Environmental Audit:
What Your Business Needs To Know To Take Advantage of Immunities and Privileges

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Companies that self-disclose environmental violations discovered during self-audits can be eligible for immunity from environmental fines and penalties. In Ohio, Kentucky, and Indiana, each state has adopted *statutory* protections when environmental violations are self-reported. Each of these states provides protection for the confidentiality of self-audit reports, and depending on the state, immunity from or reduction of civil penalties. These statutory immunities and privileges are similar to those described in USEPA's April, 2000 Incentives for Self-Policing: Discovery, Disclosure, Correction, and Prevention of Violations. 65 Fed. Reg. 19168 (April 11, 2000). Unlike USEPA's Policy, the protections of Ohio, Kentucky and Indiana law have been enacted by their respective General Assemblies and are legally enforceable by the reporting company.

Ohio: Ohio Revised Code Sections 3745.70 -.74 provide protection to those who self-report environmental violations to state regulatory agencies as a result of a self-audit. Ohio's statute provides that the contents of the audit report, as well as communications concerning its preparation, are privileged and confidential. Immunity from civil penalties is provided for self-reports that meet the conditions set forth in the statute. No immunity is conferred for criminal violations or for the economic benefit component of a civil penalty imposed for a violation that resulted in significant economic benefit. Like most self-audit reporting statutes, the self-disclosure must be prompt and voluntary (not required by law), and compliance must be achieved "as quickly as practicable" or according to a schedule imposed by the state. The privileges and immunities do not apply if (i) within the three year period prior to disclosure, the reporting entity engaged in a pattern of environmental noncompliance, (ii) the violations resulted in "serious harm or an imminent and substantial endangerment to human health and the environment," and (iii) the violation is of a specific requirement of an administrative or judicial order. R.C. §3745.72(E). In the event the reporting entity sends the self-disclosure to the wrong agency, or if multiple agencies have jurisdiction, the director of the receiving agency is required to deliver the disclosure to the agency with jurisdiction. R.C. §3745.72(H). These self-audit

statutory protections apply only to environmental audits conducted between 1997 and January 1, 2014. Although the confidentiality privileges are preserved, the statute does not bar damage payments, or create immunity, in connection with harm to persons, property, or the environment. R.C. §3745.72(D). However, third-party tort claimants may not discover the privileged audit report.

Kentucky: Kentucky Revised Statutes §224.01-040 is the statutory privilege and immunity provision protecting environmental self-audits under Kentucky law. Unlike Ohio, Kentucky law specifically requires that the audit report bear the legend "Environmental Audit Report: Privileged Document" in order for the self-audit to qualify for protection. Preconditions similar to those in the Ohio statute must be met in order for the immunity and privilege protections to apply: prompt reporting, voluntary disclosure, and no history of a pattern of noncompliance. The corrective measures must be implemented within 60 days. Criminal violations are not protected. The Taft law firm was successful in procuring a written opinion from a Kentucky Circuit Court holding that the statutory self-audit privilege protected the environmental consultant's report from discovery in private party environmental litigation. The court also held that the attorney-client and work product privileges protected the confidentiality of the environmental consultant's report.

Indiana: Like its two contiguous states above, Indiana provides a statutory privilege protecting the confidentiality of the environmental self-audit report. IC-13-11-2-68 and -69; IC-13-28-4-1, *et seq*. However, unlike Ohio and Kentucky, Indiana's statutory protection provides no immunity from civil penalties. Indiana's conditions to qualify for the privilege are similar to those of Ohio and Kentucky, except that the party claiming the privilege must "promptly initiate and pursue appropriate efforts to achieve compliance with reasonable diligence." IC-13-28-4-2.

The Indiana Department of Environmental Management (IDEM) has published its self-disclosure guidance at www.in.gov/idem/files/npd_mp_004_r2.pdf
IDEM's guidance parrots USEPA's policy on reduction or forgiveness of the gravity-based portion of the civil penalty. In addition, IDEM requires voluntary disclosure within 45 days of

discovery for the self-disclosure policy to apply, and the violation must be corrected within 60 days of discovery (but extensions for completing corrective action may be granted by IDEM).

USEPA's Policy on Self-Disclosure (April, 2000): USEPA's protections are a policy, and are not statutory. Although not a law or regulation, USEPA recognizes the importance of fairly applying the policy to protect self-audit reports and reduce civil penalties in order to create the incentive for companies to self-report. However, USEPA's policy contains flexible language allowing USEPA the discretion to determine how much to forgive of the gravity based portion of a civil penalty. USEPA's Policy requires self-disclosure within 21 days of discovery. The self-disclosure must contain information showing that EPA's nine conditions to coverage apply. Our experience is that EPA initiates follow-up contacts with the reporting company to verify that the qualifying conditions of the Policy have been met.

Because of the layering of federal and state environmental regulation, it is not unusual for self-audit disclosures to be made by companies to USEPA and the applicable state agencies via the same self-disclosure letter in order to assure that all agencies with enforcement authority are notified. This is particularly important for multi-media self-audits conducted of company facilities in different states and USEPA Regions. The self-disclosure privileges and immunities set forth above can provide significant protection from agency enforcement, and convey the message to regulators that the reporting company has a culture intended to improve compliance.

FAQ's Concerning Self-Audits:

1. What is one of the first issues to cover with a client before recommending an environmental self-audit? Self-audits are only a successful part of an environmental compliance program if the client is prepared to spend the money necessary to correct problems discovered during the audit. Therefore, the environmental consultant or attorney should always point out to the client that the benefits of the self-audit immunities and privileges are only available if the client is financially prepared to fix the discovered problems. While it is not possible to define with precision the extent

of corrective measures before the self-audit begins, experienced professionals are able to estimate a range of corrective measure costs likely to result from an audit.

2. Are environmental consultants exposed to client lawsuits if they recommend a self-audit, but are in error in their advice to the client concerning the protections of the self-audit reporting? Probably, if an enforcement action or lawsuit results from the self-reporting. Providing the wrong advice to a client can lead to the client's failure to qualify for the self-audit immunities and privileges. This mistake can make the entire self-audit discoverable and provide a roadmap for regulators to follow in an enforcement proceeding against the client. It is advisable for the client and consultant to seek the counsel of an experienced environmental attorney.

3. Should the client self-report to regulators if only one of several company facilities has been self-audited, and the client has other similar facilities that are not being self-audited? Although this is a case-by-case evaluation, the answer is: "probably not." Clients should expect regulators to inquire about compliance at other company facilities, particularly those with similar operations, if non-compliance is reported for one facility as a result of a self-audit. Self-reporting is usually not advisable unless self-audits are performed on a company-wide basis.

For more information concerning self-audit privileges and immunities, please contact Tom Barnard (tbarnard@taftlaw.com) or Kim Burke (kburke@taftlaw.com), or any member of the Taft Environmental Practice Group.