufacturers, businesses or business organizations may develop voluntary processes for environmental self-regulation aimed at improving their environmental performance, provided that existing environmental laws and regulations are complied with, and through which they commit themselves to surpassing or complying with higher levels, goals or benefits in environmental protection issues.
>
> The Secretariat *(la Secretaría)* shall encourage or agree on:
>
> I.- The development of adequate and environmentally friendly manufacturing processes, as well as that of environmental protection and recovery systems, agreed upon with boards of industry, trade and other productive activities, manufacturers organizations, entities representing a given geographical area or region, institutions devoted to scientific and technological research and other interested organizations;
>
> II.- Compliance with voluntary standards or technical specifications related to environmental matters more stringent than the Official Mexican Standards *(Normas Oficiales Mexicanas)* or dealing with issues not covered by such standards, which shall be jointly agreed upon with private parties or associations and organizations representing such private parties. To this end, the Secretariat may promote the implementation of Mexican standards in accordance with the Federal Act on Metrology and Standardization *(Ley Federal sobre Metrología y Normalización)*;
>
> III.- The establishment of certification systems for processes or products meant to encourage such compatible consumption patterns that may lead to the preservation, improvement or recovery of the environment, in accordance with the applicable provisions of the Federal Act on Metrology and Standardization, and
>
> IV.- Such other actions that may lead businesses to accomplish environmental policy goals which go beyond those set under prevailing environmental laws and regulations.

As stated in the above-mentioned section, self-regulatory instruments in Mexico emphasize *measures aimed at improving the environment* (development of adequate and environmentally friendly productive processes, as well as of protection and recovery systems) and *voluntary compliance mechanisms* (compliance with voluntary standards or technical specifications related to environmental issues and certification systems for processes and products).

However, three aspects should be emphasized. First, while Section 38 is explicit, it does not set forth limitations. This means that the list of environmental self-regulatory instruments is not limited to those referred to in the Act; Subsection IV provides for the undertaking of "such other actions that may lead businesses to accomplish environmental policy goals which go beyond those set under prevailing environmental laws and regulations," such as tradeoffs or delegations. It is still too soon and there is not enough joint experience between authorities and private parties to accept the need for and convenience of implementing new voluntary compliance measures, but the ongoing trend definitely points towards their consolidation within an integrated scheme of self-regulatory instruments.

Second, Section 38 contemplates self-regulatory instruments in general, without actually entering into any particulars, which should be interpreted in the sense that they shall be regulated through administrative decisions, such as regulations adopted by the Federal Executive, or included in the Official Mexican Standards. Since the wording of the LGEEPA amendments simply set forth general principles governing their implementation, there are still several regulatory issues regarding the scope, procedures, requirements, application and enforcement of self-regulatory instruments that will have to be governed by specific regulations adopted under the LGEEPA, or any other statute. Care has

to be exercised, however, in order not to overly restrict their use or reduce the flexibility of environmental audits, since this might jeopardize their efficacy.

Third, the statute makes specific reference to the character of the voluntary initiative. The law defines or recognizes only those self regulatory initiatives which go beyond legal standards.

2.2.2 The Planning Act (Ley de Planeación)[6]

The Planning Act regulates Section 26 of the Constitution and aims at establishing the basic norms and principles that will guide the National Development Plan *(Planeación Nacional del Desarrollo)* and, accordingly, direct federal public administration activities. In addition, it provides the foundation for the actions taken by private parties to contribute in the fulfillment of the goals and priorities set forth in the Development Plan and its programs. The Act includes a chapter devoted to "Working Agreements and Encouragement" which regulates the instruments and mechanisms to be agreed upon with private citizens in order to ensure compliance with government policies.[7] In this sense, Section 37 states that: "the Federal Executive, directly or through its departments, and the federal agencies, may establish working agreements with representatives of social groups or other interested parties for the undertaking of those actions contemplated in the Development Plan and the programs thereto." The following provisions of the Planning Act relate to the nature and character of the working agreements:

> Section 38. The concerted actions, referred to in the previous section, shall be the subject of contracts or working agreements[8] of binding force for the parties involved; such contracts or agreements shall include the consequences and sanctions that may arise from noncompliance, in order to safeguard the public interest and ensure they are properly fulfilled within the specified time-frame.
>
> Section 39. The contracts or agreements entered into in accordance with this chapter belong to Public Law. The disputes that may arise from the interpretation and fulfillment of these contracts or agreements shall be settled by federal courts.

The binding nature of the agreement is relevant. Even though engaging in an environmental audit process is a prerogative of the private party, once the contract is agreed upon with the authorities, a connection is established whereby the party being audited is legally bound to undertake the agreed-upon audit, as well as those actions contemplated in the prevention and remediation programs. The agreement is made with the joint consent of the parties involved and generates subjective juridical situations.

As Section 39 makes clear, the agreement to undertake an audit will be considered to be in the nature of a public law. It is through this very provision that the law preserves the public interest, which cannot be left at the mercy of private parties, and allows the authority to take actions from a privileged position, without relinquishing its prerogatives or the powers vested in it as a public entity. Reviewing various working and environmental compliance agreements has led to the clear conclusion that even though environmental authorities promote the establishment of these agreements with private parties, the obligation of the latter to seek compliance with environmental statutory provisions is neither weakened nor limited. In fact, according to the law, such agreements establish that

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[6] Published in the *Diario Oficial de la Federación*, 5 January 1983.

[7] Chapter VI, Sections 37 to 41.

[8] Agreements and contracts are defined under Sections 1792 and 1793 of the Civil Code; for the Federal District in matters of common law *(fuero común)* and for the entire Republic in matters under federal jurisdiction *(fuero federal)*: "A joint agreement *(convenio)* is the acceptance by two or more persons to create, transfer, modify or terminate an obligation." "Those agreements that create or transfer obligations and rights are known as contracts." It is then clear that agreements are of a generic nature while contracts specifically generate or transfer obligations and rights. Based on the legal definition, the appropriate legal instrument to be used in arranging environmental audits is the "contract," since legally binding obligations for audited businesses are thereby created.

failure to comply with the measures agreed upon and within the specified time-frame will result in sanctions being imposed by the authority, in accordance with the provisions of the LGEEPA.

In cases of noncompliance with the provisions set forth in the working or environmental compliance agreements, private parties shall be subject to the sanctions provided by the LGEEPA, and the Federal Agency for Environmental Protection *(Procuraduría Federal de Protección al Ambiente*—Profepa) is empowered to impose them to secure enforcement of the agreed upon compliance agreements. These agreements do not mandate sanctions other than those established in the LGEEPA, nor supersede the legal obligations set forth in the environmental legislation.

2.2.3 1995–2000 National Development Plan[9]

The National System of Democratic Planning, defined under Section 26 of the Constitution and under the Planning Act, provides that the government's objectives, goals, policies, strategies and priorities regarding environmental matters must be included in the National Development Plan and in the programs for the different sectors. The National Development Plan is the instrument that commands government policies and actions. It is the document which dictates national goals and the strategies and priorities for economic development; it is also the instrument that governs the contents of the different programs for each one of the sectors.

The 1995–2000 National Development Plan provides that:

> [...]the policy regarding the environment and resource exploitation shall encompass more than a strictly regulatory role so as to serve also as an instrument for [1] the promotion and encouragement of investments in environmental infrastructure, [2] the creation of new markets and [3] the financing of sustainable development…all of which shall be accomplished through…an incentive system that will encourage producers and consumers to support those issues dealing with environmental protection and sustainable development.[10]

This assertion is tied to the philosophy of self-regulation, which advocates incentive/reward mechanisms as opposed to command/control principles. These two philosophies are not mutually exclusive; in fact, they are complementary. The guidelines stated in the Plan are included in the program established by the Secretariat of the Environment, Natural Resources and Fisheries *(Secretaría de Medio Ambiente, Recursos Naturales y Pesca*—Semarnap) for the implementation of environmental policy under the present Administration, namely the Program for the Environment 1995-2000, hereafter referred to as the "Environmental Program."[11]

In its work to modernize environmental laws and policies, Semarnap plans to work in several directions, including self-regulation, as stated in the Environmental Program:

> Not in every case is it efficient or even possible for environmental authorities to forcefully impose technical or process restraints on productive activities. In many occasions it is more convenient, both from a public and private perspective, to develop, by common consent, self-regulatory systems that fulfill a series of objectives such as:
>
> • going beyond legal requirements or filling existing regulatory gaps,
>
> • promoting total environmental quality principles in productive processes,

[9] Published in the *Diario Oficial de la Federación* of 31 May 1995.

[10] Chapter 5.8, "Environmental Policy for a Sustainable Growth," pp. 165–166.

[11] This Plan was published in the *Diario Oficial de la Federación* of 3 April 1996 and by Semarnap itself on 13 March 1996 as *Programa de Medio Ambiente 1995–2000*. All page references to the Environmental Program in this document refer to the latter publication.

- promoting private sector joint responsibility and initiative in compliance with the environmental objectives of the nation,
- cost effectively fulfilling other goals related to environmental protection,
- decentralizing environmental management duties, and
- enhancing the corporate image of businesses or industrial sectors that undertake environmental initiatives.

Self-regulatory mechanisms will require the design of instruments through which agreements between the private and public sectors may be formally realized, as well as auditing and communication systems. *Self-regulation has three main components: environmental audits, voluntary standards and certification processes [emphasis added]*.[12]

After defining political priorities and strategic actions, the Environmental Program specifically mentions 13 projects and actions whose development is considered a priority, among which are:

- the promotion of voluntary standards,
- the development of an environmental auditing system emphasizing export industries, and
- the development of environmental certification systems.[13]

[12] Semarnap—Environmental Program, 1996, 118.

[13] Ibid., 121.

3 Voluntary Compliance Measures in Mexican Environmental Practice

3.1 Policies and Instruments

The LGEEPA, when originally enacted, did not provide among its environmental policy instruments any mechanism relevant to the implementation and use of voluntary compliance measures. The 1996 amendments to the LGEEPA introduced mechanisms for self-regulation and environmental audits to the Act. In accordance with their voluntary compliance character, these instruments are mainly intended to prevent ecological damage and to promote and secure compliance with environmental legislation. Environmental audits constitute the most important instrument embodying the intrinsic characteristics of voluntary mechanisms implemented by Mexican authorities.

In the following sections three key mechanisms are reviewed: environmental audits, ISO 14000, and the FIDE seal for electrical energy savings.

3.2 Environmental Audits

3.2.1 Objective and Description

Environmental audits were introduced in Mexico to reduce the occurrence of industrial accidents, to promote controls on atmospheric emissions, and to help curb water and soil contamination resulting from commercial and industrial activities, by using an instrument that departs from traditional procedures entailing oversight, enforcement and sanctions.

In Mexico, environmental audits are aimed primarily at identifying, evaluating and controlling those industrial processes which might be operating under risky conditions or causing environmental pollution. Through audits a systematic and exhaustive analysis is carried out on the processes and practices of businesses involving the production of goods and services for the purpose of ascertaining the degree of their compliance with environmental regulations and practices and, as a result, assess potentially risky situations in order to institute appropriate preventive and remedial measures. Audits also assess whether an industry's administrative procedures, production activities and trade practices are adequate and consistent with legal obligations, institutional guidelines, standards, safety codes and good engineering practices.

Environmental audits are voluntary procedures which, while actually being undertaken by private parties and public corporations, are supervised by Profepa in order to assess whether or not private and public parties comply with those requirements dealing with the prevention of environmental degradation. The development of an environmental audit involves a comprehensive review and evaluation of an industry's processes, installations and activities.

3.2.2 Parties involved

Semarnap is the administrative authority in charge of the performance of environmental audits. This Secretariat of the federal executive branch was created by amending the Organic Act of Federal Public Administration *(Ley Orgánica de la Administración Pública Federal*—LOAPF) by decree published in the *Diario Oficial de la Federación* on 28 December 1994.

Section 32 bis of the LOAPF specifies the responsibilities of Semarnap, which are to: "design and conduct the national policy on national resources—unless such duties are expressly placed under the administration of another department—ecological matters, environmental recovery, water, environmental regulation of urban planning and development of fishing activities…"[14]

According to the Bylaws of Semarnap,[15] its organizational structure includes, among other bodies, two decentralized agencies[16] under its direct control dealing with environmental matters: the National Ecology Institute *(Instituto Nacional de Ecología*—INE), in charge of the design, administration and evaluation of national policies regarding ecological and environmental protection issues, and Profepa, which is responsible for the enforcement of applicable legal provisions relating to the prevention and control of environmental pollution, as well as the establishment of those mechanisms, recourses and administrative procedures that might prove necessary for its mandate to be fulfilled.[17]

Specifically, Section 62 of the Bylaws of Semarnap states that Profepa shall have the authority to:

> VIII.- Perform environmental audits and assessments regarding the exploitation, warehousing, transportation, production, transformation and commercialization systems; the use and disposal of wastes and compounds; and those activities whose very nature pose a threat to the environment.

Since the Bylaws of Semarnap also assign specific duties to its administrative divisions, the powers vested in Profepa authorities for the encouragement, promotion, coordination and arrangement of environmental audits are also important to consider. In accordance with Section 66 of the Bylaws, the Planning and Coordination Division *(Dirección General de Planeación y Coordinación)* is empowered to:

> III.- Promote, encourage and arrange with private parties, groups and industrial chambers, the performance of environmental audits;
>
> [...]
>
> V.- Design mechanisms to assess the technical skills of professional individuals and firms for undertaking environmental audits and assessments;
>
> VI.- Develop, in conjunction with the relevant divisions of the Secretariat, technical training programs in the areas of environmental audits and assessments;
>
> VII.- Promote cooperation and communications, at the national and international levels, to foster technical development in regard to environmental audits and assessments;.

[14] Subsection II.

[15] Published in the *Diario Oficial de la Federación* of 8 July 1996.

[16] According to Section 17 of the LOAPF, "in order to provide greater attention to and efficient handling of those administrative issues under their jurisdiction, the Secretariats of State *(Secretarías de Estado)*…may rely on decentralized administrative agencies which shall be placed under their direct control and invested with specific decision powers on such issues and within the territorial jurisdiction assigned to them, in accordance with the applicable legal provisions."

[17] The administrative structure and the mandate of the INE are set forth in Sections 54 to 61 of the Bylaws, while those pertaining to Profepa are in Sections 62 to 82.

The Operations Division (Dirección General de Operaciones), created by Section 67 of the Bylaws, is empowered to:

I.- Coordinate or undertake, on its own or through third parties, in accordance with the legal provisions governing secrecy issues on such matters, environmental audits and assessments of either public or private entities in regard to: their exploitation, warehousing, transportation, production, transformation and commercialization systems; the use and disposal of wastes and compounds; those activities whose very nature constitute a threat to public health, property or the environment; and the measures adopted by businesses, and their ability to prevent environmental contingencies and emergencies or take action thereto.

[…]

IV.- Establish, in accordance with the guidelines issued by the Legal Division *(Dirección General Jurídica)*, the working agreements to arrange for the undertaking of those actions resulting from environmental audits or assessments, and their compliance deadlines;

V.- Coordinate or undertake, on its own or through third parties, the environmental audits and assessments that are required in order to prevent emergencies and contingencies arising from those activities that pose an environmental hazard, and

VI.- Follow up on the actions contemplated in the agreements brought about by environmental audits and assessments, in order to ensure that the required prevention and remediation measures are complied with.

According to Section 76 of the Bylaws, the mandate of the Legal Division is, among other things, to:

X.- Provide support to the appropriate administrative divisions of Profepa for the undertaking of environmental audits and assessments;

XI.- Make proposals to the head of Profepa (Procurador) concerning the internal legal guidelines to be observed in the performance of environmental audits and assessments, as well as in the issuance of decisions and the imposition of applicable sanctions.

The state bureaus *(Delegaciones Estatales)* of Profepa, for their part, have been authorized under the Bylaws of Semarnap to perform environmental audits and assessments.[18]

3.2.3 Legal Authority and Framework

As mentioned previously, recent amendments to the LGEEPA provide a legal foundation for certain voluntary or self-regulatory mechanisms, including environmental audits. The Planning Act also establishes ground rules for the development and application of audits.

The LGEEPA

The enactment of the LGEEPA in 1988 was an important step in the development of environmental legislation in Mexico, as it made possible important achievements in environmental management. After the cumulative experience of almost eight years, the decision was made to amend the LGEEPA, introducing a number of legal innovations, including a legal framework for environmental audits.

[18] Cf. n. 15, supra, Section 82, Subsection VII.

Sections 38 bis, 38 bis 1, and 38 bis 2 regulate the main aspects of audits, such as their purpose and scope, the rules to be followed when performing them, the approval or certification of environmental experts able to ensure professional quality for the audits, and the setting up of regional assistance centers for small and medium-size industries. The relevant provisions state as follows:

> SECTION 38 bis.- Those responsible for the management of a business may, through environmental auditing, voluntarily undertake a methodological testing of [the business's] operations with regard to the pollution and risk thereby caused, as well as the level of compliance with environmental regulations, international standards and sound engineering practices, for the purpose of designing such preventive and remedial measures deemed necessary for the protection of the environment.
>
> The Secretariat shall develop a program aimed at promoting the undertaking of environmental audits, and shall be able to supervise their execution. To this aim, it shall:
>
> I.- Set the guidelines establishing the methodology to be followed in the performance of environmental audits;
>
> II.- Design a system for the approval and certification of environmental experts and auditors, stating the procedures and requirements to be met by those interested in joining the system, provided that the provisions of the Federal Act on Metrology and Standardization are complied with. To this end, it shall set up a technical committee made up of representatives from research institutions, professional colleges and associations and industry organizations;
>
> III.- Develop training programs for environmental inspections and audits;
>
> IV.- Establish a system of rewards and incentives that will help to identify those industries which duly comply with the commitments arising from environmental audits;
>
> V.- Promote the creation of regional support centers for the small and medium-size industries with the aim at facilitating the performance of audits within these sectors, and
>
> VI.- Expressly agree to or arrange, with individuals and public or private juridical persons, for the undertaking of environmental audits.
>
> SECTION 38 bis 1.- The Secretariat shall make available, to whomever is or might be directly aggrieved, those prevention and remediation programs that result from environmental audits, as well as the diagnosis on whose grounds they are based. In each and every case, legal provisions regarding the confidentiality of industrial and commercial information shall be adhered to.
>
> SECTION 38 bis 2.- The States and the Federal District may establish environmental self-regulation and auditing schemes in their respective jurisdictions.

The following observations may be inferred from the wording of the law. First, industry participation in an environmental audit is voluntary. Section 38 bis does not obligate any individual or business to submit to an audit, and thus the authority cannot force their participation in one. An industry must abide by the results of an environmental audit only once it signs an environmental compliance agreement.

Second, Mexican environmental authorities are given distinct powers enabling them to enter into working agreements with individuals and businesses for the purpose of performing audits. Up until the 1996 amendments to the LGEEPA, environmental audits were undertaken without reliance on legal provisions enacted by the Congress of the Union; they were solely based on administrative bylaws.[19] The amendments provide stronger legal support to the government to encourage and arrange the performance of environmental audits, and grant private parties juridical security about the scope of the procedures involved. These new provisions set the framework for the audit process, but they

[19] See Section 38, Subsection IX of the Bylaws of the Secretariat of Social Development *(Secretaría de Desarrollo Social)*, published in the *Diario Oficial de la Federación* of 4 July 1992; see also Section 62, Subsection VII of the Bylaws of Semarnap, published in the *Diario Oficial de la Federación* of 8 July 1996.

must be developed in a specific regulation to carry out the intent of the act, as well as to define the regular process that must be observed by Profepa in strict conformity with the law.

Third, interested third parties are allowed access to information produced by audits, such as prevention or remediation programs, as well as the underlying diagnosis which gives rise to such programs. "Third party" means any person who is or might be aggrieved by the activities carried on by audited persons or businesses, and that is not a party to any working agreement triggering such audits. Only those persons who have a genuine and justified interest and suffer or may suffer damages caused by the noncompliance with an environmental obligation by those persons or businesses being audited will be granted the standing of aggrieved third party.[20]

Fourth, the confidentiality of industrial and commercial information is safeguarded, as provided under the Industrial Property Act *(Ley de la Propiedad Industrial)*.[21] In accordance with Section 86 bis 1 of the latter Act, "when, during the course of judicial or administrative proceedings a party thereto is required to reveal an industrial secret, the authority hearing the case shall adopt such measures as may be needed in order to prevent it from being disclosed to third parties not involved in the dispute. No interested party shall, under any circumstances, either reveal or use industrial secrets referred to in the above paragraph."

Fifth, in Mexico all three levels of government—federal, state and municipal—have concurrent jurisdiction over environmental audit issues.[22] This shared jurisdiction exists in order to allow for a sounder implementation of audit programs, and the development of closer links between regulators and regulatees. The trend is toward having state and municipal authorities take the leadership in the design and implementation of voluntary compliance measures, within the framework of the national environmental policy. The use of voluntary compliance measures at the state and municipal levels will result not only in greater acceptance of these instruments, but also in their more widespread use.[23]

The policy followed by Profepa's Environmental Audit Division *(Subprocuraduría de Auditoría)* in regard to such audits has encouraged private and public parties to come before Profepa to arrange for the undertaking of an environmental audit. The agreement between the authority and the party to be audited is made formal through two legal instruments: (i) the Working Agreement, under whose terms the audit is launched and the involved party commits itself to abide by the audit results; and (ii) the Environmental Compliance Agreement, subscribed to at the end of the audit and prescribing the appropriate preventive and remedial programs to be implemented by the audited party, together with the compliance deadlines. The time granted for such programs to remedy environmental

[20] See the following decisions by the Supreme Court of Justice of the Nation: "Aggrieved third party," and "Legal standing of aggrieved third party," cited in the list of court decisions.

[21] Published in the *Diario Oficial de la Federación* of 27 June 1991 and amended by decree published on 26 December 1997. Section 82 of this Act states that: "any information for industrial and commercial use, which is held in secret by individuals or juridical persons and results in their gaining of or maintaining a competitive or economic advantage over third parties in the performance of productive activities, is deemed to be an industrial secret if the necessary measures and systems have been adopted so as to preserve its confidentiality and restricted access thereto."

[22] It must be pointed out that the LGEEPA is a "general" law, not a "federal" law. This means that the distribution of jurisdiction over these issues is contemplated under the LGEEPA; to that end, it establishes joint jurisdiction *(concurrencia)* of the Federal Government, and the governments of the states and municipalities, within their respective jurisdictions, "over environmental protection issues and those dealing with the preservation and recovery of the ecological equilibrium…." Section 73, Subsection XXIX of the Political Constitution of the United Mexican States.

[23] It is worth emphasizing that, apparently, both private parties and nongovernmental organizations have raised concerns about states and municipalities being the ones in charge of administering the laws and regulations governing environmental matters. While the former, on the one hand, are afraid that the states and municipalities will be far too inflexible in enforcing such laws and regulations, the latter, on the other, are of the opinion that state and municipal authorities might be less strict than the Federation in dealing with environmental issues.

shortcomings is determined by factors such as law irregularities, risky situations and by the investment that must be made. In those instances where the audited party is not able to fulfill the commitments set forth in the Environmental Compliance Agreement, Profepa may grant an extension, provided that the affected party satisfactorily proves that (i) it has not been able to begin complying with its obligations for reasons beyond its control, or (ii) there have been delays in the implementation of the programs for the same reasons.[24]

It should be noted that environmental audits are not actually performed by public servants but by private consultants. Profepa also appoints supervisors, who make sure that the consultants abide by the Terms of Reference. Since the appointment of both consultants and supervisors is considered of paramount importance for the success of audits, transparency in the appointment process is essential. Before the 1996 amendments to the LGEEPA, Profepa had a list of trained experts with the ability to perform audits; however, this list had no legal standing whatsoever, for the Procuraduría itself had the power to invite consultants who were not on the list to undertake audits, when it was of the opinion that such persons had the requisite experience and the ability to comply with the Terms of Reference. This has now changed. The Act now states that Profepa shall establish:

> [...]a system for the approval and certification of environmental experts and auditors, and determine the procedures and requirements to be fulfilled by parties interested in becoming part of the system. To this end, Profepa must set up a technical committee made up of representatives from research institutions, professional college associations and industrial organizations.[25]

3.2.4 The Audit Process—Philosophy

In Mexico, an environmental audit implies a systematic assessment to determine whether or not administrative procedures, production activities and commercial practices of a business are adequate and consistent with the legal obligations, institutional guidelines, standards and other applicable provisions governing environmental protection. Therefore, throughout the performance of an environmental audit a complete review of each and every process, facility, and activity pertaining to the audited business is performed.

Environmental audits encompass the following issues:

- industrial safety,
- water,
- air,
- noise,
- solid wastes,
- hazardous wastes, and

[24] Mexican legislation contemplates the possibility of nonfulfillment of obligations committed to under an agreement or contract. In this sense, it provides for exceptions where an act of God *(caso fortuito)* or 'force majeure' *(caso de fuerza mayor)* are involved. An "Act of God" is defined as a "natural and inevitable event, foreseeable or not, that absolutely prevents an obligation from being fulfilled…. '[F]orce majeure'[...]relates to actions by humans, foreseeable or not, but inevitable, that absolutely prevents an obligation from being fulfilled" (e.g., a strike that is not caused by the employer). See Rojina Villegas 1985, book V, volume 2, 357-389.

[25] Section 38 bis, Subsection II. Profepa has established working agreements with several professional institutions such as the College of Mechanical Electrical Engineers, A.C., the National College of Chemical Engineers, A.C., the College of Environmental Engineers, A.C., among others, with the aim of setting up joint assessment committees that will formulate guidelines and help Profepa with the process of selecting potential environmental auditors who might be included in the identification and certification system.

- land pollution.[26]

The audit process includes matters related to:

- design,
- construction,
- operation and maintenance,
- materials,
- facilities,
- practices,
- procedures, and
- personnel.

The auditing program is based on the assumption that private parties, when making use of this instrument, may have the possibility of remedying all the environmental shortcomings in their facilities or processes, while avoiding those sanctions that might be imposed as a result of an official inspection. Furthermore, environmental audits provide for an integrated analysis of environmental deficiencies that may exist in a business, as opposed to inspections that, because of their limited scope, do not allow authorities to handle comprehensively all of the existing environmental problems, including issues not yet legally regulated. For this reason authorities have conceded that environmental audits are a valuable instrument which allow businesses to comply voluntarily with regulations and standards at the federal, state and municipal levels.

Environmental audits are directed at:

- assessing the environmental management of audited businesses;
- assessing the degree of compliance by audited businesses with environmental laws and regulations;
- assessing the degree of compliance by audited businesses with their own environmental policies and with the policies and guidelines set for their sector;
- assessing the practices and procedures relating to the management and maintenance of facilities; and
- developing an action plan to remedy those deficiencies uncovered during audits.

[26] Environmental audits include health and safety issues. Legally, these issues are the jurisdiction of the Secretariat of Labor and Social Welfare *(Secretaría del Trabajo y Previsión Social)*. It is important to acknowledge that environmental authorities are not empowered to enforce labor laws and regulations. This is relevant, for such provisions may not be enforced by Profepa even where noncompliance by audited businesses is uncovered. A relevant Supreme Court ruling asserted that "in strict conformity with Section 16 of the Constitution, the authority shall fully justify its jurisdiction when adopting any action that may cause any annoyance; and, except where it is provided by law that such jurisdiction is extended, voluntary adherence by a private party may not validate lack of jurisdiction, since public servants may decline their responsibility to make sure that their actions are legally permitted." (See: "Jurisdiction. Voluntary adherence by a private party to authority's acts cannot, in principle, validate the lack of." Second Collegiate Court [of the *Suprema Corte de Justicia de la Nación],* cited in the list of court decisions.

These aims are merely methodological guidelines for undertaking environmental audits and always require that adjustments or a change of focus be made according to the business being audited. It is the joint responsibility of Profepa, the business, and the consultant to establish the exact parameters to be followed at the time when the grounds for an audit are laid.

One of the main objectives of Profepa is the undertaking of environmental audits of those businesses that pose a greater threat to the population or the environment. The comprehensive review of each process, facility and activity, includes all aspects of the business, expressly regulated or not. In other words, when the authority and a private party agree to the performance of an audit, the latter commits itself to remedy, repair, build or undertake such actions that may be deemed necessary as a result of the audit, whether or not there exists a specific legal obligation to do so. This is done to safeguard lives and the environment, and to turn the facility into a clean industrial operation.

Though any business may be approached for an audit at any time, facilities considered to be high risk, located in a sensitive environmental region, or judged to pose a significant threat to the environment are especially likely candidates for an audit by Profepa. Currently, the authority tries to devote its time and resources as efficiently as possible to industries that present a greater risk to the environment. To this end, the Environmental Program establishes the following:

> The strategy underlying the audit process is the voluntary participation of businesses in the prevention and control of environmental pollution. Aimed, in the beginning, at those larger industrial businesses in the country with a higher level of risk, and at public sector industries, this strategy will be extended to all businesses in general, particularly those participating in commercial activities within the free trade zones as well as those whose production is partially or totally destined for export markets.
>
> It is intended that the environmental audit, as a voluntary instrument for the prevention and control of industrial pollution, be strengthened through the establishment of working agreements with businesses, thereby ensuring that the effects carry through the whole production structure.[27]

Although it may be triggered by an "invitation" from Profepa requesting the private party to submit to an environmental audit, the audit itself is considered to be a voluntary undertaking since Profepa does not have the power to force a business to undergo such an assessment. Even though the audit is meant to be voluntary, not accepting the "invitation" results in a much higher probability that the stubborn business will be subjected to an inspection and supervision visit by any of Profepa's divisions.

Once a business agrees to the performance of an environmental audit (as a result of the "invitation" or in a spontaneous decision) the following obligations must be contained in the Working Agreement. The firm agrees to:

- adhere to the Terms of Reference established by Profepa for the performance of environmental audits, and submit to Profepa's oversight;
- undertake all the necessary actions, studies, projects, tasks and programs for the establishment, adjustment and/or development of the environmental action plan (see Section 3.2.7 below) resulting from the assessment;
- control its activities through the environmental action plan, so as to minimize the hazards and the pollution generated by its production process; and
- carry out the provisions of its environmental action plan.

[27] Semarnap—Environmental Program 1996, 119.

3.2.5 The Audit Process—Terms of Reference

Profepa, through its Environmental Audit Division *(Subprocuraduría de Auditoría)*, has released a document containing the terms of reference for the performance of environmental audits (hereafter referred to as "Terms of Reference"). The Terms of Reference specify Profepa's expectations for environmental audits, the tasks to be accomplished in them, and establishes the methodology to be followed in audit performance, including:

- legal grounds,
- requirements for the conduct of environmental audits,
- requirements for the supervision of environmental audits,
- requirements for reporting on environmental audits, and
- requirements for the environmental compliance agreements.[28]

The Terms of Reference establish the procedures and approaches to be used by the expert who performs the audit. They were also intended to standardize the criteria used for assessing industries, obviously allowing adequate flexibility to cover a wide range of economic activities, geographical areas and social conditions. This is why the contemplated procedures and approaches are general in scope. The specific aspects to be assessed must be tailored to the type of industry, the location and other distinct characteristics pertaining to the party involved.

3.2.6 The Audit Process—Conduct

An environmental audit comprises the following three stages, namely: (1) Planning (or Pre-Audit); (2) "In situ" Assessment (or Audit); and (3) Post-Audit.[29]

Planning (or Pre-Audit)[30]

At this stage a detailed activity program is prepared, which must describe the type of tests and analyses to be performed. All the planning and decision making about how the environmental audit is to be carried out is performed during this phase, as well as the gathering of all the relevant information regarding the business to be audited, especially its processes, products and raw materials.

"In situ" Assessment or Audit[31]

This is the most important stage in the entire audit process. During this phase all those studies that lead to the establishment of the environmental diagnosis and the ensuing remedial measures must be carried out. The environmental consultant performs all tasks—sampling, monitoring, and analysis—according to a program agreed upon by the private party, with ongoing participation and supervision on the part of Profepa. Actually, the environmental consultant is constantly in contact with Profepa and is committed to sending periodic advance reports, laboratory tests, sample analyses and "in situ" assessments in order to guarantee the fairness of the audit. Officials from Profepa take part in the visits made by consultants to audited facilities.

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[28] Section 32 bis, Subsection I of the LGEEPA.

[29] Carmona Lara 1995, 88–96.

[30] Ibid.

[31] Ibid., 89.

Within this phase, there is a series of secondary stages, namely:

- the gathering of basic data;
- the analysis of the production process;
- the analysis of raw materials;
- the cost analysis of wastes and emissions management.

The process of assessing an industrial facility requires undertaking studies inside and outside the facility. Those undertaken inside encompass the review of technical records and registers. Throughout this stage a fruitful exchange of information among those involved is encouraged in order for all three parties to gain a better understanding of the origin of the problems or deficiencies uncovered. The work outside the facility consists mainly of collecting and analyzing information relating to the natural environment, the socioeconomic conditions and the applicable provisions of environmental laws. The analysis of the natural and socioeconomic conditions attempts to assess the facility's environmental impact. The analysis of the environmental legislation identifies those legal provisions, regulations and standards with which the audited business must comply. The legal analysis focuses on environmental legal instruments, but it may also cover other areas, such as issues of health and safety in the working place.

It should be pointed out that, during the course of an audit, Profepa relies on internal communication in order to avoid inspection visits while the audit is being performed, although from a technical standpoint, there is no impediment in the current legislation preventing Profepa or any other authority from carrying out such visits. In fact, both in the Working and the Environmental Compliance Agreements, Profepa expressly retains its powers of inspection and supervision.

Regarding notification of other authorities about the progress of an audit, Profepa's policy is now that the Subprocuraduría for Environmental Audits notifies the division charged with inspecting private facilities when environmental audits are undertaken. It is up to the private parties to inform other authorities directly. There is an ongoing plan to strengthen the coordination during audit performance among the various levels of government, federal and state, not only to make other authorities aware of the audit itself, but also to enable other agencies to understand the role and contribution of it. In practice, other state and municipal government agencies have refrained from inspecting those private parties who have informed them of an ongoing environmental audit.

Post-Audit[32]

It is at this stage that a final report is prepared, based on the information gathered, which includes the conclusions arising from each one of the processes assessed. The final report contains an account of the audit results that includes:

- an executive summary;
- the audit report; and
- the technical and photographic appendices.

The report must meet minimum requirements in order for the results of the audit to be included in the Environmental Compliance Agreement that will be endorsed by Profepa and the private party.

[32] Ibid., 92.

The signing of the Environmental Compliance Agreement marks the end of the normal environmental auditing process and sets the actual grounds for those actions to be undertaken by the private party within a given amount of time, in order to remedy the anomalies and/or deficiencies uncovered during the audit.

3.2.7 Audit Follow-up

Given that the audit process results in the preparation of an appropriate plan of action for post-audit implementation, Profepa expressly reserves its right to undertake visits and monitoring in order to verify that these obligations contemplated under the Environmental Compliance Agreement are strictly fulfilled.[33] Should a private party fail to perform the actions and meet the deadlines agreed upon, or should any anomalies be detected during an inspection visit, the authority may impose those sanctions contemplated under the LGEEPA, the coercive instrument upon which it may rely in order to force compliance by the private party. Normally, according to the information provided by Profepa officials, these inspections are made every three months, whether or not the private party has submitted a report on the activities undertaken in order to fulfill his obligations under the Agreement.

Where such visits or monitoring show that the private party has not abided by the terms of the Environmental Compliance Agreement, Profepa may also impose administrative sanctions. Notwithstanding, through these Agreements, parties may be granted extensions in non-risky situations to comply with environmental laws and regulations and this practice, in the final analysis, does not contradict the compliance provisions set forth by law.

Therefore, the most important part of the environmental audit program is the way in which Profepa agrees with the private party on the steps to be taken in order to remedy the deficiencies uncovered during the assessment process. These steps are expressly reflected in the schedule of actions and times appended to the respective Environmental Compliance Agreement. Normally, these "action plans" set forth the timetable for the initiation and conclusion of each remedial action (represented in bar graphs), the specification of responsibilities, and the associated costs, and are tracked by Profepa.

It is worth mentioning that one of the main attractions of environmental audits is that they provide an integrated, overall analysis of the audited business, which could not be achieved solely through periodic inspections conducted by Profepa, since these would always be limited in scope by the expressly issued inspection order.

3.2.8 Financing of Environmental Audits

Profepa

In December 1992 Profepa launched its nationwide Environmental Auditing Program in 58 industrial facilities located in 10 states (Baja California, Chihuahua, Coahuila, Distrito Federal, Estado de México, Guanajuato, Jalisco, Michoacán, Nuevo León and Tamaulipas). In order to implement the program, Profepa decided to promote environmental audits by funding the first ones to be performed in Mexico, with the purpose of making business people aware, through a representative sample of environmental audits, of the advantages and benefits rendered by them. Approximately 5 million pesos were contributed by the government to the first environmental audits performed in 1992 in the Coatzacoalcos-Minatitlán industrial region. These were performed in 19 high-risk industrial facilities, so classified by the handling and the quantities of hazardous substances used in their production processes. In December 1992, with the launching of the nationwide environmental auditing program,

[33] Ibid., 95.

an initial investment of 17 million pesos was allocated, and by the end of 1993 a total of 200 million pesos had been spent.[34] For 1996 the Procuraduría budgeted approximately 20 million pesos.[35]

Nacional Financiera (Nafin)

During 1995, this federal financial institution established a special fund to extend loans, through certain lines of credit offering preferential interest rates, for environmental programs involving the implementation of remedial measures and actions. Nevertheless, according to information obtained from Nafin officials, the funds allocated for financing projects of this type have not been completely spent in any of the fiscal years since the program was launched. It has been suggested that the main reason for this is due to inadequate dissemination of information about the program's existence.

Along with ordinary loans, Nafin offers direct funding for environmental projects through its association with the North American Environment Fund (NAEF) and the European Community Investment Partners (ECIP). The ECIP was designed to finance environmental projects for small and medium-size Mexican businesses that undertake projects in conjunction with European firms. According to information from Nafin, the ECIP will fund up to 50 percent of the operating costs involved in conversions, up to 20 percent of total capital expenditures and up to 50 percent of human capital training and development expenses. The maximum amount allocated per project is US $1.36 million.

Banobras

The National Bank for Public Works and Services *(Banco Nacional de Obras y Servicios Públicos*—Banobras) has established an Infrastructure Investment Fund *(Fondo de Inversión en Infraestructura*—Finfra) with an initial contribution of 250 million pesos from the federal government. However, it is anticipated that the Fund will adopt a mixed capital structure with monies coming from the federal government, the private sector, and/or international financial institutions.

The Fund will endeavor to provide funding for new projects in the following areas: highways, seaports and airports, water distribution, sewage and sanitary works, urban transportation equipment and infrastructure, and waste disposal and recycling. In order to determine the feasibility of the project on the basis of its profitability and risk, Banobras has issued operating rules for Finfra, which establish the parameters for accessing the monies deposited in the Fund. Priority shall be granted to those projects aiming at:

- promoting the undertaking of projects with significant social returns;
- developing, transferring, innovating or improving the existing technology in a specific industrial sector;
- contributing to regional development;
- cooperating in the diversification, enhancement or modernization of national productive capacity; and
- integrating production processes.

[34] *Procuraduría Federal de Protección al Ambiente*, Report submitted by the Chief Procurador to the Consulting Council of Profepa, July 1992–November 1994, 23.

[35] Statement by Mr. Antonio Azuela de la Cueva, Federal Procurador for Environmental Protection, during the closing session of the Mexico-Canada-United States Seminar on ISO 14000, Environmental Auditing, organized by Profepa in Mexico City, 23 August 1996.

Investments made by the federal government in the areas mentioned will not only contribute to the protection of the environment, but also help reduce financial costs or increase existing limited funding for implementing actions arising from environmental audits.

3.2.9 Efficacy of Environmental Audits

According to reports from Profepa, from the beginning of 1992 to June 1997, 759 audits were undertaken, of which 669 were completed and 90 were still in progress; 676 action plans were signed, 328 of which were still in progress, 110 had been fulfilled, and 238 were at the agreement stage.[36] The environmental auditing program has focused mainly on industrial activities deemed of high priority—both in terms of the risks they pose and the significance of their participation in national exports. The large public sector corporations, such as Mexican Oil (Pemex), the Federal Electrical Commission *(Comisión Federal de Electricidad)* and Mexican National Railways *(Ferrocarriles Nacionales de México),* have been included in the program, as have such private sector corporations as Mexican Cement (Cemex), Peñoles, Mexican Steel Works *(Altos Hornos de México)*, Nestle, Ford Motor Company, General Motors of Mexico, Nissan Mexicana and other companies belonging to the chemical, textile, foodstuffs and leather industries, among others. Fewer audits were performed on these public sector corporations in 1995, due mainly to the economic crisis. Overall, however, the number of audits on public sector and private corporations has risen year by year, according to Profepa's figures: 1992 (19), 1993 (66), 1994 (161), 1995 (179), and 1996 (274).

Although the number of performed audits has increased, this does not necessarily correlate directly to the number of inspection visits.[37] Such visits now focus on sectors not included in the auditing program. Unquestionably, environmental auditing has fundamentally favorable aspects because the private party decides to absorb the costs of implementing the audit and allows Profepa to allocate enforcement resources to inspection priorities.

Profepa has stressed that one of the major achievements realized by implementing the environmental auditing program is that for each peso it has allocated for audit performance, the industrial sector has invested an average of 13 pesos in order to remedy problems discovered in the course of them.

3.2.10 Impact of Environmental Audits on the Standard of Care

Because environmental audits are both flexible and jointly planned by the industry and the environmental authority, their beneficial impact upon the level of environmental care is enhanced. In fact, an environmental audit makes the business or industry combat the causes of the environmental damage, while the employment of sanctions by Profepa does not necessarily result in an improvement to the environmental standard of care.

Likewise, since audits are not restricted to those areas specifically regulated or subject to standards, their existence and conduct will result in a gradual overall improvement in industrial environmental performance and the promotion of environmentally-friendly policies. Given the experience and results attained through environmental auditing, Mexico may not be far from recognizing the need and suitability for new standards and regulations to be adopted and applied.

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[36] See Profepa's WWW page at <http://www.profepa.gob.mx>

[37] Profepa statistics show that from August 1992 to July 1996, 54,085 inspection visits were conducted; 2,000 partial and 424 total closures ordered; and 37,958 irregularities detected.

3.2.11 Impact on Third Parties and Fairness of Environmental Audits

The working and environmental compliance agreements brought about by environmental audits have no effect on third parties, in particular when juridical persons are involved. The agreements entered into by juridical persons are binding only on such persons, except in violations of criminal law (see below).

Under civil law, juridical persons are indeed liable for the damages caused by their legal representatives in the fulfillment of their duties; should these circumstances arise, such persons would have to redress the damages so caused.[38] Where the activities engaged in by a juridical person result in a third party being personally injured or his property damaged, the third party would be entitled to bring a civil suit against the juridical person in order to request punitive damages.[39]

Under criminal law, the Criminal Code for the Federal District regarding common law *(fuero común)* matters and for the entire Republic in respect to federal jurisdiction *(fuero federal)* establishes, as a general principle, that only individuals can be accused of committing crimes. Section 11 of the Criminal Code states that:

> Where a member or a representative of a juridical person, corporation, partnership or business of any kind, except Government Institutions, commits a crime with the means provided by the entity itself for this purpose, so that the crime is committed in the name, or on behalf, or for the benefit of that juridical person, the judge may, only in those instances specified by law, order the suspension or the dissolution of the organization, where he deems it necessary for the protection of the public.

The wording of the law clearly asserts that it is the member or representative of the juridical person who commits the crime, not the juridical person itself; however, in certain situations the provisions governing participation in crimes may apply and, therefore, the suspension or the dissolution of the organization involved may be ordered. As the Court stated,

> [...]it is not acceptable that those who act on behalf of juridical persons not incur liability, for, if such an argument is allowed, the crimes eventually committed by individuals who hold positions at different levels within the organization would remain unpunished, the reason being that sanctions ought to be imposed on the juridical person itself, which is absurd from a logical and legal standpoint since such a person lacks self will and only engages in actions through individuals. This is why the directors, managers, officers and other representatives of juridical persons are personally liable for any felonies they commit on their own behalf or on behalf of the juridical person they represent.[40]

This ruling makes clear that failing to comply with working or environmental compliance agreements will result in the representatives and officers of the juridical person being held personally liable should any criminal offense be committed. The juridical person itself shall bear civil liability for failing to comply with its own obligations and, in such event, it shall redress any damages caused to individuals themselves or their property as a result of its negligence.

Antimonopoly Legislation

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[38] Section 1918 of the Civil Code for the Federal District regarding common law *(fuero común)* matters and for the entire Republic in respect to federal jurisdiction *(fuero federal)*.

[39] See the decision by the Supreme Court of Justice of the Nation, "Redressing of Damages by Moral Persons," cited in the list of court decisions. The conviction to punitive damages does not entail criminal liability, for in order to reach a decision regarding civil liability it is only necessary to prove that harm has been caused to the plaintiff's property by third-party actions, and that the moral persons are not exempted from civil liability according to the provisions and requirements of the law.

[40] "Criminal Liability for the Representatives of Moral Persons." See the list of court decisions.

One of the voluntary mechanisms introduced in the LGEEPA is the establishment of certification systems for processes and products aimed at promoting consumption patterns that are friendly to, safeguard, improve or remedy the environment. In this instance, the authority has to exercise great care in designing such systems, so as to avoid the onset of monopoly practices.

In Mexico, the Federal Act on Economic Competition *(Ley Federal de Competencia Económica)* is intended to safeguard the processes of competition and free enterprise through the prevention and the eradication of monopolies, monopoly practices, and other restrictions on the efficient operation of markets for goods and services.[41] Under this law, "any action that improperly hinders or prevents competition and free enterprise in the production, processing, distribution and commercialization of goods and services" is construed, along with other similar conducts, as monopoly practice.[42]

Certification systems may have a detrimental effect if they are used by economic groups in order to prevent other suppliers of goods and services from entering the marketplace because they lack the financial, technological and human resources to meet market standards. This is why a great deal of accuracy is needed when defining the legal nature of certification systems and how they will operate, so as to prevent the onset of exclusive and unfair advantages in favor of one or a number of suppliers of goods and services.

Government intervention in the regulation of certification systems is relevant in this respect, since it is an essential element in preventing the onset of monopoly practices. The Supreme Court has provided guidance in this respect, asserting that "presumptions of monopoly shall not include those activities performed through official oversight or intervention or any kind of involvement by the State, who, at any time, may restrain private activities or attach conditions thereto." Furthermore, for this regulatory activity "to be constitutional, it must be general, previously in force, and apply to all activities of a similar nature, not only to isolated cases, since this translates into exclusive preferences and detrimental advantages."[43]

Applicable Criteria

On the matter of criteria to insure equity among the businesses subject to the audit program, Semarnap Environmental Program policy states that:

> Regulation implies significant social costs both for the private sector and the public administration. Thus, efforts have to be made in order to obtain the greatest social benefits possible from regulatory activities. To this end, it is imperative[...]that all regulatory instruments embrace cost and effectiveness criteria, in accordance with current or foreseeable technological advances and high levels of environmental quality in productive processes, within the framework of a real micro-economic adjustment trend.[44]

Undoubtedly, the high cost of undertaking and implementing environmental audits raises serious concerns. Even though efforts have been made to obtain funding for small and medium-size businesses to gain access to this mechanism, in the vast majority of cases it continues to be inaccessible for these entrepreneurs. However, the development of Regional Centers will help to minimize the cost of the audit for small and medium-size businesses so that they will not be excluded from the benefits of the program.

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[41] This Act was published in the *Diario Oficial de la Federación,* 24 December 1992. The authority in charge of its administration is the Secretariat of Commerce and Industrial Development *(Secretaría de Comercio y Fomento Indus - trial)*, through the Federal Commission on Competition *(Comisión Federal de Competencia).*

[42] Section 10, Subsection VII.

[43] "Monopolies." See the list of court decisions.

[44] Semarnap Environmental Program 1996, 113.

In any event, environmental auditing has evolved into an instrument that actually complements the traditional methods of inspection and oversight. The economic inequity that might arise (even though the costs for large businesses are proportionately greater) does not prevent, in fact, any businessman from approaching Profepa. This is particularly true for those companies that, as a result of their activities or their geographical location, are subject to closer scrutiny by the authorities or adjacent community.

The possibility of devising a "self-auditing" system that breaks away from the rigidity, the high costs, and the operational and logistical limitations imposed on private parties by environmental audits is now under consideration. This "self-auditing system" would entitle businesses taking part in the program referred to in the next paragraph to undertake the assessment of their facilities and, with the help of a consultant, file the required report with Profepa. The idea is not to tie the performance of environmental audits to the logistical and operational limitations of Profepa, but instead to allow all types of businesses to perform the audits and report the results to the authority, with the help of certified consultants. This program is still in the analysis stage, but there are indications that it will be adopted in the near future.

On this particular issue, Environmental Program policy provides that:

> In addition, a self-auditing program entailing a reporting audit procedure, which implies filing, with the [relevant] authority and through a certified consultant, a declaration on the environmental state of the facilities and processes of a business, shall be put into place.
>
> Under this program, all of the participating businesses shall be monitored in accordance to the provisions of the law, by assessing them at random, in order to confirm the veracity of the reports filed.
>
> To counterbalance sanctions, an incentive/reward program shall be designed with the aim at fostering compliance with environmental laws, regulations, standards and programs in a fair manner.[45]

Since environmental audits, because of their cost, may be prohibitively expensive for the vast majority of Mexican businesses, specially those of small and micro-size, Profepa is currently studying, in conjunction with the National Chamber for Processing Industries *(Cámara Nacional de la Industria de la Transformación*—Canacintra), several options to make environmental audits more financially accessible, without sacrificing those goals which benefit the environment.

Confidentiality Obligation

As a result of the 1996 amendments to the LGEEPA, access to information pertaining to environmental audits is guaranteed. Section 38 bis 1 states that Profepa "shall make available, to whomever is or might be directly aggrieved, those prevention and remediation programs that result from environmental audits, as well as the diagnosis on whose grounds they are based." The confidentiality of industrial and commercial information is safeguarded in accordance with the provisions of the Industrial Property Act *(Ley de Propiedad Industrial).*

These provisions acknowledge that environmental damages affect society and thus it is desirable that the outcome of the environmental audits performed be made available to the public. Before the Reform, the information pertaining to audits could only be made public with the express consent of the businesses involved since they were the ones that voluntarily provided the authorities with all the information connected with an audit. This step is considered of paramount significance, as the dissemination of information will encourage greater societal scrutiny of the compliance with actions required stemming from the auditing process.

[45] Ibid., 119.

3.2.12 Liability for the Implementation of Environmental Audits

In the implementation and performance of environmental audits, many individuals who perform important duties bear responsibilities imposed by the legal obligations entailed in the agreements signed with Profepa. The audited business, therefore, must allow access to its facilities and make all necessary information readily available to those charged with carrying out the audit so they are able to understand the production processes and the degree of compliance achieved with environmental laws, regulations, rules and standards. For his part, the auditor or consultant must compile, review and analyze the information relating to the production processes and their interrelation with the soil, the atmosphere and the water. In addition, the anti-pollution equipment, the measures designed to minimize risks and the emergency plans must also undergo an examination. Furthermore, the relevant sampling and analysis must be performed in order to assess the veracity of the information. Finally, the supervisor appointed by Profepa plays a significant role for he/she is the person in charge of ensuring that the auditor adheres to the terms of reference governing the environmental auditing process.

Professionals who perform environmental audits may be held criminally liable for activities carried out in exercising their profession, as contemplated under the Criminal Code: the responsibility incurred by professionals or persons who are devoted to providing services of a technical nature, being legally entitled to do so, and who as a result of exercising their profession, by reason of negligence, lack of expertise, carelessness or any other motive implying criminal responsibility, may result in them being liable for having committed a crime deliberately or by negligence.[46]

As explained earlier, on many occasions an environmental audit is triggered by an "invitation" extended by Profepa to have a business enter the auditing program. Depending on the outcome of the audit, an Environmental Compliance Agreement is signed, under the provisions of which the audited business commits itself to implement certain remedial measures within a given period of time. Failure to do so may result in the corresponding sanctions against the audited business being imposed by Profepa.

It is the responsibility of the business, as a juridical person, to comply with the agreements. In other words, the responsibility belongs to the corporation itself, not to its directors, officers or representatives. As was noted earlier, the obligations and rights acquired by a juridical person through contracts or agreements belong exclusively to this juridical person itself—not to its members or representatives. On the other hand, such individuals will be liable only if a criminal offense is committed, since under Mexican law criminal responsibility concerns individuals only.

Neither does the authority stop being responsible for the enforcement of environmental laws and regulations, nor are private parties exempted from complying with their statutory obligations. In fact, the environmental audit does not alter the prevailing legal order by which private parties must fulfill their environmental duties and authorities must ensure that they do so through the powers vested in them to sanction offenders and force the undertaking of remedial actions.

3.2.13 Relationship of Environmental Audits to other Compliance Mechanisms

Environmental auditing does not prevent a business from adopting other types of voluntary measures. Quite the contrary. The environmental audits implemented by a business probably facilitate the undertaking of other voluntary measures. A measure such as ISO 14001, for example, may raise the level of concern and care for the environment, which is precisely the central aspect examined

[46] "Technical criminal responsibility incurred by professionals." See the list of court decisions.

during an environmental audit, however it does not guarantee compliance. Some of these other voluntary measures and incentives are discussed in the following sections.

According to Profepa, the mandatory environmental criteria in Mexico exceed the guidelines established by instruments such as ISO 14001. It is also important to point out that, where there is no suitable environmental instrument to handle a specific case, Profepa frequently relies on technical criteria developed by the industrial sector (as has lately been the case for Pemex), or on internationally accepted principles for environmental regulation (such as those developed by Environment Canada, the US Environmental Protection Agency, and the European Union).

3.3 ISO 14000 as a Voluntary Compliance Measure

3.3.1 Description of ISO 14000

ISO 14000 is a series of international standards currently being developed by the International Organization for Standardization. These standards will define the uniform parameters, the reaction ability and the management controls that will serve as an international benchmark when assessing the level of compliance and ecological efficiency of a particular industrial business. Achieving these standards will entitle a firm to obtain ISO 14001 certification, testifying to its technological advancement and its adherence to the goals set for environmental protection.

ISO 14001 certification may well bring about a double benefit by: (a) providing the certified company with added advantage in marketing its products and services because of the prestige ISO certification; and (b) aiding company operations and performance because of the technology and improvement measures required by ISO 14001 certifying bodies. In turn, it is hoped that such production improvements will provide additional incentives to make other businesses want to pursue such certification.

Judging from the level of acceptance enjoyed by ISO 9000 standards (Quality Assurance Systems), many specialists are already predicting that ISO 14001 may soon become worldwide in scope and uncertified businesses will be handicapped in carrying on commercial activities, particularly in foreign trade.[47]

3.3.2 Legal Basis

There are two types of standards in Mexico, the Official Mexican Standards *(Normas Oficiales Mexicanas*—NOMs) and the Mexican Standards *(Normas Mexicanas*—NMXs). Although both systems may include environmental provisions or measures, they differ in that, while the NOMs are mandatory, the NMXs serve merely as a guideline or reference.[48]

The ISO 14001 standard was translated into Spanish by multi-disciplinary task groups coordinated by the Mexican Institute for Standardization and Certification *(Instituto Mexicano para la Normalización y Certificación, A.C.)*. The intent is to include this standard among the NMXs, thereby introducing it into the Mexican legal system as only a voluntary standard and reference parameter.

Recently, many seminars and meetings have taken place, principally organized by business associations, with the aim of assessing the scope, objectives, and implementation of ISO 14001 in Mexico. Profepa has also been actively participating in a review of ISO 14000, together with other

[47] According to data from the Mexican Institute for Quality *(Instituto Mexicano de la Calidad)*, only 1,000 firms in Mexico have achieved ISO 9000 certification.

[48] As defined in the *Federal Act on Metrology and Standardization*, published in the *Diario Oficial de la Federación* of 1 July 1992. Amended by decrees published on 24 December 1996 and 20 May 1997.

governmental agencies. While there is some interest from the private sector to incorporate ISO 14001 as NMXs, it is important to point out that the environmental authorities consider the incorporation of the ISO 14001 standard in Mexico to be premature and have clearly stated that adherence to ISO 14001 does not ensure compliance with Mexican legal standards.[49] The Mexican government does nonetheless recognize the potential benefits of improved environmental management systems such as those proposed under ISO 14001. It is the view of Profepa that the Mexican audit process already incorporates the concepts of ISO 14001, and goes even further.

Other efforts undertaken by environmental authorities have as their goal the near term facilitation of the ISO 14001 certification process. Thus the Environmental Program states that:

> [Reduction in the generation of wastes] will facilitate the future certification of this industry under ISO 14000, which will soon be considered essential for export goods manufactured by potentially polluting industries.[50]

When considering the role played by voluntary standards, the Environmental Program provides that:

> It is of paramount importance to promote them and encourage a growing number of firms to implement them, for they are more cost effective than regulations unilaterally enforced by the authority. Their adoption by the private sector results from two main reasons. On the one hand, in the medium term, preventing pollution is much more profitable than controlling it, or even than evading regulations, for it makes processes more efficient and less costly. On the other hand, there is increasing international pressure for them to be adopted, and they tend to become a requirement for participating in many markets for both intermediate and final consumption. *The environmental authority shall support any initiative dealing with voluntary standards that may benefit the environment [emphasis added]*.[51]

According to the most recent data, some Mexican companies have started providing services related to ISO 14001 certification. On this issue the Environmental Program provides that:

> Product certification and the issuance of ISO 14000 voluntary standards will most certainly prompt vertical cohesion among industries. The certification both of the products and environmental management, which is implicit in such mechanisms, will lead to the establishment of networks of suppliers who are in a position to guarantee that environmental standards are complied with. No doubt, this will foster a greater integration of productive activities and contribute to the development of new markets. This, however, points to the need for finding simplified certification systems for small and medium-size firms, in order to avoid the onset of artificial commercial barriers.[52]

In Mexico, the certification process is being carried out by private auditing firms utilizing the unofficial draft of the ISO 14001 standard.[53] The "authorization" currently being granted to audited businesses by the consultants will purportedly be replaced by the appropriate "certification" if and when the ISO 14001 standard is officially issued.

3.3.3 Efficacy of ISO 14000

Even though the ISO 14000 standards are only partially developed, the experience from ISO 9000 suggests that implementation of the new standards will generate a positive impact on the economy. The promoters of ISO 14000 rely on the success enjoyed by ISO 9000 (Quality Assurance Systems)

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[49] The official position of Profepa is expressed in Resolution 97/05 of the CEC Council, "Future Cooperation regarding Environmental Management Systems and Compliance."

[50] Semarnap Environmental Program 1996, 122.

[51] Ibid., 118–119.

[52] Ibid., 129.

[53] Interview with Ing. Carlos Soto Rivera, U. L. de México, S.A. de C.V. (a subsidiary of Underwriters Laboratories).

to assert that a similar concept applied to environmental management could prove beneficial and, most probably, attain the same degree of success in protecting the environment that ISO 9000 did in revolutionizing management. However, it is important to recognize that although similarities exist between the two systems of standards, ISO 9000 filled a vacuum in the area of management quality while ISO 14001 is only a support to legal environmental protection standards.

Relying on international support to make businesses implement an efficient system of management in order to fulfill their environmental protection obligations may sound like a remote possibility, but the success enjoyed up to now by ISO 9000 shows that such a goal may actually be attainable.

3.3.4 Relationships with and Effects on other Compliance Mechanisms

The ISO 14000 standards can be directed at businesses as a complement to government-initiated programs pertaining to environmental protection. While they appear to present no obstacle to the use of other compliance strategies and their implementation will likely have a favorable impact on the environmental practices of industry, there are varied opinions about the effect of the ISO 14000 program. According to the Mexican Institute for Standardization and Certification, the operational and administrative procedures enshrined in the ISO 14000 standards for promoting environmental protection complement those established in Mexico's existing environmental legislation. Profepa, however, has some concerns regarding ISO 14001. The agency's view is that ISO 14001 is a trade-related mechanism that may have environmental side benefits, but it does not guarantee environmental protection, nor indeed substitute for national regulation.

The ISO 14000 standards are directed at preventing pollution. Instead of attempting to substitute for environmental regulations, they provide an incentive promoting increased, more efficient compliance. The working concept is that all industrial and commercial activities will directly or indirectly affect the environment unless timely attention is given to avoid or reduce any deleterious impacts. There is considerable disagreement as to whether ISO 14000 will replace existing regulations. However, it is important to remember that the ISO system relies on a baseline standard established by government regulation.

There is also confusion about the precise scope for the application of these voluntary "standards." ISO 14000 standards will not substitute for the compliance levels required by the NOMs (it will not be legally feasible) and the remaining statutory provisions imposed by LGEEPA. They would simply have no legal validity unless they were to be included in the legal system as Mexican standards developed and were issued in accordance with the provisions of the Federal Law on Metrology and Standardization. As NMXs, though, and an international reference, they may become highly useful instruments to enhance environmental awareness and promote industrial practices that will result in more visible protection of the environment.

In this connection, the Environmental Program provides that:

> Voluntary measures entail agreements between companies and environmental authorities which contemplate the fulfillment of environmental requirements at levels which go beyond those imposed by official standards, or the filling of statutory gaps.
>
> It is imperative to work jointly with the private sector to develop agreements on voluntary measures in certain, particularly troublesome industries. At the same time a new generation of voluntary measures defined by the International Organization for Standardization (ISO) that include environmental management in the Total Quality Standards of companies, must be stimulated with the joint participation of the private sector. These measures, which are gaining increasing international relevance,

lead to behavioral patterns of a technological and administrative nature, aimed at preventing pollution, minimizing wastes and substituting production inputs.[54]

3.3.5 Impact of ISO 14000 on Standard of Care

A beneficial impact of having ISO 14000 standards on environmental protection and management levels function in a parallel and complementary manner to environmental regulations may be an increase in the global level of environmental protection. ISO 14000 standards do not try to access nor include requirements for aspects of occupational health and the administration of safety; nevertheless, this is not meant to discourage an organization from developing and integrating these elements into the administrative system. However, the certification/registration process is only applied to the system's environmental administration aspects.

Environmental regulation is not modified by the introduction of ISO 14000 as NMXs; what will happen is that firms seeking ISO 14001 certification will necessarily pass tests demonstrating that they have an efficient organizational, monitoring, and response system to prevent and attend to all kinds of environmental contingencies.

3.3.6 Impact on Third Parties and Fairness of ISO 14000

The way that ISO 14000 standards have been designed allows third parties an important role in their management. In fact, the very success of these standards is based on the significance granted them by third parties. While the standards are voluntary measures, they have been designed in such a way that they should result in a competitive advantage for firms implementing them. It seems likely, based on experience with ISO 9000, that as such standards become more popular, businesses will request the companies with whom they deal to satisfy the criteria established by ISO 14000 and gain certification. Thus, by choosing to do business with ISO 14000-certified companies, third parties will contribute to the protection of the environment.

These standards provide the guidelines for the development of an environmental management system and the implementation of its principles, as well as for its correlation with other management systems. In theory, the guidelines may apply to any organization, whatever its size, type, background or degree of development, since they relate to the implementation and/or betterment of environmental management systems. And since the costs of implementing ISO 14001 are directly related to the size of the business seeking certification, at first thought it would seem that principles of fairness should prevail.

Nevertheless, it has been the experience in Mexico with ISO 9000 that certification costs are usually considered to be very high, and that only a few large businesses may actually attempt the certification process. In order for the ISO system to become more "democratic," available to small or medium-size companies, it is essential that funding be made accessible to gain certification. Moreover, the ubiquitous lack of information about developments in the global economy, except within the inner circle of more sophisticated businesses, may exclude the vast majority of small businesses.

3.3.7 Responsibility for the Implementation of ISO 14000

As previously mentioned, the establishment and implementation of ISO 14000 standards results from a voluntary and unilateral decision made by a specific business. Decisions about certification of businesses is by private certifying bodies according to ISO standards. If the firm complies, a certificate will be issued, stating that the guidelines of the ISO 14001 standard have been fulfilled; the certifying

[54] Semarnap Environmental Program 1996, 118.

bodies will then conduct periodic verifications that the certified business is continuing to be in compliance. Responsibility for implementing and complying with ISO 14001 lies with the certified business; the certifying body merely tracks continued compliance or adherence.

In order for the set of ISO 14001/NMXs standards to be successful, it is necessary for businesses to assign appropriately skilled, authorized persons to assume responsibility for implementing the environmental management system and to dedicate appropriate resources for its implementation. Operations managers must take personal responsibility for and be committed to the development of the environmental management system.

In the view of Profepa, ISO 14001 does not reduce the parallel duty of industry to comply with the legal standards. Neither does it restrict the powers of the government to enforce the law against ISO 14000-certified companies. As asserted by the Federal Procurador for Environmental Protection, Antonio Azuela de la Cueva:

> Without intending to diminish the significance of a system such as ISO 14000 and the importance it may have for businesses, we must strongly emphasize that, as far as the Mexican Government is concerned, being successfully tested and certified under ISO 14000 will not imply that the Mexican environmental legislation is complied with.[55]

3.4 The FIDE Seal for Electric Energy Savings, as a Voluntary Compliance Measure

3.4.1 Description of the FIDE Seal

The National Commission on Energy Savings *(Comisión Nacional para el Ahorro de Energía*—CONAE), in support of the goals and objectives established by the Federal Commission on Electric Power *(Comisión Federal de Electricidad)*, and with the participation of suppliers from the electricity sector, business boards and the Union of Electrical Sector Workers of the Mexican Republic *(Sindicato de Trabajadores Electricistas de la República de México)*, established the Trust for the Support of the Energy Savings Program for the Electric Power Sector *(Fideicomiso de Apoyo al Programa de Ahorro de Energía del Sector Eléctrico)*, a private body that joins efforts and guarantees the participation of the several sectors involved. The various duties performed by the Trust include the granting of the "FIDE Seal." This seal is available to all suppliers of goods and services who wish to assure consumers that the electrical equipment and appliances they acquire are energy efficient.

The first three certificates granting the right to use the FIDE Seal have been issued to the following companies:

- Phillips Mexicana,
- Osram de México, and
- General Electric.

According to the 1995–2000 Program for the Development and Restructuring of the Energy Sector *(Programa de Desarrollo y Reestructuración del Sector de la Energía)*, a key instrument in Mexico to achieve savings and an efficient use of energy is "[...]to promote the adherence of the social and private sectors to those programs aimed at achieving energy savings in transportation, processes, buildings, the production of goods and the supplying of services."[56]

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[55] Shorthand notes of the closing session of the Mexico-Canada-United States meeting on ISO 14000, "Environmental Auditing," held by Profepa in Mexico City, 23 August 1996.

[56] *The 1995–2000 Program for the Development and Restructuring of the Energy Sector*, Mexico City: Energy Secretariat *(Secretaría de Energía)*, 1996, 64.

3.4.2 Legal Basis of the FIDE Seal

Application for FIDE certification is a voluntary action taken by private parties. There is no legal obligation to seek such certification. The FIDE Seal is a concerted action between government and manufacturers of goods or suppliers of services.

The 1995–2000 Program for the Development and Restructuring of the Energy Sector acknowledges that the "existing legal framework governing energy efficiency is not comprehensive, besides being widely scattered in many laws and regulations. The design of a draft bill on energy efficiency is a key priority in this regard."[57] Should such a bill be drafted, it would have to include definitions and regulations which would allow the implementation of an incentives program promoting energy savings and efficiency, in the same way that provisions regarding self-regulatory measures were introduced into the recent LGEEPA amendments.

As a further example of a voluntary compliance mechanism, the FIDE Seal is better explained by economic rather than merely legal reasons, since manufacturers find in this seal an incentive to produce energy efficient appliances, even if no requirement to do so exists. A decline in the consumption of energy helps reduce atmospheric pollution and generates a competitive advantage in a market where consumers prefer to buy "green" labeled products instead of ones that are not "environmentally friendly." Though the FIDE Seal is directed at the reduction of detrimental environmental impacts beyond what is required under the NOMs, it has evolved into an innovative way of promoting industrial merit recognition.

3.4.3 Efficacy of the FIDE Seal

The granting of the FIDE Seal results from an assessment and certification process that guarantees the optimal energy consumption of the products carrying it. The seal is an opportunity to promote the purchase and use of energy saving goods by consumers and originates from the need to identify such products. In this regard it shares the underlying philosophy of ISO 14000.

3.4.4 Impact of the FIDE Seal on the Standard of Care, Third Parties and Fairness

The FIDE Seal accomplishes two main purposes. On the one hand, it helps increase productivity and competitiveness both for electrical power producers and consumers and, on the other, it contributes to efforts being undertaken around the world to reduce hydrocarbons consumption in the generation of electric power, while also minimizing the environmental impact caused by the burning of fossil fuels and reducing their role in the generation of energy. The promotion of energy savings is a key factor in any strategy centered on sustainable development where energy, the environment and the economy play the leading roles.

The FIDE Seal is an example of a certification procedure for "green" manufacturing processes and products, which acknowledges the compliance of those processes or products with certain requirements that allow them to qualify as "environmentally friendly." In regard to such innovations, Section 6 of the Environmental Program provides:

> Product certification is another initiative of a self-regulatory nature that results from market needs at the international level and, increasingly at the domestic level as well. Through such a mechanism, a differentiation of products is sought, so that those being produced with technologies of better environmental quality or which have a lesser impact on the environment are rewarded.

[57] Ibid.

Once more, it should be emphasized that in order for any voluntary compliance mechanism to become widely available, the existence of attractive and readily available funding is imperative. Otherwise, the mechanism turns into an inaccessible luxury for the vast majority of businesses, which lack the financial resources to take the steps necessary for compliance.

3.4.5 Relationships with and Effects on other Compliance Mechanisms

As may be concluded from the comments made previously, the FIDE Seal does not, given its voluntary character and flexibility, represent any obstacle to the implementation of other compliance tools. Instead, it may be undertaken in conjunction with other means to achieve higher levels of environmental protection, which is after all the ultimate goal of all compliance measures. Furthermore, in contrast to creating an obstacle for compliance with environmental regulations, the FIDE Seal actually promotes such compliance, thereby generating a symbiotic relationship encouraged by economic efficiency. Such a valuable combination fully satisfies cost/benefit analysis, the key concern of businessmen in considering any voluntary measure for adoption.

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Appendix: List of Interviews

Procuraduría Federal de Protección al Ambiente (Profepa)

Secretaría de Medio Ambiente, Recursos Naturales y Pesca (Semarnap), Unidad de análisis económico

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The United States

The United States

1 INTRODUCTION

1.1 Environmental Regulation In The United States—A Background Sketch

Not very long ago, the observation that environmental regulatory systems in the United States appeared to be moving from traditional command and control instruments to a more inclusive "compliance" philosophy might be regarded as perceptive. The same observation today would merely be trite, so quickly has this movement taken hold. Neither the reasons for this now apparent paradigm shift nor the potential consequences of it, however, have been studied with great care. To begin to fill the void, this report examines several of the new non-enforcement mechanisms designed to increase levels of compliance with environmental requirements currently under consideration or in use in the United States at the state and federal levels. Various early experiences with the design and implementation of innovative measures are discussed in order to provide a point of departure for constructive analysis of potential issues and considerations that these initiatives may raise.[1]

Administration of the laws and regulations intended to protect the environment and public health in the United States is accomplished through a complex and often confusing relationship between the federal government and the fifty state governments. Although an extended discussion of the legal architecture and respective responsibilities of the parties is beyond the scope of this paper, the next several paragraphs provide an introduction to these subjects.[2]

Acting primarily pursuant to its authority under the US Constitution to regulate interstate commerce and those activities that may have impacts on interstate commerce, the national Congress has enacted a number of major statutory programs in the last several decades that may affect one or more environmental media. Among the best-known and most widely significant of these are the Clean Air Act (regulating emissions into the atmosphere), the Clean Water Act (regulating discharges into waters), the Resource Conservation and Recovery Act (regulating the disposal of solid and hazardous wastes, primarily on or below the surface of the ground), the Comprehensive Environmental Response, Cleanup and Liability Act (regulating the remediation of hazardous waste disposal locations), the Safe Drinking Water Act (regulating the provision of potable water) and the Surface Mining Control and Reclamation Act (regulating the extraction of minerals from the earth).

Each of the statutes creating these programs either establishes, or authorizes the US Environmental Protection Agency (EPA) to establish by administrative action, those national performance standards deemed necessary to safeguard the environment from activities in the regulated sphere of conduct. These standards are described with varying degrees of detail, and in different ways, in each statute. Each statute also provides the EPA with an enforcement scheme, of varying degrees of complexity and comprehensiveness, to utilize in order to coerce recalcitrant persons to conform their conduct to the germane performance standards. Thus, each statute gives the EPA an identifiable set of standards to enforce across the US, and the enforcement tools needed to secure compliance with them.

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[1] Debates over semantics often dominate discussions about these new measures. For some, these initiatives represent simply an *expanded* definition of enforcement, not programmatic efforts to increase compliance through the use of tools outside the realm of traditional enforcement mechanisms. This approach leads, in turn, to the necessary use of such phrases as "hard enforcement" and "soft enforcement."

This report does not adopt the expanded-definition convention. Rather, enforcement here continues to refer only to traditional coercive efforts to alter behavior; actions designed to encourage compliance without force or direct coercion through other, perhaps newer measures, are not considered to be enforcement for purposes of this report. A more detailed description of the utilized typology appears in Section 1.2.

[2] This section of the paper is based on information presented in *The Law of Environmental Protection*, edited by Sheldon Novick and published by the Environmental Law Institute.

It would be entirely logical to conclude that by this structure the Congress intended to make EPA the prime environmental regulator for the country. It would also be entirely wrong. Congress in fact intended to set up what has been variously described as a partnership, a system of cooperative federalism, or an oversight relationship in which the authority for setting standards and enforcing them is exercised both by the states and the federal government. This potentially confusing allocation of responsibility is made even more complex by the potential for a state to have differing roles in different environmental programs.

For their parts, most states have their own comprehensive environmental programs. While these programs may be modeled on correlate federal programs (and may in fact be sufficiently broad for the state to secure federal "authorization" to carry out the federal program under this local authority), they are not creatures of federal law. The state programs exist and operate entirely independent of federal power.[3] They are based instead on the inherent police power of the individual states. This police power invests in the state the ability to act, legislatively and through executive action, to protect the health, safety and public welfare of its citizens.

It is essential, therefore, to understand that the states carry out a sweeping array of environmental regulatory activities under their own direct statutory (or common law) authority. These activities include both standard setting and enforcement.[4] In total, the commitment of personnel and other resources by the fifty states far outstrips that of the federal EPA. State agencies also make more individual decisions, which affect more persons and entities, than does the federal government. In authorized states, these agencies may also be carrying out the program administration functions of the federal statutes. But they do this under the color of state law, because the EPA has determined that the applicable local authority is at least congruent with the federal authority. Even if a state elected not to seek authorization for a particular program, or if it were removed for some reason by the EPA, the state would continue to administer programs under its own law. In such an instance, EPA would run a parallel program in the state under federal authority.

As this regulatory universe expanded, at both federal and state levels, encompassing an ever larger population of firms and targets for regulation, the role of enforcement has changed from being limited to aggressive actions to impose sanctions for environmental violations to an orientation that views enforcement as only one item on an ever-enlarging menu of options of governmental actions to achieve compliance.[5] Two conceptual explanations commonly offered for this change might be termed structural and normative.

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[3] The EPA generally retains the authority to oversee state implementation of the federal program. Explicit in this oversight role is the ability to take direct enforcement actions in instances where the federal agency determines there has been a failure to effectively enforce the laws and regulations.

[4] The federal environmental statutes generally do not preempt state legislative activity. As previously noted, they authorize states to establish programs *at least as stringent* as the parallel federal program. Thus, states are generally free to establish programs which go further than the correlate federal programs, or to establish programs in areas not addressed by the federal government. Many states, for example, had comprehensive regulations regarding municipal waste disposal long before EPA promulgated federal standards; other state efforts address ground water protection and objectionable odors. Moreover, some federal programs which contemplate state implementing activity require the states to establish specific performance standards to reify aspirational or conceptual national standards. The Clean Water Act, for example, contemplates that delegated states will promulgate specific in-stream criteria for individual stream reaches to satisfy the "swimmable and fishable" standard of the federal statute.

[5] Many regulators argue that they have always employed a wide range of mechanisms to secure compliance, and that enforcement has seemed predominant only because it is publicized the most. A number of states have had technical assistance programs of one sort or another, often completely segregated from enforcement efforts, for many years. This paper assumes *arguendo* that enforcement has been the primary response of regulators to non-compliance in the past.

The structural explanation derives its power from the explosive expansion in the scope of environmental oversight in the last decade or so. To take only two examples, the federal Superfund law (the Comprehensive Environment Remediation, Cleanup and Liability Act) and the Clean Air Act Amendments of 1990, as well as the state statutes which implemented them, have swept increasingly more, and increasingly smaller, entities into the net of liability.[6] The latter, for instance has imposed obligations upon hundreds of thousands of car owners, on similar numbers of commuters and their employers, and on thousands of small businesses whose emissions now exceeded lowered thresholds. Thousands of communities and literally millions of people were made subject to recycling requirements intended to reduce the flow of garbage to landfills. Thousands of facilities (and tens of thousands of individual tanks) were brought into a system of registration and operating requirements for underground storage tanks to prevent and detect leaks. Many of these tanks were located at small, proverbial "mom and pop" service stations and other small businesses. Agricultural operations were made subject to regulations to improve nutrient management. Construction sites, facilities without piped wastewater effluent discharges, and myriad other locations became responsible for dealing with requirements for nonpoint-source discharges. The list of examples of environmental regulatory requirements reaching deeply into the fabric of everyday society seems to grow longer by the month.

In short, the original view that environmental degradation could be solved by changing the behavior of a few, easily identified and large-volume polluters has given way to a new perception that the universe of culprits is substantially more diffuse and atomistic.[7] More importantly, this universe is not inhabited solely (or even primarily) by organizations with the ability to understand easily abstruse regulatory requirements or absorb unlimited costs in complying with them. Small businesses, without benefit of engineering or other expert skills, struggle to understand dozens of pages of technical requirements. Permit applications often must be prepared by teams of costly experts, beyond the easy grasp of many entities which now need formal government approval to continue to engage in the same activities they have carried out for years. Further, traditional punitive threats, such as the specter of continuing fines of up to US$25,000 per day for each day of violation, were intended originally to coerce compliance from structured organizations causing significant pollution. These responses may be wildly out of proportion to both the extent of harm and the degree of "recalcitrance" of a small business or sole proprietorship. Popular—and judicial—support for *any* fines may be scarce, for example, in instances of small businesses that need every dollar for compliance efforts, or against individual commuters who cannot yet find mass transit to allow them to reduce their vehicle miles traveled, or against many other easily imagined examples.

In sum, environmental regulators have become increasingly aware that numerous structural reasons may account for one or more members of a regulated community failing to be in compliance with applicable requirements. There is a growing recognition that enforcement responses may be more effective in addressing contumacious attitudes in adversarial contexts but less effective as a first response to molding behavior to conform to new and complex requirements. Enforcement may be absolutely appropriate—and necessary—to respond to sophisticated entities that are knowingly violating the law, but it may be counterproductive in encouraging compliance by persons being brought for the first time into a regulated universe. The movement away from largely exclusive

[6] CERCLA was of course enacted in the waning days of the administration of Jimmy Carter in late 1980. While the statutory scheme was in many ways controversial from the outset, passionate concerns about its efficacy have risen in direct relation to the dramatic growth in the number of parties who have come to be included as direct defendants or third-party defendants in liability and contribution actions brought under the law's strict liability provisions. Much of this growth occurred in the late 1980s and early 1990s.

[7] As the comic strip character Pogo once presciently said, "We have met the enemy and he is us."

reliance on such command and control solutions reflects a conscious effort by regulators to enlarge their toolbox by adding other mechanisms to respond to the varied causes of non-compliance. Having discovered that the world is made up of more than just nails, regulatory agencies are attempting to wield tools other than just hammers to assure compliance.

The second commonly offered explanation for relying upon other measures in addition to traditional enforcement responses stems from a belief that societal norms and values have undergone a fundamental, and germane, transformation. Both scientific and popular American culture of the last twenty-five years have presented a virtually constant message of support for environmental protection.[8] A steady drumbeat has carried information about ecosystems or species threatened by pollution, environmental cancer clusters, environmental curricula in primary and secondary schools, international conferences calling for renewed efforts to protect the environment, periodic—and catastrophic—oil spills, data on toxic releases, and innumerable other treatments which bathe protection of the environment in a flattering light.

To the normative theorists, the interaction between this positive depiction of concern for the environment and the natural human desire for cognitive consonance is not difficult to predict. Despite the suspicion of some members of the environment community, business leaders as whole do not represent a distinct criminal class. Rather, such leaders tend to see themselves comfortably in the mainstream, cherishing and reflecting society's values and norms. More specifically, today's business leaders grew up during decades when their culture affirmatively espoused protection of the environment as an inherently positive goal, and held up for censure conduct which jeopardized our natural world simply to increase profits. Accordingly, the argument goes, today's business leaders bring a fundamentally different attitude about environmental regulations, and their obligation to meet them, than their predecessors who made decisions and ran facilities at the dawn of the environmental age.

The normative rationale commonly offered for a broader compliance approach to environmental regulation, thus, is ultimately based on the belief that regulators and regulatees now share—perhaps for the first time—the same goals and value systems. Non-compliance today, it is argued, should more appropriately be regarded as a breakdown in communication or understanding and not an implicit challenge to the underlying regulatory philosophy. While perhaps quibbling about particular methods or specifications, business leaders today are said to very much want to do the right things for the right reasons, and should be given every opportunity (and aid) to demonstrate this. The logical consequence of this view: enforcement responses are no longer necessary in most instances; they should be reserved for intentional wrongdoing, or repeated wrongdoing by those who are in fact capable of compliance.

1.2 A Basic Taxonomy

The efforts, programs and instruments described in this report to assist in or assure compliance with environmental obligations are frequently lumped together under the rubric of "voluntary compliance measures." This term offends some as being both inaccurate and oxymoronic. To the extent that it contemplates conduct that meets external standards, it is seen as oxymoronic because obligations imposed by law require, not request, compliance. It is perhaps the essence of the rule of law that subjects are not free to pick and choose which lawfully imposed requirements they will obey and

[8] The last several years have featured the emergence of a backlash to the present system of environmental decision-making and protection. It is difficult to judge yet whether this reaction is to the substance of environmental protection efforts or to the methods by which they have been carried out. Outright rejection of the need to maintain a diverse and healthful environment remains rare to the point of invisibility.

which they will ignore with impunity. Compliance with such externally established requirements cannot ever truly be said to be voluntary in the dictionary sense of the word: "acting or performing without external persuasion or compulsion."[9] Regulatees are always subject to external compulsion if they fail to comply. While it is certainly true that most facilities engage in compliant behavior without such external compulsion having to be threatened, let alone brought, knowledge of the existence of such power can hardly be doubted. It drains the word of all useful meaning to call such conduct "voluntary." One may volunteer to participate in a magic trick at a parlor show, but one does not volunteer to obey the laws the sovereign establishes.

If the use of "voluntary" makes the term an oxymoron, then the use of "compliance" makes it misleading. Many of the instruments under consideration as "voluntary compliance measures" utilize internally generated practices or standards to improve environmental performance. Organizations may intend that their employees meet these internal standards, and may further hope that these standards will encourage environmental performance that meets applicable requirements. Nonetheless, it is not helpful to speak of voluntary "compliance" with these internal standards; compliance is traditionally associated with those externally established obligations of the environmental regulators. Adherence to voluntary internal measures may prove to be associated with compliance with legal standards, but it is not synonymous with it. Thus, the term "voluntary compliance measures" is misleading to the extent that it induces confusion between the voluntary commitment to internal practices and the obligatory satisfaction of external requirements.

This ambiguity is complicated by the existence of many different new programs—with more innovations appearing virtually every day—having varying designs and goals. Some efforts focus on assuring conduct that meets existing obligations. Some propose to over-control emissions in order to achieve levels of environmental protection not presently required by law.[10] Others hope to exchange present requirements for newly conceived obligations that will realize at least equivalent environmental protection, and do so at lower cost. Virtually all of these efforts have been called, at one time or another, "voluntary control measures."

In the hope of bringing some greater discipline to the examination, this report utilizes the following scheme of classification in describing the situation as it currently prevails in the United States:

a) compliance assurance measures—any actions, programs, efforts, mechanisms, and the like, not required by law, that a person voluntarily undertakes to make it more likely that he will comply with external legal obligations. These actions may be entirely unilateral (e.g., creation of an environmental management system), bilateral (negotiation of a binding agreement, not required by law, to bring greater clarity to an ambiguous standard of care or requirement), or multilateral (third-party auditing and disclosure under a program of penalty forbearance for prompt correction).

b) environmental improvement measures—any actions, programs, efforts, mechanisms and the like, not required by law, that a person voluntarily undertakes to reduce the total mass or toxicity of pollutants released to the environment.

[9] *The American Heritage Dictionary*, second college edition (1982). The definition provided in the text appears under the *Law* field label for the word "voluntary" and is perhaps the most precise for these purposes. The first and second definitions, which are connotatively consistent, are "arising from one's own free will" and "acting on one's own initiative."

[10] Some measures may fall into several categories. Pollution prevention efforts, for example, may make it more likely that a discharge will comply with applicable limits or may reduce total environmental loading below that required by law, or both.

c) environmental exchanges—any actions, programs, efforts, mechanisms and the like, not otherwise required by law, to control or reduce the release of pollutants to the environment that a person commits in a binding legal document to undertake, usually in exchange for relief from other applicable requirements.

In a simplistic sense, the first of these categories can be viewed as fostering compliance with existing standards, while the second and third categories have as their common element compliance with standards other than the normally applicable ones. Environmental improvement measures, of course, supplement compliance with existing standards by the addition of voluntary control activities, not required by law, to reduce pollution directly. Finally, environmental exchanges attempt the most radical transformation of the present system by focusing on releases often largely outside the current regulatory ambit. Facilities agree to devote their energies to partial or total control of these previously neglected sources; in return they are granted leave to ignore some otherwise applicable obligations.[11]

Environmental improvement measures and environmental exchanges can be seen as examples of a far more ambitious effort to remake the entire process by which the basic environmental protection standards are established. This broader topic is beyond the scope of this report. Consequently, the focus of this examination will be on compliance assurance measures, or efforts to enhance compliance with existing standards. Environmental improvement measures and environmental exchanges will be considered only where they are directly related to the central theme.

1.3 Report Design

The shifting view of enforcement described above in Section 1.1 is taking place against a complex backdrop. Many agencies now recognize that end-of-the-pipe solutions have not addressed all environmental problems at all facilities, and are not likely to any time soon. At the same time, government has been widely criticized for lacking a sufficient service orientation. This has led to increased efforts by regulated industries and others across the nation to moderate the negative impacts of government action on commerce. Even the matter of employee training and retraining for more effective public outreach impacts the discussion. As a result, new developments in compliance assurance now reflect markedly different regulatory approaches and new roles for employees of regulatory agencies.

In response to these cultural changes and continuing criticisms, state agencies and the EPA have begun to consider new regulatory approaches and new roles for their employees. These efforts to improve regulatory relationships and increase levels of compliance through non-adversarial mechanisms are at varying stages of development, although most are still in pilot or experimental phases.[12] Consequently, this paper attempts to provide a brief description of several selected compliance assurance measures that illustrate the breadth of these innovations. These capsule descriptions provide a foundation from which to pose questions about different views of such issues as openness, agency capture, risk of induced error, fairness, resource consequences and others. It is hoped that this will in turn lead to a better understanding of these compliance assurance measures and how they might alter the way in which agencies act and might be perceived, thus aiding in the evolution and acceptance of the policies themselves.

[11] In theory, an agency will only enter into an agreement relieving applicable requirements where the specific substitute actions proposed will confer at least an equivalent, and preferably greater, benefit on the environment.

[12] Of course, many of the compliance assurance measures are being introduced at the state and federal levels as pilot programs. Proponents have expressed a desire to proceed cautiously and with ongoing evaluation in order to assess the efficacy and acceptability of these new directions.

2 Federal Efforts

2.1 The Environmental Leadership Program

The Environmental Leadership Program (ELP) of the United States Environmental Protection Agency is the leading edge of the federal effort to explore alternatives to traditional enforcement responses. The program was inaugurated in June of 1994 with a formal public request for proposals from facilities who wished to participate in the pilot phase of the effort. According to EPA's announcement, the program has four major purposes:

- to examine the basic components of what should be state-of-the-art compliance management systems (e.g., mentoring, pollution prevention);
- to identify the verification procedures (e.g., third-party auditing, self-certification) that ensure that the ELP is working;
- to establish measures of accountability so these management systems will be credible to the public; and
- to promote community involvement in understanding and supporting innovative approaches to compliance.

Facilities were encouraged to volunteer to demonstrate innovative approaches to environmental management and compliance. EPA looked for particular program elements in selecting participants. These included advancing the design of sophisticated environmental management systems (such as ISO 14000), providing assurance of performance through third-party certification, self-certifying compliance, and establishing public measures of accountability.

Facilities receive several benefits from participating in the ELP. According to EPA, selected facilities gain "public recognition for their ELP participation." More tangibly, perhaps, they also were granted a period of amnesty from punishment for violations detected and disclosed during the program. EPA issued Enforcement Response Guidelines specifying the modified enforcement posture it would adopt regarding participating facilities. According to the Guidelines, neither EPA nor the appropriate state agency would conduct routine inspections at ELP facilities. All inspections, including those mandated by law, would be conducted in the course of the specific facility ELP project.[13] In exchange for disclosing knowledge of existing or newly detected violations, ELP participants were to receive a 90-day period to correct violations without being subject to enforcement action (including notices of violations or penalties). The correction period can be extended an additional 90 days in certain instances.

Finally, ELP facilities were given the opportunity to work collaboratively with EPA and state regulators to identify methods for reducing inspections and streamlining reporting requirements. This last benefit may in fact be more substantial than its wording first suggests: examination of some of the projects reveals an unusual relationship in which the roles of regulators and regulatees are almost entirely reversed, with the facilities providing the standards of conduct for the agency officials to consider.

[13] The Guidelines reserved the right of EPA or the states to conduct inspections and respond appropriately in instances of imminent and substantial endangerment to public health or the environment, or in response to information concerning potential civil or criminal violations at the facility.

EPA ultimately selected twelve facilities from more than 40 volunteers to conduct pilot projects. Of the twelve, four are electric utility power plants, two are military installations, and the remaining six are traditional commercial installations. One of the six projects involves two related waste management facilities; four others are manufacturing locations and one is a small printer.

Each participating facility signed a formal Memorandum of Agreement (MOA) with the EPA and the appropriate state environmental regulatory agency. The MOA became the blueprint for the facility's project and for the role of regulatory officials in participating or overseeing the administration of the project. Each MOA identified the members of the project team, which comprised representatives from the facility and from the state and federal regulatory agencies. The Enforcement Response Guidelines were referred to and attached to each MOA, insuring a consistent and predictable response by state and federal officials in the event of any violations at any participating facility.

As the name itself suggests, the ELP effort is a pilot program to identify the characteristics of facilities and organizations which can be regarded as environmental leaders. EPA has chosen to work closely with these twelve carefully selected facilities in order to scrutinize various programs, instruments, attitudes and other considerations which may contribute to this intangible quality of environmental leadership. Environmental leadership, moreover, means more to EPA than simply environmental compliance. While each facility was chosen in part because it has a solid compliance record with state and federal regulators, EPA feels strongly that compliance alone is not sufficient to warrant the leadership mantle. EPA has accordingly looked for facilities which, among other things, also mount effective community outreach programs that provide opportunities for dialogue and participation by local affected populations.

EPA has designed the ELP in part to allow regulators to work far more closely and collaboratively with regulated facilities than has previously been the case. These new relationships are expected to allow environmental regulators to gain a much more comprehensive and sophisticated understanding of activities, processes and functions at large facilities. EPA hopes to evaluate the merit of moving from the position in which inspectors took, in essence, a simple snapshot of the state of a facility's compliance at a given moment to making a video which views an entire management system in order to discern why present conditions exist and what mechanisms are in place (or are needed) to insure continued compliance (or prevent recurrences of noncompliance).

Further, EPA regards the program as having very well defined boundaries which provide opportunities for agency enrichment while safeguarding against serious negative consequences. In addition to having positive compliance records, participating companies were required to provide, where available, two prior years of audit data. This is intended to help EPA gauge compliance baselines. Limiting the program to a pilot period will allow the agency to evaluate its utility promptly and make judgments about future directions.

At the conclusion of the pilot, EPA will examine the value and significance of the various programs it has considered at ELP facilities. It may then, for example, develop a composite model environmental management system which represents the best of the systems reviewed. The agency may also identify the components of an effective community outreach program. Overall, the analysis may result in the identification by EPA of those compliance, management, outreach and other attributes that make up an environmental leader.

EPA plans for these "requirements" for environmental leadership to raise the floor substantially for what will be considered acceptable environmental performance. Even though they will not

represent legally binding norms, companies vying to be regarded as environmental leaders will be expected to conduct themselves according to these criteria. In addition to recognition by the general public, which will inure to enrollment in this elite group, such leaders may be able to benefit from a range of positive governmental consequences EPA is considering making available. Although none has been finally approved, EPA may ultimately decide to provide some or all of the following incentives under review to environmental leaders:

- formal government recognition of leadership status,
- better relations with government,
- a modified inspection program,[14]
- differential enforcement discretion,
- modified reporting and notice requirement, and
- economic incentives.

All of these components are consistent with EPA's vision of itself in the near future as an agency looking for higher rates of compliance with less intensive use of resources and a less intrusive/adversarial relationship with regulatees.[15]

Finally, the ELP effort should be distinguished from Project XL, another EPA initiative. Although the variety of innovative measures encompassed within the twelve facility projects is broad enough to cause some blurring, ELP is fundamentally an examination of compliance assurance measures. According to EPA, the ELP projects are specifically intended to test new approaches to assuring compliance instead of relying upon command and control measures. The ELP projects work within existing regulatory requirements, seeking to meet current standards with reduced costs and burdens.

In contrast, Project XL is an environmental exchanges effort. It will examine entirely new *regulatory* management systems as alternatives to the existing approaches for setting standards. Projects will be granted flexibility from current regulations in exchange for environmental performance which will be superior to that achieved by compliance with those current regulations.

2.2 Examination of Selected ELP Projects

It is too early in the pilot study to provide a definitive examination or analysis of the ELP projects at this time: the projects do not reflect final recommendations by either industry or government, and they are not yet concluded and can only be considered works in progress. Nonetheless, an examination of several selected projects *as proposed* in the MOAs can provide some perspective into the

[14] EPA reports that some facilities have indicated that they may not want reduced inspection levels even if they have a comprehensive management system in place or are considered an environmental leader. They appear to feel that continuing governmental vigilance provides additional legitimacy to their position in the community as environmentally conscientious citizens. This may provoke an interesting dialogue with regulators who hope to use innovative measures such as leadership designations as ways to conserve inspection resources. In a fascinating role reversal, an agency may find itself trying to persuade a facility to accept fewer inspections while the facility argues for more frequent formal inspections!

[15] It seems clear that the process of developing and implementing the ELP was itself a resource-intensive undertaking. It necessarily included design of the pilot effort, selection of the participating facilities, negotiation of the individual MOAs, and then conduct of the programs, many of which involved extensive agency interaction with the facilities. It is perhaps not surprising that a pilot consumes more resources than it conserves. EPA's long-term goal, of course, is to implement a maintenance program which saves resources, or at least deploys existing assets in a more effective manner. Without a clear view of the final program dimensions, it is simply too early to know whether a fundamentally new relationship will achieve such efficiencies.

scope and direction of the effort. Each MOA describes a unique program designed by the specific facility in collaboration with the regulators. Nonetheless, there are several frequently recurring elements: management systems, audits, community outreach, mentoring. The following three project examinations offer an overview of the ELP effort. The analysis offered in the context of each facility-specific program is intended to illuminate issues that may be raised about similar innovative measures and is consistent with EPA's intent to consider these various measures for broader application beyond the pilot phase.

2.2.1 Ciba-Geigy

The Ciba-Geigy St. Gabriel (Louisiana) plant is a highly automated herbicide, specialty chemical and textile dye manufacturing facility. It employs approximately 1000 people on a 550 hectare site, 60 hectares of which are the plant proper, bordered on two sides by the Mississippi River. The plant has been in use since 1970.

EPA selected Ciba-Geigy to carry out several separate ELP projects. Like those of several other facilities, the Ciba-Geigy proposal does not envision developing fundamentally new mechanisms to encourage compliance. The Memoranda of Agreement (MOA) between the facility and the regulatory agencies describes three existing Ciba-Geigy programs which will come under close examination by federal and state regulators. The current programs, which may serve as the basis for models for broader use, are environmental management systems, multi-media compliance assurance, and community outreach. As with every ELP project, a team of specifically designated individuals from the facility, EPA headquarters and the Region, and the state environmental agency has been constituted to carry out these reviews.[16]

Since the selected programs are essentially extant, the focus of the activity described in the MOA entails examining systems already in place. Since Ciba-Geigy staff are presumed to be familiar with their own programs, the MOA refers frequently to the need for regulatory officials to become knowledgeable about existing efforts. For example, the discussion of the environmental management system project notes that "it is important that the agency ELP Team members have a complete understanding [of] Ciba-Geigy's environmental management systems. To that end, St. Gabriel will provide comprehensive training." Similarly, the multi-media compliance assurance project description explains that the "ELP Team will study and evaluate the compliance programs that are in place at the St. Gabriel facility." Finally, the community outreach effort is based on the ELP Team "studying and evaluating the community outreach/employee involvement program elements that are in place at the St. Gabriel facility which have helped build a trusting relationship between the facility and the East Iberville community."

It would not be fair to leave the impression that the three Ciba-Geigy projects involve only the passive review of present practices. For each project area, the tasks and objective include the development of proposed models or templates, employing the best elements of Ciba-Geigy's programs, which could be exported to other facilities. Language from the community involvement project description is representative: "From the results of this study, a model program template will be proposed which combines key program elements and alternative elements that can be used by a wide array of regulated facilities." This statement reflects EPA's ultimate goal of blending the best ele-

[16] There is currently no formal community representation on the team. However, EPA has asked all the project teams to work with local community groups and bring them into the pilot process. EPA will also engage in a dialogue with national environmental groups in Washington about the ELP effort. Finally, EPA plans to conduct a series of symposia on ELP around the country.

ments from all the ELP facilities (and other sources) into a model definition of environmental leadership.

Analysis

It bears repeating that neither the examination of current programs nor the sculpting of components into a model for other programs has been completed. It is therefore too early to evaluate the likely effect of the final results on compliance levels. Some observations can be made now, however, about the process.

It is certainly clear that the role played by regulators in this exercise bears virtually no resemblance to their traditional enforcement posture. The implications of this new role may not matter if Ciba-Geigy—or another facility participating in ELP or a successor leadership program—does not experience significant instances of non-compliance in the future which place the facility and regulators in an adversarial context. If, however, either EPA or the state comes to contemplate enforcement action against such a facility, some challenging issues may arise.

A long-standing concern of regulators, for example, is that of "capture." Regulators have generally felt it essential that they avoid the perception, or the reality, that they are so closely affiliated with a facility or company that they have lost the ability to respond impartially and in a manner consistent with the treatment of other facilities. This unhealthy closeness can occur on the personal level of an inspector who is too identified with a facility or on the institutional level, as when an agency appears to endorse the actions of a facility.

The Ciba-Geigy MOA, and the ELP project it describes, can certainly be viewed as raising the possibility of capture. Since the MOA is written by all team members and signed by high-level federal and state regulatory officials, it can be argued that these officials, and their agencies, support or agree with numerous statements within it which praise Ciba-Geigy and its environmental efforts. Will a future enforcement action be compromised by the fact that these officials appear to have supported the statement that Ciba-Geigy St. Gabriel has "a high rate of compliance with regulations"? Or by the statement that Ciba-Geigy has created a "trusting relationship between the facility and the East Iberville community"?[17]

Further, the close working relationship of the ELP Team makes the prospect of capture, or the perception of capture, all the more possible. The very goal of the projects is to produce, *jointly* between facility staff and regulators, models or recommendations for use at other facilities. It would not be at all unusual for persons thrown together to work on a common project to come to view their interests, at least to some degree, as aligned and affiliated. Such feelings about a regulated facility, or public perceptions of the existence of such feelings, are antithetical to the concept of disinterested decision-making.[18]

[17] EPA thought such risk of future compromised enforcement to be unlikely based on Ciba-Geigy's historic good compliance record. Facilities were only included in the program where such risk was perceived as low. Each ELP facility was selected after thorough civil and criminal compliance screening at both the federal and state levels. EPA, thus, feels that the risk of future enforcement is low enough to warrant conducting the pilot. It perceives the potential benefits from exploring these new relationships to justify any risk.

[18] This distinction between the act and the perception is significant. It may in fact not be likely that inspectors will tailor their responses based on a close working relationship with a facility or its staff. Nonetheless, the public may be skeptical of an agency which is *too* close to a facility that it is expected to objectively regulate. EPA hopes to overcome this perception issue. It also believes that both the reality—and the perception—of capture are made much less likely by the planned collaborative nature of the interaction and by the diverse team concept.

A related but independent legal concern is raised by the ELP projects and their formal products. The concept of capture implicates a kind of psychological or behavioral inability by a regulator to respond effectively to violations. The captive regulatory official is not formally stopped from taking appropriate action; he simply cannot bring himself to think badly of or punish someone with whom he has a close affiliation. In contrast, the separate doctrine of officially induced error (or detrimental reliance) represents a distinct legal barrier to governmental enforcement action where the regulated entity can demonstrate that its violation of a standard can be attributed to some official government action that led it to commit the violation.

Here too, it seems eminently likely that the united government-regulatee effort to propose model practices for a number of compliance areas will make the use of this defense more plausible. The ELP pilot intends to propose one or more model environmental management systems to help other facilities better manage their operations and better assess their environmental compliance. There are a number of issues raised by development of such an official model. Will ELP facilities (or future facilities in a permanent program) who implement these model programs gain a defense to penalty actions in the future because they relied upon a government-endorsed management program? Might facilities adopt the recommended system in preference to systems that might actually function better because they hope to derive the benefit of being able to argue the defense of officially induced error? The ELP MOAs neither identify nor propose to address these concerns at this time.

EPA is committed to reaching these issues as it considers expanding the pilot into a formal program. The ELP allows it to test these new relationships and governmental roles as part of the pilot evaluation. EPA is looking ultimately to validate or refute its hypothesis that the potential benefits of this new approach outweigh the risks. This hypothesis is being similarly tested by state governments through their own initiatives. These benefits may include an increased knowledge of facility operations by government regulators; an increase in joint inspections and audits, including multi-media assessments; more "process" reviews, which promote future compliance; and an overall higher level of compliance.

Transparency and participation are additional relevant measures for the Ciba-Geigy ELP project. Environmental requirements are generally established today by formal process which is largely open to review and includes clearly delineated opportunities for public input. Even enforcement actions, initially arrived at by unilateral government decision, are subject to public review through participation in the judicial process. While one of the three elements is community outreach, the Ciba-Geigy ELP project plans to conduct its activities within a very small circle of participants, not currently including the general public. The scope of an internal environmental management system or multimedia assurance system may not appear to rise to the level of significance of regulatory standard, or require public participation, but the unique circumstances here argue otherwise. The fact that these systems are intended for wider use gives them greater resonance, suggesting the need for community involvement. Moreover, the implicit (or perhaps explicit) imprimatur of government regulators on these systems, with its previously suggested implications, makes the need for wider input all the greater.[19]

[19] EPA's view is that it has been difficult to engage local community or interest groups in the environmental management system development process. Many other more immediate issues command a greater priority for these groups. However, EPA endorses the view, also advanced by the Responsible Care program, that communities should be involved in the development of environmental management systems. This will be one of the topics explored at its national symposia series, and in meetings with national environmental interest groups.

2.2.2 Duke Power

Duke Power operates the Riverbend Steam Station, a 454-megawatt coal-fired electric generating plant on the Catawba River in North Carolina. Riverbend has over 100 employees, one of whom is the Environmental Coordinator, who reports directly to the plant manager. The Riverbend station was chosen as an ELP site involving a number of disparate projects which are now simultaneously being carried out.

A. The Riverbend Steam Station Audit Program

One project involves an auditor exchange, which is a variant of the notion of third-party auditing. Riverbend proposes to supply an auditor to participate in assessment activities at a power plant of the Arizona Public Service (APS). In turn, APS will provide an auditor to review implementation of the facility assessment program at Riverbend. The expressed intent of this auditor exchange program is "to network, to benchmark, to acquire external input into [the Riverbend] audit process...."

From the written description, this particular ELP project does not involve government participation, either in the design (save some minor refinements suggested by government team members) or implementation of the third party audit program. It does not, therefore, implicate the same concerns for agency capture or officially induced error. Pursuant to the EPA Enforcement Guidelines which are a component of the ELP projects, any violations detected by the audit need to be disclosed to the appropriate agencies. If so disclosed, no penalties will be imposed for violations qualifying under the Enforcement Response Guidelines if they are corrected within 90 days.

Regular auditing of environmental performance is generally accepted as a useful compliance assurance measure and, increasingly, is viewed as the minimum standard of care for environmentally conscientious facilities. The refinement which Riverbend offers in its ELP project is to exchange auditors with an unrelated but similar facility. In this practice, each facility sends a team of its own internal auditors to perform a comprehensive assessment of an unaffiliated facility and report its findings to management. This approach may in fact offer some additional advantages. The opportunity to "benchmark," i.e., to observe what another is doing better and then to adopt the superior practice, could very well encourage continuous improvement. This is especially likely if Riverbend periodically exchanges auditors with different facilities. Moreover, the same question of "capture," this time of workers' actions, may be avoided by assigning the audit responsibility to someone who is independent.

Audit Incentive Programs

The larger question that may be asked about any program offering governmental incentives for audits is whether the enforcement forbearance which an agency provides for audit disclosures is justified. The argument supporting protection from penalty for violations discovered by audits is that it is of crucial importance to encourage the detection, and prompt correction of, environmental violations. This objective is important for at least two identifiable reasons. First, it serves the primary goal of the environmental regulatory structure to encourage compliance with requirements. A violation cannot be corrected until its existence is known by responsible officials; an audit, in theory, detects such conditions whether intentional or otherwise. Second, self-auditing can supplement, or even replace, government oversight of facility operations. Limited government resources can be maximized if some portion of regular inspections can be obviated by comparable internal efforts at self-policing.

Any negative consequences attached to audit discovery and response may, it is argued, serve only to discourage rigorous self-examination in the future. Industry has long maintained that it is

illogical for it to provide evidence of instances of non-compliance if the very act of identifying and revealing this information becomes the basis for a punitive governmental response, regardless of the vigor of the facility's corrective response.

There is a certain irony in this argument in support of enforcement protection for audit disclosed violations. Proponents of this position appear to be confirming, wittingly or not, the theoretical construct that enforcement responses will serve to alter the behavior of both the direct and indirect subjects. Advocates for protection from enforcement penalties for conditions disclosed by audits and corrected, however, appear to believe that enforcement actions will not deter future wrongful conduct but will discourage use of the assessment process which reveals the conduct and allows its correction.

Given the choice between a) promptly detecting (and correcting) non-compliance but running the risk of a fine or b) not detecting the non-compliance promptly (or at all) and thereby postponing both corrective action and the fine, audit advocates appear to prefer the latter. Even if they do not actually prefer it, they fear that it will be the choice of many firms and facilities. This choice, the audit advocates unfortunately know, is not supportable environmentally, publicly or politically. The preferred solution for many, of course, is to eliminate the need to make any choice by removing even the threat of punitive sanctions for discovered and disclosed violations. The EPA Enforcement Guidelines accomplish exactly this.

Audit programs may already be too well entrenched to be considered experimental. There are a number of issues about them, nonetheless, that should be considered.

At the basic theoretical level, one can question whether the audit amnesty philosophy is designed to deter violations or merely to detect and correct them. This is not a distinction without significance. In basic enforcement theory, the initiation of enforcement—whether it consists of simply the compulsion to correct or includes a penalty as well—is intended to be sufficiently unpleasant to make repetition of the violation less likely. The express goal of enforcement is not limited to merely restoring the *status quo* to one of lawful conduct. It includes as an equal objective the deterrence of future deviations from the lawful norm.

Most audit amnesty programs implicitly regard this deterrent component of enforcement as unimportant at best, counterproductive at worst. These programs emphasize, virtually to the exclusion of other considerations, the need to correct the present violation. While this goal is certainly of great importance, it is unclear whether it is wise to sacrifice at its altar those mechanisms which would at the same time prevent recurrence of the violation. For example, how does an audit amnesty program affirmatively discourage employees from allowing, through inattention or negligence, non-complying conditions to come into existence?[20] If employees can be presumed to be knowledgeable both about their firm's audit procedures and the government's amnesty response, then it can be speculated that their vigilance may in fact be reduced. They will carry out their tasks with the assurance that if they make a mistake which compromises environmental performance, it will inevitably be detected and corrected by the next audit. Further, as long as the audit mechanism works and amnesty is extended, their employer will not face enforcement; it will simply take those steps and expend those funds which were required all along for compliance.

[20] The scope of this inquiry does not extend to intentional violations. Most audit amnesty programs, as do the Enforcement Guidelines, exclude intentional or criminal violations from any forbearance policy. The efficacy of the criminal exclusion is discussed below.

There is nothing the least bit censorious or disapproving—let alone punishing—about this process. There is nothing about it which denotes the violation as an exceptional event with implications for the future. Indeed, a woebegone observer trapped in the lockstep enforcement mentality of the 1980s who was afforded a glimpse of this dynamic might understandably wonder if environmental violations had simply become a quotidian element of business, to be accepted and corrected without interest or reaction from government regulators. It is only an additional act of mild fantasy to imagine a series of violations, perhaps different each time and perhaps not,[21] discovered and corrected by successive audits without any governmental enforcement response serving to deter this sequence.

Some may counter that violations conferring a significant economic benefit on a facility are usually exempt from amnesty protection. This intuitively necessary exemption from such programs (to level the playing field), however, only serves to underscore the same problem. First, to the extent that the prime audit supposition is correct—i.e., if audit results are not protected, then audits will not be conducted or disclosed—this exemption means that audit efforts will not encompass those significant violations most likely to be of harm to the environment and of concern to environmental regulators.[22] Second, this exemption confirms that the deterrent and leveling effects of enforcement responses will remain necessary to address serious problems. And if regulators must remain thus engaged even where audits are nominally conducted, the value of such programs in reducing demands on regulatory resources is greatly diminished.

Audit Programs and Ambiguity

The related question of quantifying or establishing "significant" economic benefit introduces a second set of issues about audit amnesty programs. For lack of a more elegant description, these programs appear to be constructed on a binary foundation. That is, firms are either completely immune from enforcement for a violation or completely at risk for it depending on certain stated criteria regarding the amnesty program. The criteria commonly include such elements as the detection of the violation through an audit, prompt correction of the violation, the violation not constituting criminal conduct, the violation not conferring significant economic benefit on the violator, and the like. Unfortunately, these criteria are not the stuff of which objective, undisputed and clear decisions are made.

For example, the central concept of auditing is not self-defining. There are, to be sure, many definitions of audits and audit programs which can be consulted. But are firms free to decide which definition, which program description, they may follow?[23] And does government have to involve itself in what was advertised as a private practice to certify acceptable audit procedures? Even settling the question of definitional scope does not eliminate potential problems. Does the discovery of a violation have to be made in the precise context of a process that meets the endorsed definition

[21] Many audit policies, like the Guidelines, only disqualify from protection subsequent violations when the prior ones were the subject of an enforcement action. Some policies contain a vague reservation of rights to respond to repeat violations or patterns of violations. As discussed below, the imprecision inherent in such approaches only introduces additional difficulties. Of course the Guidelines, like virtually every other audit program, exempts from enforcement protection serious or criminal violations, or acts which cause damage to the environment.

[22] Of course, if the supposition is not correct, then there is no need for the amnesty provisions in the first place.

[23] See the discussion below regarding ISO 14000 and the various extant federal programs which already address the necessary sweep of management and audit systems.

to invoke the protection of an amnesty program?[24] Can a firm be sure that the government will agree that it has implemented a satisfactory, continuing, systematic self-review process if it discovers a violation in its very first audit, without a track record to show a continuing commitment to the process? Such questions acquire great significance because complete protection from enforcement under these programs turns on their resolution. It is not difficult to envision the conduct of complex and lengthy preliminary proceedings to determine whether a regulatory agency has retained authority to initiate enforcement at all.

The same ambiguities plague the other criteria. The meaning of prompt corrective action surely lies in the eye of the person beholding the violation, and therefore having to find the funding and secure the necessary goods and services to correct it.[25] From this standpoint, the inclusion of significant economic benefit is particularly perplexing. Except in rare circumstances (usually involving an accidental loss of product to the environment, which does not require an audit to detect any way), every violation results in some economic benefit to the person who failed to adequately control. An audit amnesty policy incorporating this criteria requires the government to decide where to place the economic benefit of every disclosed violation on the continuum from negligible to significant in order to decide, again, whether the authority to bring enforcement has been retained or waived by policy. The government's conclusion about the placement on this continuum may not mirror the judgment of the disclosing firm.

Notwithstanding these uncertainties, the existence of the criminal conduct criteria may in fact be the most mystifying. The decision whether an action is criminal or not is a uniquely legal determination, and one which can be made only at the end of an enforcement proceeding guided by its own complex rules. It goes virtually without saying that the dozens of environmental criminal cases which have gone to trial, and beyond, bear testimony to the difficulty of ascertaining whether specific conduct was criminal. Yet, the Enforcement Guidelines and other comparable policies make this determination, which requires its own enforcement action, a prerequisite to the initiation of an enforcement action. There may be a path out of this wilderness of mirrors, but it is not evident from the Guidelines themselves.

These problems are in great measure solved if the existence of an audit program which detected violations and the prompt correction of the violations were each factors to be expressly considered by the ultimate adjudicator of enforcement sanctions, and not threshold criteria for enforcement itself. The scope of the audit program, for instance, or the promptness of corrective action in light

[24] This is not an academic inquiry. An enforcement case which became a standard bearer for those seeking an audit and disclosure privilege involved a waste management company which disclosed information to the regulatory agency that one of its facilities had intentionally and deceptively accepted substantial volumes of waste in excess of its permit limits. Defenders of the company protested that it should never have been made to pay a fine for these violations, notwithstanding that the fine was mandatory, not discretionary, under law, because of the voluntary disclosure. The discovery of these violations, however, occurred almost serendipitously by a high company official in the course of his normal duties. It was not unearthed during an audit or any other systematic procedure, regular or episodic, to evaluate compliance. If an audit amnesty program had been in place, the question of whether this was a "qualifying" audit discovery would have been central to any contested enforcement action.

[25] The EPA Enforcement Guidelines ostensibly limit prompt corrective action, for purposes of enforcement amnesty, to 90 days (with a discretionary 90 day extension). It is difficult to imagine that this, or other arbitrary definition of time periods, will not be subject to intense jawboning and negotiation by those who believe they can show that they cannot make the necessary corrections within the maximum time despite good faith and best efforts (e.g., equipment cannot physically be ordered, delivered and installed in the allowed period). After all, they will argue, they have done all that they can to detect, disclose and correct. Why should they be subject to enforcement when the ability to correct "promptly" is beyond their control? Nonetheless, it is EPA's expectation that most companies will want to do the right thing and will correct within the contemplated time frame, or will agree that the problem should be handled pursuant to traditional expectations. The first year of the ELP has borne this expectation out.

of all the relevant circumstances, would all be important factors in determining the appropriate enforcement deterrent sanction, if any. Such information could also be identified as relevant in the guilt and punishment phases of criminal trials. This would preclude the incongruous experience of holding a criminal trial at which a verdict of not guilty means that the government did not have authority to bring the trial in the first place.

Proponents of audit amnesty programs frequently claim that they need the certainty of protection from regulators to stimulate the use of audits. The certainty they have secured in the current run of programs, however, is more illusory than real. The disappointment of those who are eventually confronted, to their surprise, with enforcement for what they thought was protected will be all the more crushing because of these expectations.

B. The Riverbend Steam Station Community Involvement Program

A second ELP project at Riverbend is devoted to community and employee involvement. Through this effort, the ELP team hopes to develop a teaching curriculum and lesson plans regarding electric generation facilities and their interaction with pollution prevention efforts and with ecosystems. According to the (memorandum of Agreement), the plans and teaching materials "will be tailored to Riverbend...to include any planned environmental enhancement for the site as described by our site based environmental programs, pollution prevention activities, and the EPA Environmental Leadership Program for Riverbend." The avowed benefits of this effort include reinforcing "with students and educators that Riverbend produces electricity in an environmentally compatible manner." This undertaking will be augmented by open houses at Riverbend, where EPA will be expected to participate and demonstrate the successes of the ELP at the facility.

Analysis

The previously noted observations about the specter of agency capture presented in the Ciba-Geigy ELP apply with at least equal vigor here. The Riverbend project also has as an express goal the transformation of the relationship between regulator and regulated. According to the MOA, federal and state officials are committing to a "'hands-on' learning experience by actively participating in the Riverbend pilot projects." Even further, Riverbend expresses the hope that it will develop with the regulators what it (in the MOA) calls "business relationships" that are conducive to trust and progressive process development.

There are some differences between this program and the one at Ciba-Geigy, although their significance may be more apparent than real. The new relationship with regulators is forged here not in the context of working on a true compliance assurance program (like the environmental management system at Ciba-Geigy). Riverbend and the government officials will collaborate on educational outreach efforts into the community to present the heartwarming saga of environmentally friendly electric power generation. In one sense, then, the capture phenomenon is not as worrisome because the cozy agency affiliation does not occur in a traditional regulatory setting. Indeed, while educational efforts are important in developing community understanding, there is no clear link between this activity and increased compliance. There may be some anecdotal evidence supporting the view that effective community outreach and education programs lead to greater citizen vigilance and, ultimately, improved company conduct.

That void, unfortunately, may also be the reason to be even more apprehensive about the potential for capture in this instance. Community outreach programs may eventually become one of the requirements for inclusion in an ongoing environmental leadership program. If non-compliance situations arise, outreach efforts praising a facility in broad, public contexts, may be even more

problematic for government regulators to deal with than the narrower association with Ciba-Geigy over a relatively technical environmental management system. These outreach efforts can be expected to burnish a company's environmental image generally with the community and the public. Regulators thereafter considering enforcement against Riverbend may be influenced not only by their own ELP-formed perception that Riverbend is an environmentally concerned citizen; they may also be affected by a sense that the public at large will not accept this new, incompatible image of Riverbend as polluter. These considerations would substantially undermine an agency's ability to respond, even in traditional enforcement situations.

Notwithstanding this concern, EPA and Duke Power believe that their non-traditional relationship holds the potential for great return. Joint compliance audits with state, federal and company inspectors provided valuable insights to all parties. The careful entry screening process and the limited nature of the pilot are seen as justifying any theoretical risks.

2.2.3 McClellan Air Force Base ELP

McClellan Air Force Base is located ten km from Sacramento, California. The installation covers about 1200 hectares and employs almost 16,000 workers, making it the largest industrial employer in northern California. McClellan is the predominant space and logistics facility for the Department of Defense. As such, it carries out a wide range of activities related to the operation and support of aircraft and the monitoring of satellites.

The McClellan project is instructive because the relevant MOA points out, perhaps more evidently than most other projects, the exceedingly tentative and preliminary nature of the entire ELP effort. Although the introduction to the MOA purports to "spell out in specific terms the plans of McClellan AFB...," the scope and goals of the project are anything but clear.

Analysis

The McClellan ELP appears to be an effort to develop compliance assurance programs and self-monitoring measures which, when implemented, can reduce the need for routine regulatory oversight. Unfortunately, the language of the MOA is more conclusory than clarifying. The ELP Team, for example, is simply committed to work "to develop, demonstrate, and document innovative and proactive environmental processes, selection criteria, and measures of success that can be used to reduce resource burdens on regulatory agencies and McClellan without increasing risk to the public's health or the environment." Although this seems quite open-ended, a later reference to developing a baseline from the McClellan experience makes it unclear whether the Team is charged to examine only existing practices or to imagine some not yet in use. There are also confusing references to the possibility of considering partnering with other facilities to fill voids or secure supplemental information. Neither the circumstances of such voids nor the identity of other facilities to be consulted is defined any further.

This criticism may be unduly harsh, as the wording of the MOA makes it hard to reach any firm conclusions about the project. One of the early Team tasks is to document "key ingredients used by McClellan to create, establish, and now maintain its progressive environmental enthusiasm, culture and ethic" in order to create what is referred to as a "baseline." This baseline, which may be intended to represent a collection of successful compliance measures, will then be used to qualify what are called "other progressive facilities." From there, the Team will develop "acceptance criteria" that, presumably, regulators can use to evaluate requests from facilities which hope to be freed from traditional compliance requirements.

Although the project is styled as an ELP effort to identify compliance assurance measures, this characterization is called into question in one of the last of the described project steps. The MOA calls for the Team to examine the prospect of merging compliance measures and pollution prevention efforts in order to "achieve, surpass, or permanently eliminate possibility of future regulations effecting McClellan." This phrasing, rather than suggesting a compliance assurance measure, speaks in the language of a Project XL environmental exchange in which McClellan will substitute its own standards for otherwise applicable requirements.

Needless to say, the paucity of details in the McClellan ELP makes it extremely hazardous to try to evaluate the outcome or possible benefits. This vagueness itself, however, may be cause for some anxiety. This project, like each of the others, entails a substantial commitment of time and resources from federal and state regulators (as well as from facility personnel). EPA presumably accepted the facility for an ELP proposal to explore compliance assurance measures; McClellan may be hoping to orchestrate an environmental exchange which allows it to pretermit existing obligations. At the least, there is a possibility that an effort built on different expectations will lead to inefficient use of resources, rather than spawning mechanisms which make more efficient use of them. Moreover, if there was a failure to define clearly the objectives and expectations at the outset, all participating parties may view the eventual results negatively. This may frustrate, rather than stimulate, the development of good working relationships between regulator and regulated.

2.3 ISO 14000

Description of the Program

The International Organization for Standardization, or ISO, is a private federation of national standards bodies from more than 100 countries. Its mission is to facilitate international trade in goods and services and to develop intellectual, scientific, technological and economic cooperation through the development of standardization and other related activities. For the last several years, ISO (and more particularly, its specifically-created Technical Committee 207) has been developing a set of standards for managing the environmental aspects of a business. The first parts of this series, known as ISO 14000, began to be formally adopted by the organization in later 1996.

It is crucial to emphasize at the outset that the ISO 14000 series will not establish specific performance standards for environmental compliance. ISO cannot and does not purport to supplant the governmental role of prescribing emissions limits for air pollution sources, or limits for wastewater discharges, or design and material standards for waste disposal facilities, or myriad other compliance standards. The 14000 series is designed rather to help firms identify the types of internal management controls, self-review efforts, progressive improvement measures and other processes necessary to conduct business in today's highly regulated environment. The prime ISO goal in setting forth these management standards is the encouragement of international trade through the harmonization of business standards and practices.

Four key sections of the 14000 series deal with core management system issues.[26] The first of these is the basic environmental management system standards, which call on firms to do the following:

- have a formal environmental policy which is disseminated and understood;

[26] ISO will also include standards in the comparatively more peripheral areas of environmental labeling, life cycle assessment and products standards.

- have a process to develop and track environmental measures, objectives and goals;
- monitor legal requirements and compliance with them;
- develop and administer necessary training to employees;
- generate and maintain adequate documentation of the firm's activities; and
- develop emergency preparedness and response plans.

These components represent the core of the ISO environmental management system.

Two other key sections deal with auditing issues. One prescribes standards for the conduct of audits and the general principles underlying the audit process. ISO 14000 requires firms to have audits at all relevant business levels: corporate, operating unit or division, and plant or factory. The standards describe the need for periodic and systematic assessments. The other auditing section provides qualifications criteria for the auditors themselves.

Finally, ISO 14000 establishes standards for firms to utilize in evaluating their own environmental performance. These standards require a firm to evaluate both its environmental management system and the operational controls intended to assure environmental compliance. These also require companies to develop goals for their ultimate environmental performance, and measures to assess achievement of those goals. The standards strongly urge continuous improvement of environmental performance and ongoing measurement to document the progress.

Analysis

At least at its present stage of development, the ISO 14000 series is the paradigm of a voluntary assurance measure. Development of the standards has been purely voluntary, by a consortium of private organizations. Acceptance and implementation of the final ISO standards are also to occur by voluntary choice of individual firms and businesses. While some have expressed concern that if they gain wide acceptance, the ISO standards will become *de facto* requirements for firms to compete internationally, that specter is not sufficiently distinct at the present time to warrant thinking of the standards as mandatory or required by law.

The US EPA has understandably expressed a strong interest in the development of the ISO 14000 series. In general, the agency supports the identification and implementation of voluntary instruments which may help firms increase their level of compliance with environmental performance standards. ISO is seen as a potentially valuable auxiliary at participating sites for the traditional enforcement program relying upon inspections and progressive sanctions. EPA has participated in the drafting of the 14000 series, particularly providing input to TC 207 regarding the need for clear commitments to compliance and pollution prevention.

Nonetheless, EPA has continuing concerns about the scope and efficacy of the 14000 series as presently constituted. To better understand these reservations, one must be aware that both the agency and the US Department of Justice (DOJ) (as well as at least one other political institution) have long recognized the existence of an internal compliance management system as a significant consideration in evaluating the propriety and magnitude of an enforcement response to a detected violation. In 1991, for example, DOJ issued a statement to prosecutors in the US Attorney's offices providing guidance on the exercise of discretion. Prosecutors were authorized to decline to bring criminal charges where a number of factors were present; prominent among them was the existence of a regularized, intensive and comprehensive environmental compliance program.

Similarly, the Sentencing Guidelines of the US Sentencing Commission authorize a judge to make a significant reduction in the culpability score of a defendant organization—a variable directly related to severity of sentence—if the offense occurred despite the existence of an "effective program to prevent and detect violations of law." The guidelines provide an extensive definition of such a program. Its elements include internally established compliance standards and procedures, assignment of high-level personnel to oversee organizational compliance with such standards and procedures, the use of internal systems (such as monitoring and auditing) to detect instances of non-compliance, and appropriate discipline of individuals responsible for violations or of failing to detect violations.

Finally, in December 1995 EPA issued a revised policy on enforcement and the voluntary discovery and disclosure of violations of environmental requirements. To qualify for attenuation of the traditional enforcement response which the policy authorizes, a firm must demonstrate that a violation was discovered either through an environmental audit or through a "due diligence" procedure to prevent, detect and correct violations. Again, the policy itself provides a comprehensive definition of the due diligence which it contemplates. This definition emphasizes components of a management system based from the outset on encouraging compliance. The due diligence must include compliance policies for employees identifying the need, and manner, of meeting all applicable requirements, assignment of responsibility for overseeing compliance, mechanisms for assuring that compliance policies are being carried out, incentives for employees and mangers to comply, and procedures for prompt and appropriate correction of violations.

To EPA, the common theme linking each of these policy pronouncements is the strong, central emphasis on compliance with environmental obligations. It is not a great exaggeration to say that compliance is the *raison d'être* for each of these systems. In contrast, the management system envisioned by ISO 14000 has harmonization and standardization, to foster international trade, as its seminal purpose. The existence of a system to monitor environmental performance is the key motivator; increased compliance is perhaps only an intended consequence of these management activities[27] Indeed, a close reading of the 14000 standards reveals not a comparable emphasis on compliance with external obligations but a focus on the firm's internal process and procedures, and the mechanisms in place to review these systems periodically.

EPA believes that the original purpose for the effort is a significant factor in evaluating its goals and objectives, and its effectiveness. As a consequence, EPA has not yet concluded that a management system satisfying the ISO 14000 series will necessarily be a compliance management system sufficient to trigger any of the enforcement policies discussed here. The agency is not prepared to assume yet that ISO certification is a warranty of due diligence. This is the primary reason that EPA has urged TC 207 to increase the compliance emphasis in the 14000 series.[28] In the same fashion, EPA has identified the need for a strong, reliable accreditation procedure and concomitant periodic review of both registrars and registered ISO companies to insure the integrity of the system. EPA is arguing for a broadly inclusive body to perform accreditation of registrars. EPA supports a body which would include not only management experts but public stakeholders and persons with experience in environmental and regulatory systems.

[27] Perhaps out of context, Joe Cascio, of IBM and chair of the US Technical Advisory Group for ISO 14000, is reported to have said in a speech at MIT that he does not care how much waste an ISO certified firms dumps into a river. It is important only that the company's environmental management system registers that it occurred. (Cited in *ISO 14000: An Uncommon Perspective*, by Benchmark Environmental Consulting, November 1995).

[28] EPA is also seeking additional commitment to pollution prevention.

3 State Efforts

3.1 Introduction

The American governmental architecture, it is often said, is designed to allow the various states to be seedbeds for the development of new varieties of social and regulatory mechanisms. In the field of environmental compliance and assurance mechanisms, at least, innovative state programs are indeed enjoying a luxuriant spring. After a long period characterized, generally, by a reluctance to stray far from the directions set by the US EPA, state regulatory officials have begun to raise a myriad of creative efforts to encourage or assure compliance with environmental requirements. Many of these have as their common element less frequent resort to traditional enforcement responses.[29]

As was true of the ELP projects, many of the state programs are pilot efforts or of relatively recent vintage, or both. This means, among other things, that few of the state programs have long implementation histories or considerable documented results. It also means that the programs in some instances are still subject to refinement or wholesale revision as officials incorporate new perceptions and information. Finally, it often means that there is a relatively limited pool of regulated entities who have taken advantage of or participated in the programs which the states are testing, limiting the opportunities for analysis at this time. In short, many programs remain works-in-progress. The following discussion examines innovations in three states, selected because they have implemented programs that are common in other states and because their programs appear to be somewhat more defined and established than others. The experience of these states, and the topics which these state programs suggest for additional discussion, may be of value to managers and policy makers in other states.

3.2 Illinois

3.2.1 Project Clean Break

The centerpiece of the Illinois effort to encourage compliance is the Illinois Environmental Amnesty Program or, as it is frequently called, Project Clean Break. The genesis, philosophy and scope of Clean Break are in many ways representative of similar programs in many other states.[30]

The impetus for Clean Break came out of a growing demand from small businesses in Illinois for government to provide some special assistance in meeting the widening array of environmental regulations applicable to them. In conjunction with the state Department of Commerce and Community Affairs, the Illinois Environmental Protection Agency (IEPA) formed a small business environmental task force to explore the problem and propose solutions. The task force report determined that small businesses "have a sincere desire to comply [with environmental requirements] both out of concern for the environment and out of a respect for the law." The report found, however,

[29] Philosophical consistency rarely being an important element of political ideology, this movement by states to pioneer creative regulatory *programs* which reflect local needs and variables is often matched, puzzlingly enough, with a contemporaneous effort to revise regulatory *standards* to be only those required by federal law, even where the federal statutes authorize local laws to be more stringent if necessary to address local conditions.

[30] Interestingly, Illinois is also a leader in structuring a new working relationship with the US EPA. It is one of only three states to have signed Environmental Performance Agreements to establish the parameters of the formal working relationship with the federal agency. These agreements employ actual environmental results, such as number of sites cleaned up, number of facilities in compliance, as the measures of accomplishment for purposes of program evaluation. The agreements are intended to ultimately replace for all the states the present, largely unsatisfactory, media-specific agreements, which measure state agency efforts instead of their effects. This mirrors the general regulatory shift to prizing increases in actual compliance levels more highly than increases in the number of actions instituted.

that this sincere desire was often frustrated by a lack of knowledge and expertise about environmental regulations and a fear that those seen as most able to cure these deficiencies—the government regulators themselves—would be more likely to punish than educate.

The Clean Break program implemented in 1995 as a result of the recommendations of this report was designed to address this precise problem. Since the affected universe was defined as small businesses which lacked the resources to master the regulatory complexities, Clean Break was limited to businesses with fewer than 200 full-time employees. Given its pilot nature, the program was only offered in a limited geographical area where a receptive local chamber of commerce was willing to assist in outreach efforts on behalf of the program.

The essence of Clean Break is simple: firms that seek assistance from IEPA in performing assessments to identify violations and agree to correct in a reasonable time period will not be penalized for the violations. As with most programs of this sort, certain classes of violations are excluded from the enforcement protection:

- violations which pose a substantial and imminent danger to the public health or the environment;
- violations which were previously identified by IEPA;
- violations which are considered a felony;
- violations which were deliberately commenced on or after the beginning date of Clean Break; and
- violations which were discovered by IEPA during routine inspections or citizen complaints during Clean Break.[31]

The public identification of the program as an amnesty effort reveals one of the key tensions that characterizes many projects of this kind. The agency viewed this as a program to provide technical assistance and instruction to businesses willing to accept it and who could not cope unaided with regulatory demands.[32] But continuing concerns about enforcement by members of the business community threatened to obscure the assistance aspects of the program. Accordingly, the title of the program itself and much of the initial outreach activity prominently featured the amnesty aspects of the initiative. Nonetheless, preliminary assessments were performed and recommendations sent to facilities before amnesty was offered. This sequence helped to discriminate between those actually in compliance and those who had violations. It also allowed facilities to make informed decisions about whether to participate.

IEPA proposed to make its traditional regulatory/enforcement inspectors available to participating firms to provide unthreatening assistance.[33] Unfortunately, initial efforts to publicize Clean Break produced few tangible results. State officials concluded that businesses had remained skeptical and suspicious of government claims that program participants would not face enforcement actions.

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[31] IEPA screened volunteers to Clean Break to insure that they were not already enforcement targets.

[32] Unlike most state agencies, IEPA asserted that it did not have more enforcement cases than it could effectively handle. It was also able to offer these expanded assistance programs without altering any of its traditional investigative responses. By pursuing a direction which involved lower-intensity interactions with the regulatory community, it hoped to be able to reach and influence more small facilities effectively.

[33] Regular agency inspectors provided the information and assessments, but they would not be the same inspectors who had routine responsibility for the facilities which they assisted pursuant to Clean Break. In their relationship with the Clean Break participants, these inspectors were known as Client Account Managers. Facilities were encouraged to feel free to continue to contact their Managers for assistance, even after the passage of time.

The Rockford Area Chamber of Commerce was already a cosponsor of the program. After more vigorously enlisting additional trade associations and the National Federation of Independent Business to vouch for the program, IEPA succeeded in persuading a number of businesses to test Clean Break. Participants were able to meet with agency representatives by phone or in person at their facilities, and the businesses which participated by telephone could remain anonymous through this initial phase of the process if they chose.[34] IEPA viewed the offer of anonymity as a particularly important incentive for businesses to participate. The agency was willing to conduct an ongoing telephone dialogue with facilities who wished to remain anonymous, providing as much diagnosis and guidance about compliance with applicable regulations as feasible based on the information provided during the calls.

Clean Break inspectors did review all applicable requirements at these and subsequent meetings. The agency staff also attempted to simplify and distill the existing regulatory requirements into their most basic components so that they would be easier to understand. After a preliminary review of the information provided by a business, the agency staff made basic suggestions about steps which could be taken to achieve compliance or pollution prevention. The business was offered an opportunity to continue and expand the relationship. For facilities which had participated to this point only by telephone, this involved a site visit that provided a basis for a more thorough review of applicable requirements and present levels of compliance.[35]

At the end of this stage, participants with continuing violations were asked to sign amnesty/compliance agreements in which they formally committed to correct any instances of non-compliance in a reasonable time frame.[36] The agreements were reviewed and approved by IEPA's counsel. In this pilot phase of Clean Break, 62 firms developed amnesty/compliance agreements and 42 ultimately signed some agreement. As of the time of this report, 27 facilities had completed all of the activities called for in their amnesty/compliance agreements.[37]

Businesses were free to "drop out" of the program up until the signing of an amnesty/compliance agreement without threat of a penalty being imposed for violations discovered as a result of the program. There was no protection for such facilities, however, from independent inspections by a different, routinely assigned inspector, who might detect the same violations. To further allay anxiety of participating firms, one of the express underpinnings of Clean Break was that the routine inspectors would not attempt to discover or make use of the information gathered by the amnesty program. While this did not appear in any written articulations of the program, there seemed to be a common understanding in IEPA that Clean Break information was tightly embargoed. With regard to public

[34] IEPA reported that very few participants elected to preserve their anonymity throughout the process. Facilities which signed agreements, of course, could not retain anonymity. IEPA also reported that some who appeared to desire anonymity arrived at initial meetings at agency offices in clothing bearing their company's name.

[35] IEPA felt confident that the limitations and disclaimers it routinely placed in amnesty/compliance agreements describing their scope and application precluded legal defenses to future enforcement actions based on assertions of officially induced error. The agency also felt confident that it did not risk liability for reliance upon advice offered in the context of the Clean Break program. The disclamatory language, coupled with the official immunity that most states, and most state officials, enjoy for regulatory actions, provides a reasonable shield against this exposure.

[36] Printed announcements of Clean Break do not exclude any classes of violations based solely upon the length of time expected to be needed for corrective action. For more than half of the participating facilities, violations were minor in nature and could be corrected within 90 days. A few facilities signed agreements allowing for up to 180 days to comply; in most instances these longer schedules required retention of a certified specialist to carry out some part of the remedial work.

[37] In the pilot program, IEPA awarded certificates to facilities which did not have compliance problems identified by the preliminary assessment, to facilities which signed agreements, and to facilities which successfully completed their corrective actions. To date, more than 65 certificates have been awarded across all three categories. These certificates were viewed by the agency as separate incentives for participation and compliant behavior.

access to information, IEPA treated information obtained through Clean Break interaction prior to the signing of a compliance/amnesty agreement as confidential. Signed agreements are available to the general public pursuant to the Illinois Freedom of Information Act.

Analysis

There are a number of interesting enforcement aspects to Clean Break. IEPA preserved its right to respond with enforcement to violations independently detected either at small business facilities that had dropped out of Clean Break or had never elected to participate. Yet the IEPA enforcement policy for those facilities already provided for penalty forbearance in most instances where the business promptly corrected the violation, whether or not a formal agreement was signed. Thus, businesses already had little to fear regarding enforcement if they agreed to correct violations, the exact incentive that Clean Break purported to establish in the first instance. In this light, Clean Break can better be seen as an effort to promote, and perhaps gain additional legitimacy for, an existing prudent approach to enforcement discretion by giving it a new name and providing it with the formality of the amnesty/compliance agreement. Clean Break did additionally offer, it should be noted, multimedia review, pollution prevention, and partial protection of the identity of participants.

In fact, however, even the formality of the amnesty/compliance agreements was casual. There seemed to be no question that the agreements were binding legal commitments. The IEPA staff unhesitatingly regarded them this way. Yet the staff also understood that taking an official enforcement action pursuant to one of the agreements—even an action simply to compel overdue corrective activity—would offend the spirit, if not the letter, of the program in the eyes of the business community. The original signed agreements contained provisions to request extensions of the period for compliance.[38] Fifteen of the original 42 participating facilities have requested and been granted extensions of time to complete the prescribed activities, often for circumstances beyond their control.

After the completion of the Clean Break pilot, IEPA instituted a successor Clean Break program that expands the initiative statewide to small auto body/auto repair shops and print shops anywhere in Illinois. An information sheet for the new program notes that other industrial sectors will be made eligible in the future.

In addition, IEPA implemented a separate Resources Conservation and Recovery Act program which it calls "compliance assistance surveys." This effort combined elements of specific targeting protocols with elements of administrative convenience. The compliance assistance surveys were utilized in four targeted industrial sectors: metal fabricators, dry cleaners, printers, and auto repair shops. These sectors were chosen for a variety of reasons, including the onset of new regulatory oversight pursuant to the Clean Air Act and the likelihood of numerous questions about hazardous waste management requirements which were often perplexing to small businesses. The agency decided to focus on facilities in these sectors which were located near its regional offices in order to minimize travel demands and related costs.

The surveys differed from Clean Break in a number of ways. Rather than waiting for firms to volunteer their participation, survey "targets" were contacted by IEPA and offered the opportunity to participate in the program. Although participation remained voluntary, the agency adopted a more persistent attitude towards those who initially declined the invitation. For those who volunteered, IEPA provided a visit, purposefully called a survey instead of an inspection, to review compliance and identify violations. Following the survey visit, IEPA sent a letter which suggested possible

[38] To their credit, IEPA officials also worried that if they were perceived as never prepared to take an enforcement action, program participants would be encouraged to ignore their agreement deadlines.

corrective steps without actually alleging the existence of violations. Facilities were not asked to sign compliance agreements of any kind.

Clean Break and the compliance assistance surveys are in many ways structurally similar to the audit/amnesty programs under evaluation in the ELP projects and in existence in several states. In each instance, a facility elects to authorize an examination, not otherwise required by law, of its compliance performance and to take corrective action in exchange for relief from enforcement for violations disclosed by this assessment. Where audit programs rely on an examination by the facility itself (directly or by an agent), Clean Break represents a class of programs that rely upon technical assistance from the government to conduct the compliance assessment.

All amnesty programs can be subject to the inquiry made earlier in this report regarding the ELP projects. That inquiry asks, in essence, whether the sacrifice of enforcement and deterrence results in fewer violations being committed or simply in more violations being corrected quickly. The IEPA effort, however, contains several elements that support independent consideration.

An argument can be made that narrowly drawn programs such as this, whether the assessment and identification activity originates from within or without the facility itself, are a more prudent application of the amnesty reward concept. Clean Break, in particular, was limited to small facilities. These are facilities that can claim, with some justification, that they cannot hope to comply with regulations about which they are completely unaware or do not even dimly understand. Unlike large facilities that can afford the expertise needed to ascertain compliant behavior, small facilities may violate the rules due to sheer lack of knowledge, not lack of attention. Programs that encourage them to take advantage of otherwise unavailable expert resources to begin to comprehend the requirements may indeed bring about permanent changes in behavior. This is a different expectation than one might have for audits at large facilities, where the result might be simply another reminder to comply with rules whose existence is already quite well-known.

This potential benefit for compliance levels at small facilities may be offset, in theory, by other, less sanguine aspects of Clean Break and other technical assistance efforts. Unlike privately administered audits, these government-sponsored assessments have resource implications for regulatory agencies. It consumes staff time and program funds to carry out "survey" visits to provide assistance to those who opt to participate.[39] These represent, of course, assets that cannot be utilized for other regulatory purposes, including traditional inspection and enforcement. Because Clean Break was limited to small businesses, it may also represent assets which were expended on relatively insignificant environmental threats. Moreover, more than one-third of the original Clean Break participants are still not in compliance with applicable requirements. While their original compliance schedules have been extended, it is possible that IEPA will ultimately need to initiate enforcement actions against some, even many, of these remaining facilities. These would then represent additional resources consumed by Clean Break beyond the energies expended to establish and implement the program. Even with carefully controlled studies, which do not presently exist, it may be impossible to gauge whether small-business programs like Clean Break realize a greater compliance return on resource investments.

Clean Break also presents its own distinct capture problems. Unlike some of the ELP projects, however, this capture potential does not result from a sense of affiliation based on an unusual closeness

[39] Illinois and other states experimenting with innovative measures recognize, much as do the sponsors of the EPA ELP, that these pilot efforts may not themselves produce resource savings. Careful examination of the results of the pilot efforts is expected to lead ultimately to efficient permanent implementation which will maximize agency resources in the long run.

with a specific facility. Clean Break, instead, threatens a perhaps unhealthy affiliation with the idea of the program itself. It is important to recall that Clean Break had as a key goal the improvement of trust and relations between regulator and regulatee. Indeed, Clean Break was not so much a new substantive program as an old one in fresh packaging, designed to convince industry that the IEPA was not the enforcement ogre it was thought to be.[40] IEPA officials candidly explained that improving agency credibility was an important element of the program.

Unfortunately, Clean Break suffers from the same vulnerability to capture as every other amnesty program: it reserves enforcement authority for certain circumstances about whose existence reasonable people could (and may be forced to) disagree. Violations can easily be imagined that fall into one or more of these gray areas. Does a condition really pose a substantial and imminent endangerment? Is a violation intentional, and therefore a felony? Even whether a condition was previously "known" to the IEPA is not always clear, given the mass of data which may be in the possession of the agency but not yet digested or analyzed.

Making enforcement decisions in the face of such uncertainty is not an unfamiliar task for regulatory agencies. Clean Break makes these choices materially different, however, because the decision in an individual case involving a participating facility will resonate not only in that case but also across the entire amnesty program. Newly found industry "trust," whether based validly or not upon a belief that a facility faces no enforcement threat once it elects to participate in the program, will be put very much at risk by every close enforcement call. For any agency with a great investment in the continuing success of an amnesty program, this additional ramification could easily influence the decision whether to pursue enforcement, even in an appropriate case.

IEPA officials agreed that this was a theoretical possibility, but believed that they had sufficiently clear internal guidelines to decide individual cases correctly. They also did not believe that any such issues had arisen during the finite duration of Clean Break. This is an issue which regulators may wish to examine when they consider compliance assistance programs which include these elements.

3.3 Arizona

Arizona has initiated a number of different programs to encourage compliance with environmental obligations. Several of these efforts have as a common characteristic the provision of various kinds of technical assistance and knowledge from sources clearly separated from the regular enforcement program. Arizona also seems to have given some thought to developing a coherent synthesis of traditional and topical methods.

Although it agrees that it has not yet decided what the precise blend should be, the Arizona Department of Environmental Quality (DEQ) feels strongly that a vigorous enforcement posture needs to remain a significant—not residuary—component of the state's overall regulatory mix. The agency fully accepts and implements the principle that it should encourage, especially through technical assistance programs, compliance which occurs without the need for enforcement actions. DEQ officials perceived that they were "taking the high road" in believing that such activities will increase compliance levels. At the same time, the agency also continues to believe that the best inducement

[40] The aggressive outreach component serves to differentiate Clean Break from the traditional enforcement program to some degree. Once inspectors reached a facility, however, their enforcement response would tend to be the same regardless of the provenance of their visit. Of course, participants in Clean Break were offered the chance to sign an agreement which formalized the same obligations and benefits non-participants would ordinarily face.

for such industry response is the knowledge that investigation, detection and enforcement await those who fail to comply.

In DEQ's view, a facility's genuine desire to comply with applicable requirements is fanned by the genuine and reasonable apprehension that enforcement remains a real possibility. This anxiety creates a kind of leverage which lifts facilities into a state of being which is more accepting of technical assistance and other compliance assurance efforts. To create this receptive climate, DEQ remains prepared to take enforcement action in appropriate instances. At the same time, DEQ officials also feel quite strongly that they need to utilize their new compliance approaches to develop greater trust between government and industry. This illustrates the continuing tension which regulators and regulatees may feel between the two philosophies. Unfortunately, this tension may mean that strategies intended in theory by the government to be compatible may be perceived as conflicting by facilities and their operators. This potential for tension is evident in other programs of this nature.

DEQ also hopes to elicit information from both its traditional enforcement activities and from its compliance assurance measures to use to develop and refine targeting strategies. In some instances, it believes that it will find that enhanced assurance measures will be indicated for a particular sector. In other instances, DEQ believes that the data it generates will support upgraded enforcement activity in a sector. For example, DEQ officials have concluded from their experience that a visible enforcement presence was particularly appropriate when a new sector was brought under regulatory oversight or an administrative initiative was launched to implement requirements for the first time in a new geographical area.

DEQ is quite prepared to accept that the proportion of its effort devoted to "consulting" rather than to "enforcing" will grow. It is confident that there is a natural ceiling on that expansion, however, formed by those sizes and kinds of businesses which will never move toward compliance except in response to enforcement.

3.3.1 Technical Assistance/Education Outreach Unit

The central DEQ program for purposes of this study is administered through the Technical Assistance/Education Outreach Unit (TAEOU). The TAEOU effort began initially as a response to statutory requirements that the state provide technical assistance to private pollution prevention efforts. This obligation was later augmented in 1990 by Clean Air Act requirements to offer a small business assistance program. DEQ saw this latter development as a basis to form a combined outreach unit which would be available to all businesses.

TAEOU, nonetheless, still sees hazardous waste pollution prevention as its primary mission. To this end, it does facility targeting based on a number of factors, including analysis of Toxics Release Inventory information and evaluation of potential impacts of new regulations on business sectors. Selected "targets" are notified of the availability of technical assistance from the Unit. Businesses that respond to the outreach, as well as those who initiate contact with the Unit on their own, are sent a form letter regarding the program. Telephone callers may preserve their anonymity and receive advice during the conversation. DEQ reports that most callers reveal their identity.

The form letter, which is actually a letter-agreement, describes the state's willingness to provide on-site technical assistance, at no cost, if the recipient desires. After the visit is completed, the state will provide a report identifying pollution prevention opportunities. The letter expressly provides that the state does not warrant the efficacy or cost of its recommendations, and that it is not liable for damages resulting from implementation of its suggestions. For its part, the facility agrees by signing

the letter to indemnify DEQ and its agents for liability arising out of the site visit and provision of the report.

Most unsolicited calls to the TAEOU have been to request compliance assistance, not pollution prevention information. DEQ has elected to respond to these inquiries and provide information. It will also conduct site visits and make recommendations if requested. TAEOU staff will consult with DEQ inspectors to obtain specialized knowledge or information where needed, without disclosing the identity of the facility in question. After the visit, the TAEOU staff will provide oral and written recommendations about compliance problems. In many instances, they will also conduct follow-up visits to the site. By formal policy, the report of the on-site visit is available to the public, except for any portion which the facility can demonstrate contains proprietary or confidential business information.

DEQ enforcement staff seem to have grown more comfortable with this relationship, but there is some indication that they were initially concerned about state representatives outside their direct control providing recommendations about regulatory requirements to facilities. DEQ officials said that they did not now have a serious concern that participating facilities would be able to defend against enforcement actions with a claim of officially induced error because the letter-agreement contained disclaimers which purported to preserve the agency's wide enforcement authority. In addition, increased cooperative efforts within the agency have added to their comfort about the functions and practices of the separate unit.

DEQ and the TAEOU have decided to approach the tension between technical assistance and enforcement response by doing more than simply assigning new inspectors to make assistance visits. The state employees who conduct the on-site assessments are not members of the traditional inspection and enforcement staffs. TAEOU staff are employed instead by a special Office of Customer Service which is completely segregated from the enforcement organization. This separation is designed to improve business confidence that the activities of the program are assistance, not enforcement, based.

Even though the form letter used to describe the program is in fact styled as an agreement, neither the letter not any other document obligates the participating facility to make any correction of violations. In fact, the letter formally states that the facility is "under no obligation under this agreement" to implement any of the recommendations provided by the TAEOU. While TAEOU staff, as previously noted, sometimes make follow-up visits to sites, they still do not seek any commitment from the facilities to comply.[41]

DEQ has taken great pains to signal the distinction between technical assistance and enforcement. To confirm this message for both its own staff and the regulated community, DEQ has gone so far as to issue a formal policy "On The Relationship Between On-Site Technical Assistance And Compliance and Enforcement Activities." This policy presents the basic proposition that the energies of technical assistance staff making site visits are focused on prevention (and, by implication, compliance) opportunities. Recognizing the possibility that violations may be detected, the policy declares that the technical assistance staff are not authorized to take any enforcement action while providing assistance. Although the TAEOU staff will identify these violations to the facility operator, their existence will not be communicated to other regulatory staff. The policy reserves the right to terminate

[41] Technical assistance programs of this type raise an interesting question of potential government liability. The prevailing American rule is that neither the state nor state officials face civil or criminal liability for simple failure to take an enforcement action to abate a violation. As previously noted, many states have offered non-enforcement technical assistance programs for years without fear of civil liability if violations went uncorrected. This tradition may very well continue to insulate parties even in the face of more public, aggressive technical assistance efforts.

site visits and take appropriate action upon discovery of imminent and substantial endangerment situations. As in most other assistance efforts, TAEOU will not accept a site into the program if it is already the subject of an existing enforcement investigation or action.

These relatively business-friendly elements are balanced by the absence of any formal enforcement amnesty component as a corollary of the TAEOU program. DEQ believes that its commitment to protecting the confidentiality of its technical assistance outreach efforts demands that there be virtually no crosswalk to regular inspection and enforcement activity. The only exception, provided expressly in the written enforcement policy, is that technical assistance personnel will immediately bring situations threatening human health or the environment to the attention of the DEQ enforcement staff. The refusal to create a programmatic connection any broader than this means that there is no exemption from enforcement activities for participating facilities. Facilities remain at risk for enforcement by the regular program for conditions which they fail to correct.

The form letter explains that the provision of on-site assistance does not relieve the facility of the responsibility to comply with all requirements. Moreover, neither the action of the TAEOU nor of the facility "affect[s] the authority of other programs within the Department to conduct independent inspections or investigate and undertake compliance and enforcement actions." While DEQ believes that affirmative participation in the TAEOU program should be a material factor in determining the propriety or magnitude of an enforcement action, it does not allow participation to bar enforcement from the outset.

DEQ has only performed about fifteen or so site visits to provide technical assistance in the approximately two years of the program's existence. The lack of enforcement amnesty may be a factor holding back widespread acceptance of the compliance assurance opportunities. State officials in Arizona and elsewhere attribute this reticence to continuing suspicion by facilities of the government's motivation, and a fear that participation will increase the likelihood of enforcement. As the TAEOU program loses more of its pollution prevention origins and moves to a formal compliance assistance orientation, DEQ anticipates adopting the audit amnesty approach utilized by the US EPA. Officials hope that this promise of no penalties for audit-detected violations (except to rectify significant economic benefit) will overcome a problem that is part perception, and will thereby encourage more wide-spread participation.

Analysis

The most significant question which might be raised about the wisdom of the TAEOU program is *not* whether it risks potential negative legal consequences for future enforcement actions. As it turns out, the better question is whether its disciplined approach of completely separating assistance from enforcement unwittingly brings a serious risk of public backlash.

As a program providing direct recommendations about compliance requirements, TAEOU does increase the chance of officially induced error. This occurs as a matter of fact whenever the government moves out of the role of setting standards and into the role of consulting on how to meet those standards. The relevant concern is not whether this increased risk occurs, but whether it increases so substantially as to outweigh the possible benefits of the program. The strong disclamatory language of the letter-agreements which participants are asked to sign appears, however, to be a reasonable bulwark against a successful assertion of the legal defense. In this light, the Arizona DEQ program does not seem to run an unacceptable risk of compromising future enforcement.

The TAEOU program is unusual, however, in that it does not incorporate any provisions for facilities to "voluntarily" commit to corrective action after violations are detected. While facilities

are encouraged to correct violations and continue to face enforcement action if they do not, they must elect to transfer themselves to the compliance and enforcement program to pursue a formal corrective agreement. (Violations which pose a threat to human health or the environment will be brought to the attention of the Arizona DEQ enforcement staff pursuant to the written enforcement policy.) No doubt incorrectly, this can easily be interpreted as sending a signal that the agency is less interested not merely in enforcement responses but compliant behavior as well. Given the access of the public to TAEOU assessment results, it is easy to imagine the outcry which would follow a major pollution incident or regulatory violation which occurred at a facility where problems were discovered during a visit in the recent past by TAEOU staff. The interaction would bear record of neither enforcement action nor compliance agreement. In such an event, the public could be most unforgiving. TAEOU's well-intentioned desire to completely insulate its technical assistance effort from its compliance and enforcement activities might seem a poor justification for so weak a response to a discovered violation. This view would be confirmed for many by the fact that the facility failed to learn the appropriate lesson.

This fear may turn out to be unrealistic. It would be unfortunate, however, if negative public reaction obscured the positive aspects of the TAEOU program. At the same time, a similar question can be raised about many other technical assistance programs which states have operated for years largely independent of their ongoing enforcement activities.

3.3.2 Circuit riders

The Arizona drinking water program has developed its own variation on the technical assistance theme. DEQ found that its enforcement policy encouraged inspectors and field engineers to issue "Notices of Violation" immediately, even to small water supply systems which were genuinely struggling to cope with rapidly changing requirements. These were the facilities least able to afford consultants to support their efforts. As a result, small systems had come to perceive the agency solely as a source of intimidation, not inspiration. They were afraid to ask for help in resolving compliance problems.

The drinking water program believed that this problem was so entrenched that no member of the DEQ staff would command enough trust from the small system operators. Not even organizational segregation of assistance and enforcement elements, as in the TAEOU effort, was thought to be sufficient. The drinking water program instead opted to reach entirely outside the agency to find representatives to offer technical assistance. In an effort to engage the facility operators, it created the circuit rider program to provide "a perceived non-threatening third party."

The circuit rider is intended to be a roving figure with extensive experience in small water system management who is retained under contract by DEQ to provide technical assistance. In operation, DEQ identifies systems which it believes will particularly benefit from this service based upon type, population, or prior difficulties. It will also dispatch the circuit rider in response to direct requests. The rider carries a letter of introduction which explains that he will not conduct sanitary surveys or compliance inspections. Instead, the rider will make technical assistance site visits during which he will be available to review all aspects of water system management. At the conclusion of the visit, the circuit rider makes suggestions regarding methods to improve operation or compliance, and documents his advice in a written document given to the facility operator.

The circuit rider mimics the TAEOU enforcement approach. Circuit riders do not share the results of their efforts with the regular agency staff. Indeed, agency compliance staff will not seek information from a circuit rider even to support an independent, subsequent enforcement investigation. Notwithstanding this internal agency embargo on use of circuit rider data, the information is

still considered open to the public. Circuit riders do not have any authority to enter into any form of compliance agreement.

DEQ and the drinking water program view the circuit rider initiative as a successful effort. Indeed, it attracted 26 requests for technical assistance in the first three months that it was offered, more than the total number of requests for compliance assistance from the TAEOU in almost two years. Beyond these simple numbers, DEQ officials report that they have received only favorable responses to the program and its value. These officials attribute the successful reception of the circuit rider program to the independent nature of the assistance that it provides.

Analysis

The circuit rider program is a hybrid, with elements of both government technical assistance and third-party auditing measures. Like other government outreach efforts, the scope of assessment activity is quite limited and, by definition, episodic. The circuit rider review is not a comprehensive or representative evaluation of performance through a systematic assessment procedure but a snapshot taken at the point that the system operator decides to request a site visit. And the limited funding available under the circuit rider's contract insures that each visit will be less intense than a private audit.

The circumscribed nature of the rider review therefore carries with it a risk of incompleteness. As with any government-sponsored outreach program, this potential for incompleteness engenders a risk of unrealized expectations. Facilities which correct a list of problems disclosed by the circuit rider will be understandably disturbed if the enforcement program inspector soon after identifies additional violations which need to be addressed. Hard-won confidence can easily be lost in such situations.

Beyond expectations, any government advice program also carries the risk of reliance on incorrect or incomplete information and the resulting defense of officially induced error. It is quite possible that the circuit rider program enlarges this risk. Since they are contractors, not employees, the riders are outside the exercise of direct control by DEQ. This lack of direct oversight increases the chance that incorrect information will be provided. In such an event, it is not very likely that small system operators will feel estopped from asserting officially induced error because the rider's formal status as contractor makes him somehow less than "official." Operators could emphasize his apparently official position and his endorsement from the DEQ in the formal letter of introduction. Although DEQ has attempted to minimize the risk of this potential by language in the circuit rider contract carefully circumscribing the scope and authority of the position, a reliance argument by a small operator taking advantage of this special program to aid in compliance may be very persuasive.

Of course, it is this distancing of the circuit rider from government affiliation, however effective it may turn out to be in a controversy, which gives the program its similarity to external audits. An outside party, without connection or bias, provides an impartial assessment of the facility and offers recommendations for improvement. There is no risk of capture because the reviewer is not associated with the arm of government responsible for enforcement decisions. The facility is at least nominally free to act on these recommendations or ignore them. Because government staff are not directly involved in providing the recommendations, enforcement for failure to respond promptly is not an immediate threat. This should encourage the use of the circuit rider mechanism which, in

turn should increase compliance levels. Finally, the absence of an amnesty component means that the government has sacrificed, at least officially, none of its enforcement discretion.[42]

3.4 Minnesota

Compliance assurance mechanisms and instruments have gained not only acceptance but a large measure of formal legitimacy in Minnesota. It was one of the first states to enact legislation establishing protection from enforcement penalties for violations voluntarily disclosed after an audit and timely corrected.[43] It has extensive educational outreach activities underway. Among other things, it is the only state that has been designated by the US EPA to carry out environmental exchanges like Project XL.

In meetings, Minnesota officials advanced a theoretical rationale for their consideration of this broad array of compliance assurance measures. In part, they strongly accept the normative view of the environmental climate. They believe that society's basic cultural standards have evolved dramatically over the last twenty years, and that business leadership has evolved in a parallel way. This now allows government to place less reliance on having to force changes in behavior from outside an organization. Minnesota feels that it can encourage change from inside organizations, by helping leaders understand that conscientious environmental performance can translate into risk reduction, enhanced efficiency and, ultimately, savings and increased profits. More importantly, they can encourage such performance by helping business leaders live up to their own self-image as concerned citizens who value the environment. Audits, environmental compliance assurance measures, and the like help reveal conditions to business leaders that they themselves will find intolerable, and that they will act to correct and prevent.

Further, Minnesota does not view the collection of these various measures as a purely private initiative to which it should react with neutrality or passivity. The state affirmatively endorses and promotes instruments which promote compliance without enforcement because it believes that their widespread use will produce important benefits to the state. Minnesota, like many other states, can only inspect a small portion of all the entities subject to regulation. The state believes that companies which perform audits will better understand what it takes to be in compliance. They will consequently require less enforcement resources, and those scarce agency assets can be focused on more deserving targets.

3.4.1 Environmental Improvement Pilot Program/Audit Privilege Policy

Minnesota's experience in developing an audit policy is illustrative of the struggle by many states, and the federal government, to address this issue. Where some states have only initiated pilot programs or only developed policies, however, Minnesota has gone on to provide full statutory protection for audit activities. The law establishes a four year pilot period.

The Minnesota Pollution Control Agency (PCA) began examining the voluntary audit question in 1990. This consideration was prompted by an overture from the Printing Industry of Minnesota (PIM), which asked PCA to provide some protection from enforcement for its members. PIM represented that printers were very interested in utilizing audits, to be conducted by PIM itself, to

[42] Concern about not meeting expectations can, as previously discussed, act to chill the exercise of enforcement authority that has on paper been preserved. And, of course, the circuit rider program suffers from the same risk of public rejection after a serious incident due to its lack of any compliance agreement component.

[43] Minnesota prefers to characterize its program as penalty suspension (upon disclosure) and waiver (upon correction) rather than audit amnesty.

identify environmental problems that needed correction, but that they were discouraged from doing so by the fear that such actions would only expose them to a greater risk of governmental response.

Lengthy negotiations continually foundered on the issue of formal amnesty for violations which were disclosed, even if corrected. PCA ultimately agreed only that it would give good faith consideration to self-disclosure and self-correction efforts by printers in its enforcement decisions. Such action might persuade PCA to forego enforcement, or might reduce the scope of a penalty, but such decisions would remain for PCA to decide based on the particulars of each case. Soon after the PIM discussions concluded with an agreement on that basis, the state Chamber of Commerce proposed that PCA expand the policy to all businesses in the state. Again, the business group pressed for definitive amnesty from enforcement by the agency, not simply express identification of auditing activities as good faith factors in evaluating enforcement responses.

After this effort failed, PCA adopted a formal, statewide policy on auditing in January of 1995 which largely tracked the earlier agreement with PIM. By then, however, the audit question had reached a level of national attention. Some states, business groups and others pressed forward broadly with efforts to create statutory privileges for information discovered by audits. These efforts intensified in Minnesota.

Thus, later in the same year, the Minnesota legislature enacted the Environmental Improvement Pilot Program (EIPP). Notwithstanding its somewhat generic name, the law created a modified evidentiary audit privilege and a sanctuary from enforcement penalties for certain detected violations which are corrected satisfactorily.[44] The goal of the statute in creating this protection is to encourage prompt reporting and rapid correction of violations, especially those that might otherwise not come to the attention of officials, and to promote pollution prevention efforts. The act establishes a four-year period in which to pilot its concepts, and requires a report back to the legislature in 1999.[45]

Program Description

As a statutory creation, the Minnesota program contains a more detailed explication of its elements than is usually presented in policy statements. Major facilities are eligible for protection under EIPP if they conduct an environmental audit and submit a report, prepare a pollution prevention plan, and submit progress reports on their pollution prevention activities. Minor facilities qualify by auditing and reporting, and meet reduced pollution prevention requirements. Facilities that report violations must correct them in 90 days or according to a timetable acceptable to the PCA.

EIPP addresses the information privilege issue in two different ways. To trigger the benefits of the statutory amnesty program, an audit "report," which is a summary of the results but not the full audit itself, must be submitted promptly to the PCA (and, in some instances, local governments). The report must include a description of environmental violations detected by the audit. Requiring submission of this report, but not the entire audit results, finesses the difficult question of how to

[44] The act exempts from protection criminal prosecutions, certain kinds of repeat violations, and violations causing serious harm or representing imminent threats. See: M.S.A. §§114C.20 *et seq.*

[45] Although it is rarely discussed with much clarity, the audit debate actually comprises two related but separate core issues. The first deals with the question of access to information generated by an audit. Usually subsumed by an extension of the legal doctrine of privilege, this issue goes to the question of whether the information obtained in an audit can be held close to the facility, and protected from release to the government or the public. In contrast to this informational/evidentiary issue, the second concern is a substantive one: can a person be secure from enforcement for a violation which he detects through an audit and promptly corrects, even where the government knows of the violation? The Minnesota statute addresses both of these questions.

accord some confidentiality to the audit process but insure that government at least learns of violations in order to confirm their correction.

The statute goes on to create what might be thought of as a kind of privilege for the full audit results themselves, but a privilege with certain significant qualifications. As to the state, the audit results are not in fact defined as privileged. The state is prohibited, however, from requesting, inspecting or seizing the results unless PCA believes that there is probable cause to believe that a serious crime has been committed. As to third parties ("all persons other than the state"), the audit results are formally recognized as privileged so long as the regulated entity is in compliance with its program obligations, i.e., has submitted its summary report, met applicable pollution prevention requirements, and corrected the violations.[46]

Such actions by the facility are, plainly enough, the express purposes of the bill. The law makes a clear policy judgment that prompt correction is the most significant objective of the existing regulatory scheme. The bill implicitly recognizes that reporting and correction by a facility usually act to mitigate the imposition of penalties in any event.

The second significant element of an audit amnesty program is, obviously enough, the benefit provided to the facility for its act of introspection. The Minnesota statute provides that the state may not impose administrative, civil or criminal penalties against a facility for violations which are disclosed in the required report and corrected within the 90-day period or other acceptable schedule.[47] Excepted from this protection are criminal actions for knowing violations, the same violation less than one year after final resolution of an enforcement action for a prior occurrence, and violations and situations causing serious harm to public health or the environment. Recognizing that even incomplete internal assessment efforts may contribute to compliance levels, the statute further requires the state to take a variety of audit-related factors into consideration in evaluating its enforcement response in those instances where the amnesty protection is not available. Finally, a facility may display for a two year period a "green star" emblem if it has corrected all violations identified in its audit and at least one year has elapsed since final resolution of any prior enforcement actions.

Minnesota officials hope that EIPP will start a process which will encourage facilities who genuinely wish to comply to take steps to assure such performance. Incentives for self-auditing are consistent with the philosophical desire to help people first to understand the rules with which they must comply. Nonetheless, early response to the new program was lukewarm. Fewer than ten audit reports were filed in the first six months of the program. With familiarity, the pace of participation has begun to increase; more than twenty additional reports were submitted in the last several months.

Analysis

The EIPP does not appear to create any significant risk of officially induced error. The environmental agency does not participate in the auditing function or provide compliance recommendations. The clear presumption is that in most instances facilities will promptly carry out corrective action without government involvement or approval, and simply provide notification thereafter. Rather than enlarging government's role to where the agency might inadvertently mislead a facility about obligations and corrections, this approach may shrink government's role to mere acceptance of notice that corrections have been made.

[46] The law does not alter private party substantive remedies, such as tort actions or citizen suits. Few, if any, compliance assurance measures purport to directly limit existing private remedies.

[47] The statute in fact prohibits the specified *penalties*, not all enforcement actions themselves. It is unclear whether it intends to bar, for example, administrative or civil actions which have as their sole request equitable relief to enjoin wrongful conduct or bring about proper conduct. These are surely forms of enforcement but they contain no penalties.

Minnesota retains, of course, the ability to confirm that corrective action has been completed. The state expects to exercise the authority in appropriate cases. Moreover, Minnesota continues to recognize that this pilot effort must unfold in the context of a comprehensive compliance program that includes traditional enforcement and deterrence.

The previous general observations about the efficacy of audit-amnesty programs, especially in light of their exclusion of the deterrence dynamic, are not repeated in full in the interest of brevity. They are of at least equal application here. The EIPP also serves as a good examplar for a variety of other issues which can arise in statutes creating information privileges or enforcement protection. These issues are worth examining in the context of a pilot program designed to explore such concerns. The existence of such issues does not compel any particular conclusion about where to strike the balance between encouraging voluntarism through such programs and preserving maximum enforcement discretion.

For example, the Minnesota approach to the repeated violation issue is very narrow. Amnesty is unavailable only where the same violation was the subject of prior formal enforcement action. This means that repeat violations where no prior instance has triggered an enforcement response as well as each new kind of violation, regardless of the number of prior different violations actually subjected to enforcement, qualify for amnesty treatment.

PCA officials also recognize that their belief in the wisdom of and commitment to the success of the audit program creates some risk of capture. For a time they equated enforcement decisions which might influence broader audit program participation with most other difficult enforcement decisions. They now appear to agree that an enforcement action against a participating facility might in fact discourage others from participating in the voluntary audit program. This is a unique issue, not raised by traditional enforcement decisions.

A more troubling aspect of these programs concerns several issues related to "openness:" accountability, transparency, and public participation and access. Other than where narrow exceptions may be applicable, the EIPP seems to establish a regime in which facilities are empowered to shield most critical information about violations. This restraint on the movement of information places a premium on the trustworthiness of facilities and their fidelity to the principles of environmental auditing.

For example, the prescribed process makes audit-based amnesty available upon submission not of the full audit results but only a brief summary. Further, PCA is denied the ability to secure the full audit to confirm its existence and scope. This places the agency in the undesirable position of having to trust—without any means to verify—that the information in the report is the result of systematic procedures to periodically assess environmental performance.

It is certainly possible that disclosed violations were discovered entirely by accident, and are being purified by inclusion in an audit report. Moreover, it is also possible that a full audit reveals the existence of other violations not disclosed in the submitted report, or that the disclosed violations have endured for a long period of time. This information is denied to PCA. Careful evaluation of information from the pilot period will provide a better sense of whether these are significant risks.

It is difficult to gauge how the inability to secure such information may affect a given state which may have regularly utilized those sources of data previously. Certainly information of this sort could have a direct bearing on how an agency carries out its mission. Evaluation of corrective plans is handicapped by inaccessibility to data which might suggest different remedial responses to be far more appropriate. Even basic decisions about the direction of new policies or regulations would ordi-

narily be influenced by access to the kind of information protected from disclosure by EIPP. Lastly, removal of such information from the process tends to make an agency less accountable for its own actions. Decisions are made in a context where, by design, the agency lacks access to all the information it needs to act wisely. This may encourage decision-makers to take their responsibilities less seriously, knowing that it is as much chance as judgment that their decisions are prudent because they lack a firm grasp of the details. In the same way, enforcement or regulatory decisions which turn out to be unwise can be explained or excused due to the insufficiency of information at the time of decision.

The contrary argument in support of the audit and correction approach is founded on a simple premise: the information to which access is now lost is very rarely sought or obtained by government anyway, and in exchange for surrendering the sleeves from its vest the public secures voluntary commitment by facilities to correct problems. This argument assigns a higher value to the pragmatic benefit of obtaining correction than to the theoretical—but rarely exercised—ability to seek information. For example, neither the federal government nor many states routinely seek audit information even though such reports may be available. Few agencies have the time or resources to conduct a thorough investigation of every incident on non-compliance which is promptly identified and corrected by a facility. Audit protection programs, like the EIPP, can be seen as simply formalizing this reality.

A similar set of potential problems afflicts third-party interests under EIPP. While the statutory summary report is available, interested citizens and others are denied access to comprehensive critical information about activities in their neighborhoods. Making the full audit results privileged from third parties means that citizens suffering from illnesses will be unable to discover whether there may be a causal connection to conditions at a local facility. Their ability to learn of a facility's past conduct in order to more meaningfully participate in permit modification or renewal actions will also be thwarted by their ignorance. In short, while EIPP appears to regard government as having only a limited need to secure these kinds of information, it regards third parties as almost unnecessary to administration of the regulatory system.

Finally, the Minnesota statute prompts again the question of whether the audit amnesty subject raises so many difficult issues which require resolution that any formal attempt to set rules only creates more problems than it solves. EIPP can easily be classified as yet another statute which seems likely to guarantee full employment for lawyers as they plumb its ambiguities. This ultimately means far less certainty than the statute suggests it brings.

The basic issue of information confidentiality illustrates this problem. The state may not seek or seize audit results unless it has probable cause regarding a serious crime. Since this protection is clearly not a privilege attaching to the information itself but a limitation on how the state might obtain it, many questions suggest themselves. The statute does not exclude all mechanisms by which the government may obtain the audit results. For example, can the government accept and make use of audit results provided, without government encouragement, by a disgruntled employee? Or can the government make use of such results if a facility employee provides them unwittingly? Numerous acquisition scenarios can be imagined, and each may require judicial resolution.

Even the exception to the government's ability to obtain directly the full audit record is less narrow than might be thought. The test for access is probable cause of a serious crime. Putting aside the question of how to define "seriousness," and accepting that the statute implicitly includes a requirement of a nexus between the alleged crime and the audit results, the restriction on the government's access may still be virtually meaningless. Probable cause of a crime is a relatively low standard of proof in the law. In fact, it is the standard the government must automatically meet

whenever it applies for a search warrant to seize evidence. On its face, then, the EIPP appears to say that the government may not seize audit results (seizure implying the use of a search warrant) except when it has enough information to obtain a warrant to seize those results.[48] This seems both tautological and of little comfort to the person expecting broader protection.

Related questions spin off this confidentiality subject. For example, the standards for the government or third parties to acquire audit information are quite different. Given the possible ease of satisfying its probable cause standard, the government may frequently acquire audit results. But the standard for third parties to overcome the statutory privilege is entirely different. Thus, it is again easy to imagine the government being in the possession of audit information which third parties cannot acquire independently. Is the government able to make this information available to third parties in the way it makes other information available? If the government cannot, then the statute could create a damaging breach between government and its citizens which would only further poison the public view of government regulatory efforts.

Interestingly, the "serious crime" standard in the information access section of the statute is different than the criteria for denying enforcement amnesty for certain criminal conduct. The exception to the provision of amnesty applies to any "knowing violation" of Minnesota's criminal laws. Since this does not appear to be the same as any "serious crime," it suggests the anomalous prospect of having audit results but not being able to prosecute, or being able to prosecute but not able to secure the underlying audit results.

These risks, issues and ambiguities may in fact represent worst-case scenarios which will rarely arise. No doubt each can ultimately be resolved through administrative or judicial interpretation. Their number and complexity, however, suggest that the EIPP may struggle to bring the immediate certainty to the audit-amnesty question which its defenders claim is necessary. These and many other issues will probably be examined at the end of the pilot period. Indeed, this evaluative opportunity is one of the prime justifications for conducting a pilot program. Still, a strong argument can be made that these difficulties are inherent, and perhaps insoluble, in any effort which attempts to elevate factors for evaluating enforcement responses into threshold discriminators for such responses.

It is important to recognize that every audit program must balance competing public policy process goals of openness and preservation of enforcement discretion with the substantive public policy goal of encouraging prompt correction of violations. Proponents of these programs will strongly argue that there is little need to worry about "theoretical" enforcement powers that are nominally sacrificed if the consequence is greater facility compliance. They might also argue that forbearance in the instance of self-disclosure and correction has always been in the mainstream of actual enforcement practice, albeit in a less clearly prescribed manner. In a sense, then, these efforts compellingly illuminate the enforcement-as-means versus compliance-as-ends dynamic which has propelled the search for innovative regulatory approaches.

3.4.2 Educational Outreach and "Eco-sense"

The PCA and the Minnesota Attorney General's Office have collaborated on a number of educational initiatives to bring compliance-related information to a broad audience. These initiatives

[48] Parenthetically, the statute does not appear to require that a criminal prosecution be brought, only that a criminal investigative tool be used. Such tools can properly be employed in investigations which eventually result in criminal declination and relegation of the matter back to the civil agency. This suggests that audit results can be used in simple administrative actions, notwithstanding the more secure protection the statute appears to offer.

frequently rely on implementation assistance and other efforts by sympathetic non-governmental organizations (NGOs).

The Attorney General's Office has been working with a local NGO, the Minnesota Environmental Initiative, which attempts to find areas of consensus between industry, environmental groups and government agencies on particularly contentious or significant issues. The group has recently created an educational curriculum, The Environmental Management Systems Training Program, to present the environmental management systems approach to businesses. The course is designed for managers and supervisors of large businesses, and is administered in ten monthly three-hour sessions. The curriculum introduces basic environmental management system concepts such as employee training, issuance of environmental policy, assignment of clear responsibility for environmental regulation, periodic performance audits, establishment of environmental objectives, and other related issues. The course is intended to raise company sensitivity to environmental compliance issues, with the ancillary goal of reducing the need for traditional inspection and enforcement resources.

Minnesota has also recognized that many small businesses are often unable to understand or implement an entire integrated environmental management system. To date, educational offerings have forced such businesses either to struggle in frustration with courses and materials which are beyond their means or needs, or to remain entirely apart from the movement towards environmental management systems. Minnesota is attacking this problem in collaboration with another NGO, the Minnesota Technical Institute (MTI).

MTI offers numerous courses for small organizations on a variety of traditional business subjects. With the help of the environmental agencies, MTI will begin to incorporate small modules on environmental management systems subjects in its business management presentations. The hope is that a simplified presentation of this material will make it appear far less daunting to small businesses. MTI will also work with other NGOs to expand their educational efforts to include environmental management systems materials.

The Attorney General's Office has also led the effort to develop environmental educational curricula for use in the school systems. The office has worked closely with a non-profit educational organization to create separate teaching guides for primary, middle and high school students. Dubbed the "Eco-sense" series, these educational materials are designed to help students integrate environmental and economic issues into their day-to-day decision-making. Funds to support operation of the program are raised by foundation grants and corporate donations.

Analysis

Of these various undertakings, only the "Eco-sense" program has the potential to raise questions about the role of government or risk potential negative effects on future regulatory activities. The efforts to make educational materials on compliance methodology more generally available to facilities do not appear to involve significant governmental involvement, nor does there appear to be the potential for governmental recommendations or endorsement of some particular course of action for an identified facility. Moreover, administration of the business educational courses is handled by third parties. Thus, it is not likely that government regulators or enforcers will so closely identify with any participants that they will lose the ability to make impartial decisions about their duties. The same nonspecific nature of the material and separation of the government from its presentation makes it equally unlikely that PCA can be legally blocked from taking an enforcement action. It is difficult to imagine a facility arguing successfully that it had merely followed specific advice provided to it by environmental regulators and that any failure in environmental compliance was induced by that advice.

Development of the public school educational curriculum does raise some interesting questions similar to those posed about the Riverbend ELP community outreach activity. The Minnesota Attorney General's Office worked to develop the curriculum with an education non-profit organization which consisted, in part, of business and industry representatives. The educational efforts are funded, in part, by business and industry interests.

This effort clearly epitomizes the new paradigm of government and commerce working together cooperatively rather than addressing environmental problems confrontationally. This may represent a valuable evolution in that relationship. Nonetheless, it is likely that the effort to develop a consensus curriculum may require government compromise not simply on technical issues (or environmental management systems issues) but on the basic societal values which will be taught to students in the schools. While it is not susceptible to easy quantification, there is surely some risk that environmental protection values the agencies are charged to defend will be sacrificed, or diluted, in the name of consensus and attracting continuing contributions to the program. And of course, once this consensus is reached with their participation, the agencies will not easily be able to renounce it. They will also have contributed to an educational process which has inculcated in students the belief that the consensus view is an appropriate way to view society.

This fear may be far too labored. Government and industry already work together to reach environmental consensus on a wide range of issues. The very act of governing can be seen as the process of finding consensus. The question remains, however, whether the action of government in working with the regulated community to develop acceptable curricula for professional educators represents a surrender of moral authority on basic social values. And if it does, does it also portend an eventual shift in the public attitudes that have provided support for enforcement activities which have sustained environmental programs for more than two decades?

3.4.3 Project XL

Program Description

Minnesota is the only state which EPA has allowed to administer XL projects directly at facilities. This generic delegation follows an experiment at a 3M plant in Minnesota in the early 1990s. Following complex negotiations with the company and EPA, the parties reached an agreement allowing the company to make facility modifications without securing the specific prior air quality authorizations which would ordinarily be required. In exchange, the company agreed to restrict air emissions to levels below those it would otherwise be allowed. PCA believes this experiment has been a success, reducing pollution, saving PCA and 3M application processing time, and allowing 3M to bring products to markets more quickly.

XL projects are environmental exchanges, not true compliance assurance measures. They do not encourage compliance with existing requirements as much as they identify opportunities to simplify or eliminate existing requirements in the interest of achieving greater environmental or administrative benefit. As such, they are technically beyond the scope of this report. Nonetheless, Minnesota's prominence in this area supports a brief discussion.

The 3M experiment can aptly be classified as a process-modification, not substance-modification, project. The company was not provided any relief from existing substantive requirements which limited the level or kinds of emissions it was allowed. Facility operations subject to substantive regulatory obligations remained subject to them. The agreement allowed 3M instead to avoid or simplify administrative procedures by which it would ordinarily provide prior notice of its proposed actions and secure agency permission.

The Minnesota legislature enacted only a few months ago a law to formally institute an ongoing XL program and create the necessary legal apparatus to implement the delegation of authority from EPA. This law attempts to preserve a balance between expediting compliance with existing administrative and notice requirements and respecting the rights of members of the community to participate in decisions which may affect them or their neighborhood. A thorough analysis of the new Minnesota statute, the Environmental Regulatory Innovations Act, is outside the scope of this report on practical experiences gained from programs already in existence. Nonetheless, a brief review of the law's significant features is appropriate.

The law makes it public policy in Minnesota to, among other things:

- encourage facility owners to measure the pollution they emit;
- encourage facility owners to implement pollution prevention and source reduction;
- reward facility owners who reduce pollution to levels below those required by applicable law;
- reduce the time and money spent by agencies and facility owners on tasks that do not benefit the environment; and
- increase public participation, encourage consensus, provide technical assistance to make participation meaningful and increase levels of communication and trust between government, regulated parties and the public.

To accomplish these goals, the law authorizes the Minnesota Pollution Control Agency to issue, and study the effect of, permits which require permittees to reduce overall levels of pollution below what is required by applicable law. The permits would also allow greater operational flexibility than current law would otherwise permit. The formal authorizations issued under the law are to be called Minnesota XL permits.

The law establishes a number of minimum criteria for the issuance of a Minnesota XL permit. Recognizing the continuing uncertainty over whether programs which require extensive custom tailoring will actually conserve agency effort, the law requires a finding that the permittee, the pollution control agency and other state and local agencies are likely to expend less time *over the long term* to administer the proposed XL permit. The meaning of this temporal precondition is not otherwise clarified.

Perhaps more importantly, the law contains several provisions relating to key issues of openness and participation. Another minimum criteria is that the relevant stakeholder group has been involved through a decision-making process that seeks consensus in the design of the permit and will have continued involvement in the implementation and evaluation of the permit.[49] A related provision obligates the pollution control agency to insure that reasonable technical assistance is provided to facilitate the stakeholders' participation. The law also requires permittees to make information available to stakeholders in a format that is easily understood.

[49] "Stakeholders" are defined to be citizens in the communities near a project site, facility workers, government representatives, business groups, educational groups, environmental groups, or other Minnesota citizens or public interest groups. The inclusion of the reference to "Minnesota citizens or public interest groups" could serve to limit participation by national groups. A separate provision requires the commissioner to insure that stakeholder groups represent diversity which emphasizes local participation but does not exclude other stakeholders. Reconciliation of these two provisions will occur in future implementation.

Analysis

The greatest risk from this zeal for "efficiency," of course, is to public participation. Notice and procedural requirements were created to allow not just the regulatory agency but interested and affected citizens as well to remain knowledgeable about and participate in decisions regarding nearby facilities. The values of such public participation are too well-known to require elaboration here. Most of these values, however, can be eroded by the elimination of notice procedures. The public may lose some of whatever measure of confidence it had developed in its understanding of the operation and externalities of a plant. Perhaps worse, the regulatory agency will lose the benefits of local participation in decisions about facility modifications. The mere ability to participate tends to increase neighborhood acceptance of the legitimacy of the process and its ultimate result. In addition, local input often provides valuable information bearing on the regulatory decision or appropriate conditions to be added to an approval. It is not uncommon for local participation to lead a facility to willingly alter an element of its approach to address a legitimate local concern about which it had been unaware.[50]

There was never much delusion that these procedural requirements added to the efficiency of the process, either for business or the regulatory agency. Procedural requirements reflect a conscious decision that the loss in efficiency is more than compensated by the gains in public acceptance and quality of decision. XL efforts which eliminate or dramatically reduce these requirements reflect a marked shift in how to strike the balance between efficiency and inclusive decision-making.[51]

The ultimate worth of these new provisions will not be revealed until the statutory scheme is tested through implementation. For example, the encouraging gestures to stakeholder involvement are potentially undermined by the specific public notice provisions. While the stakeholders are ostensibly to be involved in the "design" of the permit, the PCA need only provide pursuant to a separate provision of the law a minimum of 30 days notice for public comment on the proposed issuance of a Minnesota XL permit. It is clear that 30 days notice of a draft permit occurs far too late in the process to afford a meaningful opportunity for dialogue about the basic regulatory design of a permit. The PCA can, of course, resolve this dilemma by the simple expedient of commencing the public process at the point of application for a Minnesota XL permit, much earlier than the minimum requirement for notice of a draft permit.

Another potential conflict arises between the admonition to involve stakeholders in the implementation of a permit and the desire to reduce administrative burdens and gratuitous paperwork by granting operational flexibility. Permits which relieve facilities of current obligations for review prior to operational changes will surely relieve administrative burdens. Keeping affected community members involved in the implementation of such a permit which, by design, seeks to reduce points of interaction with regulators (and, by association, stakeholders who might influence regulators) poses an interesting challenge. It is conceivable, for example, that monitoring and reporting after the fact of a facility change which occurs without prior notice and review can preserve a meaningful role

[50] This discussion presumes that the proposed modification will in fact satisfy the applicable substantive standard. This presumption is not always valid; whether due to innocent error or worse, some modifications result in conditions which produce violations. Prior review by an agency makes this result less likely. Indeed, if facilities could always be presumed to act in a way which lead to compliance with established rules, there would be very little need at all for the prior review provided by permits.

[51] The statute under consideration does require stakeholder participation in the decision-making process leading to the initial XL permit decision. It also requires continuing involvement in implementation, although the content of that requirement is unclear where the very object of an XL permit may be to eliminate future review steps.

for the stakeholders. It is even possible that stakeholders could play a role in conducting inspections after such changes.

The Environmental Regulatory Innovations Act is a dramatic example of the trend towards modifying actual requirements which are perceived to be standing in the way of enhanced environmental protection. It is also an attempt to balance respect for existing values—such as citizen participation and conservation of resources—with new goals. The potential for clear tensions between objectives is obvious. Resolution of those tensions can only occur through careful implementation over the course of the pilot period.

4 Conclusion

The movement to increase compliance by regulated facilities through encouragement rather than enforcement is both entrenched and broad-based. Nonetheless, it is still very much characterized more by trials and experimentation than by certainty. State agencies and the EPA are breaking fresh ground in an attempt to test new ways of achieving compliance and protecting the environment. Virtually every effort is based on a genuine desire to maximize the resources of both business and government.

These initiatives will in many instances displace some portion of the spectrum of enforcement responses which have served regulatory efforts well for many years. At the same time, regulators of every stripe are adamant that traditional enforcement responses must continue to play a significant role in a system of comprehensive compliance activities in the future.

Critical examination of these new compliance assurance measures is intended not to challenge their basic motivations but to question whether their efficacy and implications are well understood, and whether they are wise replacements for traditional tools. Careful selection of those innovations which are most likely to encourage compliance without undermining substantial mechanisms, such as enforcement, public participation, openness, and others, will allow new compliance initiatives to make the most significant contribution to environmental regulatory efforts. To this end, continuing participation by state and federal officials who contributed to the preparation of this paper will allow future dialogue to benefit from the insights of those who may be most familiar with the mechanics and implications of these mechanisms.

These new initiatives and programs will continue to necessitate equally new roles for regulatory staff and accompanying new relationships within agencies and with regulated industries. Few, if any, regulatory programs in the United States are not already attempting to respond to the challenge presented by this shift. This report attempts to raise questions that will continue to be the subject of lively discussion in and among state agencies and the EPA.

This discussion, whether internal or multi-party, must continue as various pilot programs are evaluated, fresh data about compliance levels is collected and analyzed, and policy-makers gain knowledge and confidence about the use of new strategies. This paper did not attempt to inventory the entire wide array of compliance and technical assistance programs in the states. It is likely that much additional valuable information could be gleaned from the experience of these other efforts, many of which have a long existence entirely separate from enforcement and compliance activities. Finally, the several regional environmental coordination associations may make a valuable contribution in aiding agencies to prepare themselves and their employees for the new and demanding roles they must play as compliance comes to rely on an ever expanding variety of tools.

Appendix : List of Interviews

Arizona

Jack Bale, Arizona Department of Environmental Quality
Martin Todd Dorris, Arizona Department of Environmental Quality
Sandra Eberhardt, Arizona Department of Environmental Quality
Karen J. Heidel, Arizona Department of Environmental Quality
Dale H. Ohnmeiss, Arizona Department of Environmental Quality
Russell F. Rhoades, Arizona Department of Environmental Quality
Mark R. Santana, Arizona Department of Environmental Quality
Marian Slavin, Arizona Department of Environmental Quality

Illinois

Peter L. Wise, Illinois Environmental Protection Agency
Todd J. Marvel, Illinois Environmental Protection Agency

Minnesota

Rober Bjork, Minnesota Pollution Control Agency
Edward R. Meyer, Minnesota Pollution Control Agency
Lee Paddock, Office of the Attorney General
Gordon Wegwart, Minnesota Pollution Control Agency

United States Environmental Protection Agency

Tai-ming Chang, Environmental Leadership Program
Brian Riedel, Office of Planning and Policy Analysis