

[First Reprint]  
SENATE, No. 384

STATE OF NEW JERSEY

PRE-FILED FOR INTRODUCTION IN THE 1996 SESSION

By Senators McNAMARA and MacINNES

1 AN ACT concerning environmental audits and supplementing Title 2A  
2 of the New Jersey Statutes and Title 13 of the Revised Statutes.

3

4 **BE IT ENACTED** by the Senate and General Assembly of the State  
5 of New Jersey:

6

7 1. Sections 1 through 10 of this act shall be known and may be  
8 cited as the "Voluntary Environmental Auditing Promotion Act."

9

10 2. The Legislature finds and declares that it is in the public interest  
11 for businesses in this State that are subject to environmental regulation  
12 to conduct internal reviews of their operations and practices with the  
13 intent of discovering and correcting conditions that may lead to a  
14 violation of environmental laws before such violations occur; that the  
15 primary goal of environmental enforcement policies is to promote  
16 compliance and not to punish the violator; that a legal structure that  
17 promotes self-policing programs can achieve improved compliance  
18 effectively at a low cost to the State and business; and that  
19 environmental audits, when properly conducted and implemented,  
20 result not only in better compliance with environmental laws, but in  
21 the adoption of procedures and policies by businesses that exceed  
22 minimum legal requirements, and that save business money by  
23 lowering costs and reducing potential liabilities.

24 The Legislature therefore determines that it is the public policy of  
25 the State to fashion an overall statutory and regulatory scheme, by the  
26 use of incentives and the elimination of disincentives, to encourage  
27 regulated businesses to voluntarily participate in an environmental self  
28 audit and voluntary corrective action program and that it is  
29 appropriate that a safe harbor from civil and administrative penalties  
30 be established for violations discovered as a result of a voluntary  
31 environmental audit.

**EXPLANATION - Matter enclosed in bold-faced brackets [thus] in the above bill is not enacted and intended to be omitted in the law.**

**Matter underlined thus is new matter.**

**Matter enclosed in superscript numerals has been adopted as follows:**

<sup>1</sup> Senate SEN committee amendments adopted January 18, 1996.

1       3. As used in sections 1 through 10 of P.L. , c. (C. ) (before  
2 the Legislature as this bill):

3       "Department" means the Department of Environmental Protection.

4       <sup>1</sup>["Enforcement action" means any administrative order issued  
5 pursuant to statute or any civil action.]<sup>1</sup>

6       "Enforcement agency" means the State and any of its departments,  
7 offices, bureaus, agencies, or authorities, and any political subdivision  
8 of the State, including local health agencies or authorities, empowered  
9 with the ability to enforce an environmental law in its own name or on  
10 behalf of the State.

11       "Environmental audit" means a voluntary, internal evaluation of one  
12 or more facilities or an activity at one or more facilities regulated  
13 under any federal, State, or local environmental law, or of management  
14 systems related to that facility or activity, that is designed to identify  
15 and prevent noncompliance and to improve compliance with statutory  
16 or regulatory requirements, and that is conducted by the owner or  
17 operator of the facility or facilities, by the owner's or operator's  
18 employees, or by independent contractors. An environmental audit  
19 shall substantially include at least the following elements:

20       (1) A written policy articulating upper management support for an  
21 environmental auditing program, and for compliance with facility  
22 policies, permit requirements and statutes and regulations, as well as  
23 a commitment to follow up on, correct and prevent recurrence of  
24 identified problems;

25       (2) Articulated objectives, scope, frequency, and dedicated  
26 resources;

27       (3) <sup>1</sup>[The auditing function shall be sufficiently free of] Freedom  
28 from<sup>1</sup> interference with inquiry and observation or fear of potential  
29 retribution to ensure objectivity;

30       (4) Explicit written audit procedures; and

31       (5) Specific procedures to promptly prepare candid and appropriate  
32 written reports on audit findings, corrective actions, schedules for  
33 implementation, and for reporting of violations.

34       "Environmental audit report" means a set of documents, each  
35 labeled "Environmental Audit Report" and prepared as part of an  
36 environmental audit, and which shall include a statement setting forth  
37 the scope of the environmental audit, a certified index identifying the  
38 documents in the report, and the calendar dates on which the  
39 environmental audit was initiated and completed. The environmental  
40 audit report may include exhibits, appendices, conclusions, and  
41 recommendations; memoranda and documents analyzing part or all of  
42 the audit report and discussing implementation issues; an audit  
43 implementation plan that addresses correcting past noncompliance,  
44 improving current compliance, and preventing future noncompliance;  
45 documentation associated with the tracking of corrective actions for  
46 <sup>1</sup>[non-compliance]<sup>1</sup> audit findings <sup>1</sup>of noncompliance<sup>1</sup>; and supporting

1 information including field notes and records of observations, findings,  
2 suggestions, conclusions, drafts, memoranda, drawings, photographs,  
3 environmental sampling results, computer-generated or electronically  
4 recorded information, maps, charts, graphs, and surveys, provided,  
5 however, that the supporting information is collected or developed for  
6 the purpose of and in the course of an environmental audit.

7 "Regulated entity" means any person, corporation, company,  
8 partnership, or other business entity, and any governmental entity  
9 including a federal, State, and local government facility, regulated  
10 under the State environmental laws that the department administers.

11 "Voluntary" means not required by statute, regulation, permit,  
12 order, or agreement.

13

14 4. a. An enforcement agency shall not seek to obtain an  
15 environmental audit report except when: (1) the enforcement agency  
16 has reasonable grounds to believe a violation of an environmental law  
17 has been committed; (2) the violation may result in serious harm to  
18 human health or the environment; (3) the enforcement agency made  
19 the determination in <sup>1</sup>[paragraph] condition<sup>1</sup> (1) of this subsection  
20 through means independent of an environmental audit report; (4) a  
21 substantial need exists to obtain the environmental audit report; and  
22 (5) the information sought to be obtained is either not otherwise  
23 available to the enforcement agency or the enforcement agency is  
24 unable to obtain the substantial equivalent of the information by any  
25 means without incurring unreasonable cost or delay. If <sup>1</sup>[the]<sup>1</sup>  
26 conditions <sup>1</sup>[of paragraphs] <sup>1</sup>(1), (2), (3), (4), and (5) of this  
27 subsection are met, the enforcement agency may seek to obtain those  
28 portions of the environmental audit report that are relevant to the  
29 specific violation in the manner provided in this section.

30 b. If <sup>1</sup>[the]<sup>1</sup> conditions <sup>1</sup>[of paragraphs]<sup>1</sup> (1), (2), (3), (4), and (5)  
31 of subsection a. of this section are met, an enforcement agency may  
32 seek to obtain portions of an environmental audit report pursuant to  
33 an investigation through the issuance of an administrative subpoena  
34 signed by the commissioner or through the issuance of an  
35 administrative search warrant issued by a court of competent  
36 jurisdiction.

37 c. If <sup>1</sup>[the]<sup>1</sup> conditions <sup>1</sup>[of paragraphs]<sup>1</sup> (1), (2), (3), (4), and (5)  
38 of subsection a. of this section are met, an enforcement agency may  
39 seek to obtain portions of an environmental audit report pursuant to  
40 an enforcement action through discovery by an enforcement agency in  
41 a civil enforcement action or administrative enforcement action, only  
42 in accordance with law and the rules of procedure and evidence  
43 applicable to the administrative or civil proceeding.

44 d. Those portions of an environmental audit report obtained  
45 pursuant to this section shall be admissible as evidence in a civil  
46 enforcement action or a civil administrative enforcement action to the

1 extent permitted by law and the rules of procedure and evidence  
2 applicable to the administrative or civil proceeding.

3 e. Nothing in this section is intended or shall be construed to in any  
4 way modify, limit or impair the authority of an enforcement agency to  
5 seek, obtain, or <sup>1</sup>[admit] seek admission<sup>1</sup> into evidence <sup>1</sup>, <sup>1</sup>  
6 environmental audit reports for purposes of a criminal investigation or  
7 prosecution pursuant to <sup>1</sup>a<sup>1</sup> grand jury subpoena,<sup>1</sup>a<sup>1</sup> search warrant  
8 issued by a court of competent jurisdiction, <sup>1</sup>[and] or pursuant to <sup>1</sup>  
9 applicable rules of discovery, procedure, and evidence. Any portion  
10 of an environmental audit report obtained pursuant to a grand jury  
11 subpoena may not be disclosed to an enforcement agency for the  
12 purposes of a civil action unless the grand jury returns an indictment.

13 f. The limitations imposed on enforcement agencies in seeking to  
14 obtain environmental audit reports pursuant to this section shall not  
15 apply to:

16 (1) Documents, communications, data, reports, or other information  
17 required to be collected, developed, maintained, reported, or made  
18 available to a governmental entity pursuant to any federal, State or  
19 local law, ordinance, regulation, permit or order;

20 (2) Information obtained by observation, sampling, or monitoring  
21 by any enforcement agency;

22 (3) Information obtained from a source independent of the  
23 environmental audit;

24 (4) Documents existing prior to the commencement of and  
25 independent of the environmental audit;

26 (5) Documents prepared subsequent to the completion of and  
27 independent of the environmental audit; and

28 (6) The underlying factual information upon which an  
29 environmental audit report is based.

30 <sup>1</sup>g. Nothing in this section is intended or shall be construed to, in  
31 any way, modify, limit or impair the authority of an enforcement  
32 agency to seek or obtain, or seek admission into evidence,  
33 environmental audit reports pursuant to a civil or administrative  
34 procedure or review, as provided in section 13, 14, and 15 of P.L. . . .  
35 c. (C. . . ) (before the Legislature as this bill).<sup>1</sup>

36  
37 5. In setting priorities for nonmandatory inspections pursuant to  
38 any law administered or enforced by an enforcement agency, the  
39 enforcement agency shall give a lower priority to any regulated entity  
40 at which an environmental audit <sup>1</sup>[is] has been<sup>1</sup> conducted.

41  
42 6. a. The department, in consultation with the Department of Law  
43 and Public Safety, shall establish by rule a policy whereby, in  
44 determining whether or not to impose or <sup>1</sup>to<sup>1</sup> seek to have imposed an  
45 administrative or civil penalty, and in determining the amount of any  
46 such penalty, the <sup>1</sup>[existence] performance<sup>1</sup> of an environmental audit

1 serves as a mitigating factor. The department may propose that a  
2 regulated entity conduct an environmental audit in administrative  
3 consent orders or in other settlement negotiations where an  
4 environmental audit could provide a remedy for identified problems  
5 and reduce the likelihood of similar problems recurring in the future.

6 b. The Department of Law and Public Safety may maintain its  
7 current policy guideline for State and county prosecutors in the use of  
8 their discretion in pursuing criminal enforcement of any environmental  
9 law whereby the <sup>1</sup>[existence] performance<sup>1</sup> of an environmental  
10 auditing program is a mitigating factor.

11

12 7. a. If a regulated entity discovers a violation of an environmental  
13 law, regulation, or permit as a result of an environmental audit <sup>1</sup>,<sup>1</sup> the  
14 enforcement agency shall waive civil and civil administrative penalties  
15 for that violation, provided the following conditions are satisfied:

16 (1) The violation is discovered by a regulated entity through an  
17 environmental audit;

18 (2) The regulated entity voluntarily discloses the violation to the  
19 department and <sup>1</sup>to<sup>1</sup> any other relevant enforcement agency in writing  
20 within a reasonable time upon discovery of the violation. Disclosure  
21 of a violation shall include, at a minimum, all information available to  
22 the regulated entity at the time disclosure is made concerning the  
23 cause of the violation, and any actual harm to human health or the  
24 environment, or imminent and substantial threat to human health and  
25 safety caused by the violation. Disclosure shall not be considered  
26 voluntary unless it occurs prior to: (a) the discovery or knowledge of  
27 the violation by the department; (b) the commencement of <sup>1</sup>[a judicial  
28 or administrative] an<sup>1</sup> enforcement action by the State, the United  
29 States Environmental Protection Agency, or an enforcement agency  
30 acting on behalf of the department; (c) the regulated entity's  
31 knowledge that the discovery of the violation by <sup>1</sup>[a regulatory] an  
32 enforcement<sup>1</sup> agency or a third party was imminent;

33 (3) The regulated entity corrected the condition or activity  
34 constituting the violation and achieves compliance within a reasonable  
35 period of time following the discovery of the violation. If compliance  
36 cannot be achieved within <sup>1</sup>[60] 90<sup>1</sup> days following its discovery, the  
37 violation shall be corrected in accordance with a reasonable schedule  
38 approved or ordered by the department;

39 (4) The regulated entity expeditiously remedies any condition that  
40 has created or may create an imminent and substantial endangerment  
41 to human health, safety or <sup>1</sup>[natural resources] the environment<sup>1</sup>;

42 (5) The regulated entity takes appropriate, documented, steps to  
43 prevent the recurrence of the violation, and implements appropriate  
44 measures to <sup>1</sup>[mitigate] fully remediate<sup>1</sup> any harm caused by the  
45 violation; and

46 (6) The regulated entity cooperates with the department or other

1 relevant enforcement agency in the further investigation of the  
2 violation, including <sup>1</sup>[the department's] an enforcement agency's<sup>1</sup>  
3 efforts to ensure that the condition or activity constituting the  
4 violation is properly corrected, and any damage caused by the  
5 violation is fully remediated.

6 b. If a regulated entity discovers a violation of an environmental  
7 law, regulation, or permit, as a result of an environmental audit, and  
8 most but not all of the conditions listed in subsection a. of this section  
9 are satisfied, the enforcement agency may reduce the amount of the  
10 civil administrative penalty that would otherwise be assessed, or civil  
11 penalty that would otherwise be sought, or may determine not to  
12 assess or seek to impose a civil administrative penalty or civil penalty.  
13 The enforcement agency may, in its discretion, on a case-by-case basis,  
14 determine whether to impose or seek any penalty or <sup>1</sup>establish<sup>1</sup> the  
15 amount of the penalty reduction that shall be appropriate as provided  
16 in this subsection.

17 c. This section shall not apply to violations that involve purposeful,  
18 knowing, reckless, or criminally negligent conduct.

19 d. Nothing in this section is intended <sup>1</sup>[nor] or<sup>1</sup> shall be  
20 <sup>1</sup>[constructed] construed<sup>1</sup> to <sup>1</sup> in any way <sup>1</sup> modify, limit or impair  
21 the authority of an enforcement agency to undertake any criminal  
22 investigation or prosecution, or obtain criminal penalties, restitution,  
23 <sup>1</sup>[and] or<sup>1</sup> any other sanction available pursuant to the criminal laws  
24 of the State.

25 e. Nothing in this section is intended or shall be construed to <sup>1</sup> in  
26 any way <sup>1</sup> modify, limit or impair the authority of an enforcement  
27 agency to obtain damages, declaratory, injunctive or other equitable  
28 relief, or any other form of relief available by law.

29 f. If a regulated entity discovers a violation of an environmental  
30 law, regulation or permit as a result of an environmental audit and  
31 discloses the violation as provided in this section, such action shall  
32 preclude an action by any person against the regulated entity pursuant  
33 to the provisions of P.L.1974, c.169 (C.2A:35A-1 et seq.), relating to  
34 the conduct that constituted the violation.

35  
36 8. Information contained within an environmental audit report and  
37 disclosed to an enforcement agency as part of an action to achieve  
38 compliance pursuant to section 7 of P.L. , c. (C. )(before  
39 the Legislature as this bill) shall not be disclosed by the enforcement  
40 agency.

41  
42 9. a. Nothing in sections 1 through 10 of P.L. , c. (C. )  
43 (before the Legislature as this bill) shall limit, waive or abrogate the  
44 scope or nature of any statutory or common law privilege, including  
45 the work product doctrine and the attorney-client privilege.

46 b. Nothing in sections 1 through 10 P.L. , c. (C. ) (before

1 the Legislature as this bill) shall limit, waive, or abrogate any reporting  
2 requirements or permit conditions required by any other law, rule,  
3 regulation or ordinance.

4 c. No governmental entity may adopt a rule, regulation, ordinance,  
5 or a permit condition for the purpose of circumventing the  
6 <sup>1</sup>[evidentiary]<sup>1</sup> limitations established in sections 1 through 10 of  
7 P.L. , c. (C. ) (before the Legislature as this bill) by requiring  
8 disclosure of an environmental audit report.

9  
10 10. The department, pursuant to the "Administrative Procedure  
11 Act," P.L.1968, c.410 (C.52:14B-1 et seq.), may adopt rules and  
12 regulations to implement the provisions of sections 1 through 10 of  
13 P.L. , c. (C. ) (before the Legislature as this bill).

14  
15 11. As used in sections 11 through 18 of P.L. , c. (C. )  
16 (before the Legislature as this bill):

17 "Enforcement agency" means the State and any of its departments,  
18 offices, bureaus, agencies, or authorities, and any political subdivision  
19 of the State, including local health agencies or authorities, empowered  
20 with the ability to enforce an environmental law in its own name or on  
21 behalf of the State.

22 "Environmental audit <sup>1</sup>"<sup>1</sup> means a voluntary, internal evaluation of  
23 one or more facilities or an activity at one or more facilities regulated  
24 under any federal, State, or local environmental law, or of management  
25 systems related to that facility or activity, that is designed to identify  
26 and prevent noncompliance and to improve compliance with statutory  
27 or regulatory requirements, and that is conducted by the owner or  
28 operator of the facility or facilities, by the owner's or operator's  
29 employees, or by independent contractors. An environmental audit  
30 <sup>1</sup>[program]<sup>1</sup> shall substantially include at least the following elements:

31 (1) A written policy articulating upper management support for <sup>1</sup>[a]  
32 an<sup>1</sup> environmental auditing program, and for compliance with facility  
33 policies, permit requirements and statutes and regulations, as well as  
34 a commitment to follow up on, correct and prevent recurrence of  
35 identified problems;

36 (2) Articulated objectives, scope, frequency, and dedicated  
37 resources;

38 (3) <sup>1</sup>[The auditing function shall be sufficiently free of] Freedom  
39 from<sup>1</sup> interference with inquiry and observation or fear of potential  
40 retribution to ensure objectivity;

41 (4) Explicit written audit procedures; and

42 (5) Specific procedures to promptly prepare candid and appropriate  
43 written reports on audit findings, corrective actions, schedules for  
44 implementation, and for reporting of violations.

45 "Environmental audit report" means a set of documents, each  
46 labeled "Environmental Audit Report" and prepared as part of an

1 environmental audit, and which shall include a statement setting forth  
2 the scope of the environmental audit, a certified index identifying the  
3 documents in the report, and the calendar dates on which the  
4 environmental audit was initiated and completed. The environmental  
5 audit report may include exhibits, appendices, and conclusions, and  
6 recommendations; memoranda and documents analyzing part or all of  
7 the audit report and discussing implementation issues; an audit  
8 implementation plan that addresses correcting past noncompliance,  
9 improving current compliance, and preventing future noncompliance;  
10 documentation associated with the tracking of corrective actions for  
11 <sup>1</sup>[non-compliance]<sup>1</sup> audit findings <sup>1</sup>of noncompliance<sup>1</sup>; and supporting  
12 information including field notes and records of observations, findings,  
13 suggestions, conclusions, drafts, memoranda, drawings, photographs,  
14 environmental sampling results, computer-generated or electronically  
15 recorded information, maps, charts, graphs, and surveys, provided,  
16 however, that the supporting information is collected or developed for  
17 the purpose of and in the course of an environmental audit.

18 "Regulated entity" means any person, corporation, company,  
19 partnership, or other business entity, and any governmental entity  
20 including a federal, State, and local government facility, regulated  
21 under the State environmental laws that the department administers.

22 "Voluntary" means not required by statute, regulation, permit,  
23 order, or agreement.

24

25 12. An environmental audit report shall be privileged and shall not  
26 be admissible or discoverable as evidence in any civil or administrative  
27 proceeding or review, except as provided in sections 13, 14, or 15 of  
28 P.L. , c. (C. )(before the Legislature as this bill). Nothing in  
29 sections 11 through 18 of P.L. , c. (C. ) (before the  
30 Legislature as this bill) shall be construed to prevent an enforcement  
31 agency from seeking, obtaining or <sup>1</sup>[admitting] seeking admission of<sup>1</sup>  
32 an environmental audit report in the manner provided in section 4 of  
33 P.L. , c. (C. )(before the Legislature as this bill) or in the manner  
34 provided in sections <sup>1</sup>[11 through 18] 13, 14, and 15<sup>1</sup> of P.L. ,  
35 c. (C. )(before the Legislature as this bill).

36

37 13. The privilege established in section 12 of P.L. , c. (C. )  
38 (before the Legislature as this bill) shall not apply if:

39 a. The regulated entity for whom the environmental audit report  
40 was prepared, waives the privilege, regardless of whether the  
41 environmental audit report was prepared by the owner or operator of  
42 the regulated entity, by the owner's or operator's employees, or by an  
43 independent contractor hired by an owner or operator;

44 b. A court or administrative law judge determines that the privilege  
45 is being asserted for a criminal or fraudulent purpose;

46 c. A court or administrative law judge determines that (1) the

1 public's interest in obtaining the information outweighs the regulated  
2 entity's legitimate expectation of confidentiality and (2) the  
3 information contained in the environmental audit report could not be  
4 secured from any less intrusive source. The exception to the privilege  
5 provided in this subsection shall not apply to an enforcement agency  
6 seeking to obtain an environmental audit report unless the enforcement  
7 agency is seeking injunctive relief to prevent serious harm to human  
8 health or the environment;

9 d. The environmental audit report shows evidence that the  
10 regulated entity for which the environmental audit report was prepared  
11 is not or was not in compliance with an environmental law and the  
12 regulated entity did not initiate appropriate efforts to achieve  
13 compliance with the environmental law or complete any necessary  
14 permit application promptly after the noncompliance with the  
15 environmental law was discovered and, as a result, the regulated entity  
16 did not or will not achieve compliance with the environmental law or  
17 complete the necessary permit application within a reasonable amount  
18 of time; or

19 e. A court or administrative law judge determines that the material  
20 for which the privilege is claimed is not subject to the privilege as  
21 provided in section 15 of P.L. , c. (C. )(before the Legislature as  
22 this bill).

23  
24 14. a. No person shall use any privileged information to discover  
25 any other information and any information so discovered shall be  
26 inadmissible in any action or proceeding. Nothing in this subsection  
27 shall be construed to limit the authority of an enforcement agency to  
28 conduct an investigation or <sup>1</sup>[~~admit~~ seek admission]<sup>1</sup> into evidence <sup>1</sup>of<sup>1</sup>  
29 any document or information.

30 b. If a court or administrative law judge determines that any  
31 portion of an environmental audit report is not privileged pursuant to  
32 sections <sup>1</sup>[11 through 18] 13 or 15<sup>1</sup> of P.L. , c. (C. )(before the  
33 Legislature as this bill), it shall <sup>1</sup>by the entry of <sup>1</sup>an<sup>1</sup> appropriate  
34 protective <sup>1</sup>[~~orders~~ order]<sup>1</sup> provide that information <sup>1</sup>[is] be<sup>1</sup> disclosed  
35 only to the extent required for the proper conduct of the subject action  
36 or proceeding.

37  
38 15. The privilege established in section 12 of P.L. , c. (C. )  
39 (before the Legislature as this bill) shall not extend to:

40 a. Documents, communications, data, reports, or other information  
41 required to be collected, developed, maintained, reported, or made  
42 available to a governmental entity pursuant to any federal, State or  
43 local law, ordinance, regulation, permit or order;

44 b. Information obtained by observation, sampling, or monitoring by  
45 any enforcement agency;

46 c. Information obtained from a source independent of the

1 environmental audit;

2 d. Documents existing prior to the commencement of and  
3 independent of the environmental audit;

4 e. Documents prepared subsequent to the completion of and  
5 independent of the environmental audit; and

6 f. The underlying factual information upon which an environmental  
7 audit report is based.

8

9 16. Nothing in sections 11 through 18 of P.L. , c. (C. )  
10 before the Legislature as this bill) shall limit, waive or abrogate the  
11 scope or nature of any statutory or common law privilege, including  
12 the work product doctrine and the attorney-client privilege.

13

14 17. Nothing in sections 11 through 18 of P.L. , c. (C. )(before  
15 the Legislature as this bill) shall limit, waive, or abrogate any reporting  
16 requirements or permit conditions required by any other law, rule,  
17 regulation or ordinance.

18

19 18. No governmental entity may adopt a rule, regulation,  
20 ordinance, or a permit condition for the purpose of circumventing the  
21 privilege established in section 12 of P.L. , c. (C. )(before  
22 the Legislature as this bill) by requiring disclosure of an environmental  
23 audit report.

24

25 19. This act shall take effect immediately and shall apply to any  
26 environmental audit report prepared on or after July 1, 1995.

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29

30

31 Promotes the performance of environmental audits.